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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

JANUARY AND SEPTEMBER TERMS, 1921

VOLUME CVI

HENRY P. STODDART,
OFFICIAL REPORTER

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SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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During the period covered by these reports, in addition to the cases reported in this volume, there were 13 cases affirmed by the court without opinion, and 83 cases disposed of by the supreme court commission.

TABLE OF CASES REPORTED

Advance Rumley Thresher Co., Buckley v. 214
Aetna Ins Co., Security State Bank v. 126
Albin v. Consolidated School District 719
Alderman, Leypoldt & Wickstrom v. 131
Alston v. Alston 623
Anderson, First Nat. Bank v. 204
Armour & Co., Fersen v. 42
Aufdenkamp, Kenesaw Mill & Elevator Co. v. 246

Bailey v. Chilton 795
Bank of College View v. Nelson 129
Barkhurst v. Nevins 33
Bartholomew, Knuffke v. 763
Baughan v. Schuelke 627
Baylor v. Hall 786
Bee Building Co. v. Peters Trust Co. 294
Beeler v. Supreme Tribe of Ben Hur 853
Belmont Irrigating C. & W. P. Co. v. Bridgeport Irrigation District 1
Berliner v. Director General of Railroads 801
Bernstein v. State 337
Bischof, State v. 170
Bolich v. Robinson 449
Bowen v. Selby 166
Bower, State v. 436
Bowie, In re 888
Boyd v. Francisco 249
Bridgeport Irrigation District, Belmont Irrigating C. & W. P. Co. v. 1
Bringen v. Wolf 590
Brown v. Firemen's Ins. Co. 615
Buckley v. Advance Rumely Thresher Co. 214
Burton v. Lincoln Traction Co. 521
Busk, Home Builders v. 86

Caniglia v. Vacanti 793
Carpenter v. State 742
Carroll, Walton v. 138
Carter, Carter Transfer & Storage Co. v. 531
Carter Transfer & Storage Co. v. Carter 531
Case v. Supreme Tribe of Ben Hur 220
Cathroe Co., Simon v. 535
Central Bridge & Construction Co. v. Saunders County 484

Central Granaries Co. v. Nebraska Lumbermen's Mutual Ins. Ass'n. 80
Chicago & N. W. R. Co., Nye-Schneider-Fowler Co. v. 149
Chilton, Bailey v. 795
Chittenden, Foote v. 704
Christiancy v. State 822
City of Geneva, Sole v. 879
City of Kearney, Standard Oil Co. v. 558
City of Lincoln, Graham v. 305
City Nat. Bank, Iowa State & Savings Bank v. 397
Clark, Sjogren v. 600
Clark, State v. 59
Colfax County, Thompson v. 351
Commonwealth Life Ins. Co., Hagelin v. 187
Consolidated School District, Albin v. 719
Crane v. Grand Lodge, A. O. U. W. 291
Craver v. McPherson 568

Daggett v. Panebianco 572
Dailey v. Sovereign Camp, W. O. W. 767
Dappen v. Weber 812, 817
Davis, Peisiger v. 302
Dawson County, Dawson County Irrigation Co. v. 367
Dawson County Irrigation Co. v. Dawson County 367
Day, Fay v. 370
Denker v. State 779
Derr v. Kirkpatrick 403
Director General of Railroads, Berliner v. 801
Douglas County, Peters Trust Co. v. 877
Dresher Bros., McGowan v. 374
Durland Trust Co. v. Payne 135
Dyson, State v. 277

Echols v. Mutual Life Ins. Co. 409
Evans, Taylor v. 233

Farmers State Bank v. Home State Bank 711
Farmers State Bank, State v. 387
Fay v. Day 370
Fellers v. Howe 495
Ferson v. Armour & Co. 42
Fidelity & Casualty Co., Ford Hospital v. 311
Finch v. West 45
Firemen's Ins. Co., Brown v. 615
First Nat. Bank v. Anderson 204
Fischer v. Fischer 477
Fisher, Stockmen's State Bank v. 525

Foote v. Chittenden 704
Ford v. State 439
Ford Hospital v. Fidelity & Casualty Co. 311
Fowler v. Sovereign Camp, W. O. W. 192
Fox v. State 537
Francis v. Lincoln Traction Co. 243
Francisco, Boyd v. 249
Freeman, Sallack v. 299
Frye v. Omaha & C. B. Street R. Co. 333

Geneva, City of, Sole v. 879
Gilbert v. Rothe 549
Glebe v. State 251
Graham v. City of Lincoln 305
Grand Lodge, A. O. U. W., Crane v. 291
Grand Lodge, A. O. U. W. of Iowa, Grand Lodge, A. O. U. W. of Nebraska v. 12
Grand Lodge, A. O. U. W., Jensen v. 66
Grand Lodge, A. O. U. W. of Nebraska, v. Grand Lodge, A. O. U. W. of Iowa 12
Gunnarson, Peterson Bros. & Co. v. 29

Haberstroh, Skriver v. 92
Hagelin v. Commonwealth Life Ins. Co. 187
Hall, Baylor v. 786
Halley v. Harriman 377
Handlier v. Knights of Columbus 267
Harding, Hart v. 428
Harriman, Halley v. 377
Hart v. Harding 428
Hart, State v. 61
Haslam, Mullally v. 860
Hickman v. Jones 466
Hill v. Hill 17
Hill v. Hill 28
Holmberg v. Holmberg 717
Home Builders v. Busk 86
Home State Bank, Farmers State Bank v. 711
Hornby v. State Life Ins. Co. 575
Howe, Fellers v. 495

In re Bowie 888
In re Estate of Lauderback 461
In re Estate of Nebel 302
In re Estate of Strolberg 173

Iowa State & Savings Bank v. City Nat. Bank 397

Jensen v. Grand Lodge, A. O. U. W., ... 66
Jones, Hickman v. 466
Jones v. Thomas 635

Kearney, City of, Standard Oil Co. v. 558
Kenesaw Mill & Elevator Co. v. Aufdenkamp 246
Kirkpatrick, Derr v. 403
Kiser v. Sullivan 454
Knights of Columbus, Handlier v. 267
Knuffke v. Bartholomew 763
Kulhanek v. Kulhanek 595

LaFayette Life Ins. Co., Novak v. 417
Lancaster County, Scottish Rite Building Co. v. 95
Lancaster County, Young Men's Christian Ass'n v. 105
Lauderback, In re Estate of 461
Lauderback v. Lobdell 461
Leypoldt & Wickstrom v. Alderman 131
Lincoln, City of, Graham v. 305
Lincoln Traction Co., Burton v. 521
Lincoln Traction Co., Francis v. 243
Lobdell, Lauderback v. 461
Lower v. State 666
Lowman v. Shotkoski 540

McGowan v. Dresher Bros. 374
Macke v. Wagener 282
McPherson, Craver v. 568
McShane v. Murray 512
Mares Auto Co., Nedela v. 883
Marquis v. Marquis 122
Marsh, State v. 547
Marsh, State v. 760
Masonic Protective Ass'n, Sackett v. 238
Maxwell v. Maxwell 689
Miller v. Vanicek 661
Monroe Independent Telephone Co., Peterson v. 181
Moomaw, Union Nat. Bank v. 388
Moore v. Omaha Warehouse Co. 116
Morris & Co., Ulaski v. 782
Mullally v. Haslam 860
Murray, McShane v. 512
Mutual Life Ins. Co., Echols v. 409

Nebel, In re Estate of 302
Nebraska Electric Co., Roebling's Sons Co. v. 255
Nebraska Lumbermen's Mutual Ins. Ass'n, Central Granaries Co. v. 80
Nebraska Lumbermen's Mutual Ins. Ass'n, Nye-Schneider-Fowler Co. v. 605
Nedela v. Mares Auto Co. 883
Nelson, Bank of College View v. 129
Nevins, Barkhurst v. 33
Nitz v. Widman 736
North American Hotel Co., Schuster v. 672, 679
Novak v. LaFayette Life Ins. Co. 417
Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co. 149
Nye-Schneider-Fowler Co. v. Nebraska Lumbermen's Mutual Ins. Ass'n, ... 605
Nye-Schneider-Fowler Co., Poposia Coal Co. v. 4

Olson, Vandeweg v. 211
Omaha & C. B. Street R. Co., Frye v. 333
Omaha Warehouse Co., Moore v. 116
Ostenberg v. Scottsbluff Investment Co. 143

Page, Village of, Shanner Bros. v. 470
Panebianco, Daggett v. 572
Panko, Pohlenz v. 156
Payne, Durland Trust Co. v. 135
Peisiger v. Davis 302
Perry, Sieck v. 124
Peters Trust Co., Bee Building Co. v. 294
Peters Trust Co. v. Douglas County 877
Peterson v. Monroe Independent Telephone Co. 181
Peterson Bros. & Co. v. Gunnarson 29
Pohlenz v. Panko 156
Pierce v. Roach 140
Poposia Coal Co. v. Nye-Schneider-Fowler Co. 4
Pospisil v. State 40
Preston v. State 848
Prince, Swift & Co. v. 358

Rasmussen, Thomas v. 442
Remaly v. Sweet 327
Roach, Pierce v. 140
Robbins v. State 423
Roberts v. State 362
Robinson, Bolich v. 449
Robinson v. Yeatman 888

Roebling's Sons Co. v. Nebraska Electric Co. 255
Rothe, Gilbert v. 549

Sackett v. Masonic Protective Ass'n 238
Sallack v. Freeman 299
Saunders County, Central Bridge & Construction Co. v. 484
Schoenleber, Shurtleff v. 870
Schuelke, Baughan v. 627
Schuster v. North American Hotel Co. 672, 679
Scott v. Scotts Bluff County 355
Scottish Rite Building Co. v. Lancaster County 95
Scotts Bluff County, Scott v. 355
Scottsbluff Investment Co., Ostenberg v. 143
Seaton v. State 833
Seberger v. Wood 272
Security State Bank v. Aetna Ins. Co. 126
Selby, Bowen v. 166
Shanner Bros. v. Village of Page 470
Sharp, Widener v. 654
Shotkoski, Lowman v. 540
Shurtleff v. Schoenleber 870
Sieck v. Perry 124
Simon v. Cathroe Co. 535
Sjogren v. Clark 600
Skriver v. Haberstroh 92
Sole v. City of Geneva 879
Southern Elkhorn Telephone Co., State v. 342
Sovereign Camp, W. O. W., Dailey v. 767
Sovereign Camp, W. O. W., Fowler v. 192
Standard Grain Co. v. State Bank 73
Standard Oil Co. v. City of Kearney 558
State, Bernstein v. 337
State, Carpenter v. 742
State, Christiancy v. 822
State, Denker v. 779
State v. Farmers State Bank 387
State, Ford v. 439
State, Fox v. 537
State, Glebe v. 251
State, Lower v. 666
State, Pospisil v. 40
State, Preston v. 848
State, Robbins v. 423
State, Roberts v. 362
State, Seaton v. 833
State v. Southern Elkhorn Telephone Co. 342

State, Strong v. 339
State, Thiede v. 48
State, Thompson v. 395
State, Wheeler v. 808
State, Zediker v. 473
State, ex rel. Blair, v. Bischof 170
State, ex rel. City of O'Neill, v. Marsh 547
State, ex rel. Glatfelter, v. Clark 59
State, ex rel. Glatfelter, v. Hart 61
State, ex rel. McCormick, v. Bower 436
State, ex rel. McDonald, v. Dyson 277
State, ex rel. Polk County, v. Marsh 760
State, ex rel. Tanner, v. Warrick 750
State Bank, Standard Grain Co. v. 73
State Life Ins. Co., Hornby v. 575
Stockmen's State Bank v. Fisher 525
Strolberg, In re Estate of 173
Strolberg v. Strolberg 173
Strong v. State 339
Stuart v. Torrey 608
Sullivan, Kiser v. 454
Supreme Tribe of Ben Hur, Beeler v. 853
Supreme Tribe of Ben Hur, Case v. 220
Sweet, Remaly v. 327
Swift & Co. v. Prince 358

Taylor v. Evans 233
Thiede v. State 48
Thomas, Jones v. 635
Thomas v. Rasmussen 442
Thompson v. Colfax County 351
Thompson v. State 395
Thompson v. Todd 545
Todd, Thompson v. 545
Torrey, Stuart v. 608

Ulaski v. Morris & Co. 782
Union Nat. Bank v. Moomaw 388

Vacanti, Caniglia v. 793
Vandeweg v. Olson 211
Vanicek, Miller v. 661
Village of Page, Shanner Bros. v. 470

Wagener, Macke v. 282
Walton v. Carroll 138

Warrick, State v. 750
Weber, Dappen v. 812, 817
Wendt v. Wendt 554
West, Finch v. 45
Wheeler v. State 808
Widener v. Sharp 654
Widman, Nitz v. 736
Williams v. Williams 584
Wolf, Bringen v. 590
Wood, Seberger v. 272

Yeatman, Robinson v. 888
Young Men's Christian Ass'n v. Lancaster County 105

Zediker v. State 473

CASES CITED BY THE COURT

Cases Marked * are Disapproved in this Volume
Cases Marked † are Distinguished in this Volume

Abbott v. Johnston, 93 Neb. 726 599
Abney v. Clark, 87 Ia. 727 731
Abrahams v. Tappe, 60 Md. 317 169
Adams v. Fisher, 83 Neb. 686 287
Addison v. Wood Co., 207 Mich. 319 785
Advance Thresher Co. v. Vinckel, 84 Neb. 429 218
Aetna Ins. Co. v. Simmons, 49 Neb. 811 855
Aetna Life Ins. Co. v. Ragsdale, 95 Va. 579 422
Aetna Life Ins. Co. v. Rehlaender, 68 Neb. 284 855
Alden v. Todd County, 140 Minn. 175 354
Alexander v. Alexander, 26 Neb. 68 160
Allen v. Miller, 11 Ohio St. 374 800
Alter v. Bank of Stockham, 53 Neb. 223 711
American Building & Loan Ass'n v. Rainbolt, 48 Neb. 434..... 677
American Cannel Coal Co. v. Clemens, 132 Ind. 163 180
American Smelting & Refining Co. v. Cassil, 104 Neb. 706 .....361, 536
Anderson v. Kiene, 103 Neb. 773 .....408, 536
Anderson v. Tuberville, 46 Tenn. 150 727
Andrews v. United States, 2 Story (U. S. C. C.) 202 853
Anheuser-Busch Brewing Ass'n v. Hier, 52 Neb. 424 697
Appleton v. City of Newton, 178 Mass. 276 729
Armstrong v. Kleinhaus & Simonson, 82 Ky. 303 298
Arnout v. Chadwick, 74 Neb. 620 599
Atkins v. Gladwish, 27 Neb. 841 830
Attorney General v. Common Council of Detroit, 113 Mich. 388 ... 98
Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) *371 817
Aultman & Taylor Co. v. Steinan, 8 Neb. 109 35
Austin Mfg. Co. v. Brown County, 65 Neb. 60 484
Ayres v. West, 86 Neb. 297 800

Baacke v. Baacke, 50 Neb. 18 18
Bachelor v. Korb, 58 Neb. 122 163
Bacon v. Davis, 9 Cal. App. 83 275
Badger Lumber Co. v. Marion Water Supply, E. L. & P. Co., 48 Kan. 182 263
Badgley v. Herald, 9 Ill. 64 649
Bailey v. State, 57 Neb. 706 539

Baker v. Dittlinger Roller Mills Co., 203 S. W. (Tex. Civ. App.) 798 153
Ballou v. Sherwood, 32 Neb. 666 38
†Bank of College View v. Nelson, 106 Neb. 129 526
Bank of Stockham v. Alter, 61 Neb. 359 630
Bankers Life Ins. Co. v. Robbins, 59 Neb. 170 689
Barrett v. Selden-Breck Construction Co., 103 Neb. 850 765
Barringer v. Davis, 141 Ia. 419 468
Barroilhet v. Battelle, 7 Cal. 450 169
Battle Creek Valley Bank v. First Nat. Bank, 62 Neb. 825 260
Baxter v .State, 80 Neb. 840 825
Bayse v. State, 45 Neb. 261 340
Beadle v. Sanders, 104 Neb. 427 487
Bean v. Bickley, 187 Ia. 689 593
Bee Publishing Co. v. World Publishing Co., 62 Neb. 732 289
Bell v. Dingwell, 91 Neb. 699 630
Bell v. State Life Ins. Co., 24 Ga. App. 497 581
Benjamin v. Mutual Reserve Fund Life Ass'n, 146 Cal. 34 228
Bent v. Furnald, 159 Ill. App. 552 684
Berliner v. Travelers Ins. Co., 121 Cal. 451 417
Biart v. Myers, 3 Neb. (Unof.) 196 758
Bilby v. Townsend, 29 Neb. 220 470
Bird v. Stout, 40 W. Va. 43 177
Blackinton v. Blackinton, 141 Mass. 432 702
Blackwell v. O'Gorman Co., 22 R. I. 638 777
Bland v. Muncaster, 24 Miss. 62 160
Blanton v. King, 73 Mo. App. 148 652
Blochman Commercial Savings Bank v. F. G. Investment Co., 177 Cal. 762 131
Board of Commissioners v. Sauer, 8 Okla. 409 490
Board of Education v. National Bank of Commerce, 4 Kan. App. 438 599
Board of Health of City of Yonkers v. Copcutt, 140 N. Y. 12 65
Board of Home Missions v. Philadelphia, 266 Pa. St. 405 115
Board of Supervisors of Livingston County v. White, 30 Barb. (N. Y.) 72 634
Boltinghouse v. Arnold, 174 N. W. (Ia.) 563 169
Bonewell & Co. v. Jacobson, 130 Ia. 170 686
Booth v. Jarrett & Palmer, 52 How. Pr. (N. Y.) 169 298
Borden v. Borden, 2 R. I. 94 21
Boston Lodge, B. P. O. E., v. City of Boston, 217 Mass. 176 98
Bower v. Chicago & N. W. R. Co., 96 Neb. 419 775
Boyd v. Lincoln & N. W. R. Co., 89 Neb. 840 601
Boyer v. State Farmers Mutual Hail Ins. Co., 86 Kan. 442 272
Bradley v. Drone, 187 Ill. 175 166
Bradley v. Federal Life Ins. Co., 295 Ill. 381 271

Bradley v. Saddler, 54 Ga. 681 479
Brady v. Johnson, 75 Md. 445 262
Branson v. Gee, 25 Or. 462 727
Bresee v. Preston, 91 Neb. 174 160
Brewer v. American Missionary Ass'n, 124 Ga. 490 111
Brittain v. State, 36 Tex. Cr. Rep. 406 55
Britton v. Turner, 6 N. H. 481 648
Brooks v. Commonwealth, 61 Pa. St. 352 242
Brown v. Winter, 80 N. J. Law, 632 301
Bruner Co. v. Fidelity & Casualty Co., 101 Neb. 825 403
Buckingham v. Buckingham, 81 Mich. 89 588
Buckwalter v. School District, 65 Kan. 603 728
Burckhardt v. Burckhardt, 42 Ohio St. 474 553
Burlington & M. R. R. Co. v. Gorsuch, 47 Neb. 767 859
Burnett v. Wright, 135 N. Y. 543 162
Burns v. Multnomah R. Co., 15 Fed. Rep. 177 727
Burns v. State, 145 Wis. 373 847
Burt v. Busch, 82 Mich. 506 468
Bush v. Insurance Co., 85 Mo. App. 155 417
Butterfield v. Commercial Cattle Co., 72 Neb. 605 38
Butts v. Kingman & Co., 60 Neb. 224 500
Bybee v. Embree-McLean Carriage Co., 135 S. W. (Tex. Civ. App.) 203 678
Byers v. Chase, 102 Neb. 386 465

Cady Lumber Co. v. Reed, 90 Neb. 293 463
Cahill v. Baird, 138 Cal. 691 652
Caldwell v. Iowa State Traveling Men's Ass'n, 156 Ia. 327 579
Calkins v. Lockwood, 17 Conn. 154 248
Callett v. Central California Traction Co., 36 Cal. App. 240 523
Cardwell v. Union P. R. Co., 90 Kan. 707 154
Carneal v. Lynch, 91 Va. 114 740
Carpenter Paper Co. v. Wilcox, 50 Neb. 659 664
Cary v. Cary, 89 N. Y. Supp. 1061 652
Case v. Supreme Tribe of Ben Hur, 106 Neb. 220 202
Casey v. State, 49 Neb. 403 453
Catton v. Catton, 69 Wash. 130 700
Caughron v. Stinespring, 132 Tenn. 636 434
Cement Products Co. v. Martin County, 142 Minn. 480 354
Central of Georgia R. Co. v. Ellison, 199 Ala. 571 583
Central Union Telephone Co. v. Swoveland, 14 Ind. App. 341 185
Chaffee v. Sehestedt, 4 Neb. (Unof.) 740 266
Chamberlain v. Sawyer, 19 Ohio 360 633
Chamberlain Banking House v. Zutavern, 59 Neb. 623 165
Chase v. Webster, 168 Mass. 228 719
Chicago, B. & Q. R. Co. v. Oyster, 58 Neb. 1 119

Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 565 728
Chicago, B. & Q. R. Co. v. Todd, 74 Neb. 712 805
Chick v. Ives, 2 Neb. (Unof.) 879 697
Christensen v. Protector Sales Co., 105 Neb. 389 .....362, 536
Citizens Bank v. Nantucket Steamboat Co., 5 Fed. Cas. 719 345
†Citizens State Bank v. Nore, 67 Neb. 69 526
City of Chicago v. Spoor, 190 Ill. 340 288
City of Omaha v. Houlihan, 72 Neb. 326 521
City of Shawnee v. Sparks, 26 Okla. 665 828
City of Topeka v. Gillett, 32 Kan. 431 735
City of Waycross v. Waycross Savings & Trust Co., 146 Ga. 68 111
Cizek v. Cizek, 76 Neb. 797 699
Clark v. Kansas City, 176 U. S. 114 734
*Clark v. Lancaster County, 69 Neb. 717 489
Clarkson v. Supreme Lodge, Knights of Pythias, 99 S. Car. 134 ... 204
Claypool v. Robb, 90 Neb. 193 160
Cobbey v. Wright, 29 Neb. 274 800
Coe v. National Council of K. & L. of S., 96 Neb. 130 293
Coffey v. Omaha & C. B. Street R. Co., 79 Neb. 286 341
Cole v. Kerr, 19 Neb. 553 260
Commonwealth v. Adams, 114 Mass. 323 53
Commonwealth v. Lovett, 2 Va. Cas. 74 254
Commonwealth v. Smith, 141 Mass. 135 671
Commonwealth v. Young Men's Christian Ass'n, 116 Ky. 711 110
Commonwealth Bonding & Casualty Ins. Co. v. Barrington, 180 S. W. (Tex. Civ. App.) 936 686
Commonwealth Bonding & Casualty Ins. Co. v. Bomar, 169 S. W. (Tex. Civ. App.) 1060 686
Congregational Sunday School v. Board of Review, 290 Ill. 108 ... 111
Cook v. Cook, 125 Ala. 583 587
Coon v. Coon, 187 Ind. 478 177
Corbin Y. M. C. A. v. Commonwealth, 181 Ky. 384 110
Cox Wholesale Grocery Co. v. National Bank of Pittsburg, 107 Ark. 601 76
Coyne v. Davis, 98 Neb. 763 697
Cram v. Chicago, B. & Q. R. Co., 85 Neb. 586, 228 U. S. 70 734
Cram v. Sickel, 51 Neb. 828 821
Crater v. Crater, 118 Ind. 521 588
Creamery Dairy Co. v. Electric Park Co., 138 S. W. (Tex. Civ. App.) 1106 147
Creigh Sons & Co. v. Jones, 103 Neb. 706 265
Critser v. State, 87 Neb. 727 254
Cronin v. Tebo, 71 Hun (N. Y.) 59 650
Cumberland Lodge, A. F. & A. M., v. Mayor and City Council, 127 Tenn. 248 97
Curry v. State, 5 Neb. 412 .....341, 837

Cuthbertson v. State, 72 Neb. 727 853
Cutler v. Fry, 240 Fed. 238 401

Dalby v. Maxfield, 244 Ill. 214 458
Danielson v. Goebel, 71 Neb. 300 276
Da Rin v. Casualty Co. of America, 41 Mont. 175 242
Davidson v. New Orleans, 96 U. S. 97 730
Davie v. Douglas County, 98 Neb. 479 ..... 369, 494
Davis v. Hudson, 29 Minn. 27 707
Davis v. Huston, 15 Neb. 28 160
Davis v. Maxwell, 12 Met. (Mass.) 286 650
Dawson v. State, 96 Neb. 777 427
Dawson County Irrigation Co. v. Dawson County, 103 Neb. 692 ... 368
Day v. State, 102 Neb. 707 426
De Camp v. Stevens, 4 Blackf. (Ind.) *24 650
DeGraw v. Supreme Court, I. O. F., 182 Mich. 366 204
Dehority v. Wright, 101 Ind. 382 757
Delaney v. Modern Accident Club, 121 Ia. 528 581
Delozier v. Village of Magnet, 104 Neb. 765 881
Demarest v. Wickham, 63 N. Y. 320 816
Demings v. Supreme Lodge, Knights of Pythias, 131 N. Y. 522 ... 226
Dermott v. Jones, 23 How. (U. S.) 220 651
Dienst v. Dienst, 175 Mich. 724 479
Disher v. Chicago, R. I. & P. R. Co., 93 Neb. 224 ..... 245, 336
Disher v. Disher, 45 Neb. 100 630
Ditto v. International Harvester Co., 105 Neb. 544 218
Doane v. Dunham, 64 Neb. 135 460
Dodd v. Hart, 8 Del. Ch. 448 727
Dodge v. St. John, 96 N. Y. 260 162
Dodge County v. Kemnitz, 28 Neb. 224 452
Donehoe v. Crane, 141 Ga. 224 336
Doran v. Kennedy, 122 Minn. 1, 237 U. S. 362 166
Douglas County v. Connell, 15 Neb. 617 599
Dreher v. Order of United Commercial Travelers of America, 173 Wis. 173 583
Dressler v. Commonwealth Life Ins. Co., 105 Neb. 669 419
Drew v. Thaw, 235 U. S. 432 47
Duffie v. Bankers Life Ass'n, 160 Ia. 19 272
Duncan v. Western Union Telegraph Co., 87 Wis. 173 185
Dunham v. McMichael, 214 Pa. St. 485 338
Dunkel v. Hall County, 89 Neb. 585 357
Dunn v. Haines, 17 Neb. 560 800
Duval v. Advance Thresher Co., 85 Neb. 181 500
Dye v. Dye, 11 Cal. 163 881

Eager v. Eager, 74 Neb. 827 695

Ebert v. Mutual Reserve Fund Life Ass'n, 81 Minn. 116 228
Edleson v. Edleson, 179 Ky. 300 464
Edmunds v. Griffin, 177 Ia. 389 47
Edward Thompson Co. v. Schroeder, 131 Minn. 125 684
Elliott v. Aetna Life Ins. Co., 100 Neb. 833 326
Elliott v. Carter White-Lead Co., 53 Neb. 458 597
Engle v. Chipman, 51 Mich. 524 671
Enterprise Irrigation District v. Tri-State Land Co., 92 Neb. 121.. 724
Epes v. Saunders, 109 Va. 99 435
Episcopal Academy v. Philadelphia, 150 Pa. St. 565 111
Estate of Seiler, 164 Cal. 181 719
Estell v. State, 51 N. J. Law, 182 53
Ex parte Dawson, 3 Bradf. Sur. (N. Y.) 130 710
Ex parte Keeling, 54 Tex. Cr. Rep. 118 817
Ex parte La Vere, 39 Nev. 214 47
Ex parte Montgomery, 244 Fed. 967 47
Ex parte Wolf, 14 Neb. 24 567

Fager v. State, 22 Neb. 332 427
Fairbanks v. Bangor, O. & O. R. Co., 95 Me. 78 523
Fairbanks, Morse & Co. v. Burgert, 81 Neb. 465 682
Fairbanks, Morse & Co. v. Nelson, 217 Fed. 218 218
Farmers & Merchants Bank v. German Nat. Bank, 59 Neb. 229 ... 708
Farmers & Merchants Mutual Life Ass'n v. Mason, 65 Ind. App. 66 420
Farnsworth Co. v. Rand, 65 Me. 19 757
Farrell v. Farmers & Merchants Ins. Co., 84 Neb. 72 620
Fawn Lake Ranch Co. v. Cumbow, 102 Neb. 288 299
Faxon v. Mansfield, 2 Mass. *147 650
Fidelity & Casualty Co. v. Cedar Valley Electric Co., 187 Ia. 1014.. 310
Fidelity & Casuality Co. v. Martin, 163 Ky. 12 326
Field v. National Council, K. of L. of S., 64 Neb. 226 71
First Nat. Bank v. Hunt, 101 Neb. 743 237
First Nat. Bank v. McKinney, 47 Neb. 149 677
Fishleigh v. Detroit United Ry., 205 Mich. 145 775
Flannery v. Kusha, 147 Minn. 156 599
Flege v. State, 90 Neb. 39 844
Forbes v. Gorman, 159 Mich. 291 297
Ford v. State, 71 Neb. 246 52
Forest Oil Co. v. Crawford, 77 Fed. 106 739
Forney's Estate, 161 Pa. St. 209 21
Fowler v. Brown, 51 Neb. 414 85
France v. Hohnbaum, 73 Neb. 70 165
Franklin Square House v. City of Boston, 188 Mass. 409 111
Freitas v. Freitas, 31 Cal. App. 16 482
Frothingham v. Petty, 197 Ill. 418 163

Fry v. Hubner, 35 Or. 184 829
Funk v. Stevens, 102 Neb. 681 ..... 13, 193, 226

Gandy v. Wiltse, 79 Neb. 280 613
Garrison v. People, 6 Neb. 274, 285 844
Gartrell v. Stafford, 12 Neb. 545 38
Gaster v. Estate of Gaster, 92 Neb. 6, 11 699
Gee Wo v. State, 36 Neb. 241 747
Genau v. Roderick, 4 Neb. (Unof.) 436 707
General Electric Co. v. O'Connell, 118 Minn. 53 684
George v. K. & D. M. R. Co., 53 Ia. 503 289
German Ins. Co. v. Shader, 68 Neb. 1 416
Gibson v. Parlin & Orindorff, 13 Neb. 292 500
Glaeser v. City of St. Paul, 67 Minn. 368 599
Glass v. Hulbert, 102 Mass. 24 481
Glawson v. Southern Bell Telephone & Telegraph Co., 9 Ga. App. 450 184
Goff v. Supreme Lodge, Royal Achates, 90 Neb. 579 855
Goldsberry v. State, 66 Neb. 312 476
Goldstein v. Union Nat. Bank, 109 Tex. 555 131
Gordeen v. Pearlman, 91 N. Y. Supp. 420 686
Gotchall v. Gotchall, 98 Neb. 730 697
Gould v. Rockwell, 105 Neb. 724 277
Grafton v. Cummings, 99 U. S. 100 38
Grand Island Banking Co. v. Koehler, 57 Neb. 649 266
Grand Island Banking Co. v. Wright, 53 Neb. 574 31
Grand Island Gas Co. v. West, 28 Neb. 852 494
Grand Lodge, A. O. U. W., v. Insurance Board, 103 Neb. 99 13
Gray v. Peterson, 64 Neb. 671 248
Green v. Green, 34 Kan. 740 480
Gregory v. Lamb, 16 Neb. 205 678
Gregory v. Pierce, 4 Met. (Mass.) 478 32
Griffin v. Bankers Realty Investment Co., 105 Neb. 419 679
Griffith v. New York Life Ins. Co., 101 Cal. 627 417
Grosvenor v. Fidelity & Casualty Co., 102 Neb. 629 582
Guinn v. United States, 238 U. S. 347 762
Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173 119
Guth Piano Co. v. Adams, 114 Me. 390 686

Hagar v. Reclamation District No. 108, 111 U. S. 701 730
Haight v. Hayes, 3 Neb. (Unof.) 587 160
Halbert v. Gibbs, 45 N. Y. Supp. 113 652
Hall v. Western Travelers Accident Ass'n, 69 Neb. 601 204
Hallstead v. Perrigo, 87 Neb. 128 600
Hammond v. State, 39 Neb. 252 ..... 426, 812
Hanisky v. Kennedy, 37 Neb. 618 452

Hanna v. Hanna, 104 Neb. 231 446
Harris v. Harms, 105 Neb. 375 383
Harris v. Lincoln Traction Co., 78 Neb. 681 524
Harrison v. Baker, 15 Neb. 43 269
Harrison v. Harrison, 80 Neb. 103 458
Hartzell v. McClurg, 54 Neb. 313 500
Harvey v. State, 96 Neb. 786 748
Haskins v. Alcott & Horton, 13 Ohio St. 210 881
Hawver v. City of Omaha, 52 Neb. 734 677
Hayman v. Rownd, 82 Neb. 598 295
Hays v. Hays, 75 Neb. 728 700
Hays v. Hays, 126 Ind. 92 435
Hays v. United R. Co., 183 Mo. App. 608 778
Heald v. Polk County, 46 Neb. 28 494
Healy v. People, 177 Ill. 306 254
Heldt v. State, 20 Neb. 492 476
Hendershott v. Western Union Telegraph Co., 106 Ia. 529 186
Henry v. Henry, 27 Ohio St. 121 479
Henry v. State, 51 Neb. 149 453
Henry & Coatsworth Co. v. Halter, 58 Neb. 685 266
Herpolsheimer v. Funke, 1 Neb. (Unof.) 471 297
Hespen v. Union P. R. Co., 82 Neb. 495 553
Hibbard v. Kirby, 38 Ark. 102 649
Hill v. State, 42 Neb. 503 475
Hill v. State, 106 Neb. 17 28
Hoagland v. Lowe, 39 Neb. 397 266
Hobson v. Huxtable, 79 Neb. 334 587
Hofstetter v. Gash, 104 Ill. App. 455 649
Hogan v. O'Neill, 255 U. S. 55 48
Hoitt v. Hoitt, 63 N. H. 475 21
†Holladay v. Rich, 93 Neb. 491 454
Hollenbeck v. Winnebago County, 95 Ill. 148 369
Hollingsworth v. Saunders County, 36 Neb. 141 369
Hollingsworth v. Supreme Council of Royal Arcanum, 175 N. Car. 615 226
Holmes v. Evans, 129 N. Y. 140 652
Holt v. State, 62 Neb. 134 744
Holt Mfg. Co. v. Odenrider, 61 Wash. 555 678
Home Forum Benefit Order v. Jones, 5 Okla. 598 271
Home Ins. Co. v. Gilman, Exr., 112 Ind. 7 417
Hood River Lumbering Co. v. Wasco County, 35 Or. 498 727
Hooper v. Castetter, 45 Neb. 67 546
Hoover v. Wood, 9 Ind. 296 735
Hopper v. Douglas County, 75 Neb. 329 369
Horres v. Berkeley Chemical Co., 57 S. Car. 192 288

Horton v. Colorado Springs Masonic Building Society, 64 Colo. 529 98
Hotchkiss v. Keck, 84 Neb. 545 816
Houghton v. Clarke, 80 Cal. 417 653
Houston v. Farmers & Merchants Ins. Co., 64 Neb. 138 420
Hovelman v. Kansas City H. R. Co., 79 Mo. 632 817
Hubert v. State, 74 Neb. 220 825
Hudson v. Bayonne, 54 N. J. Law, 293 820
Hudson v. Osborne, 39 L. J. (Eng.) 79 535
Hughes v. Monroe County, 147 N. Y. 49 ..... 354, 369
Huling v. Kaw Valley R. I. Co., 130 U. S. 559 730
Hull v. King, 38 Minn. 349 237
Humboldt County v. Ward Bros., 163 Ia. 510 354
Humphries v. State, 100 Ga. 260 835
Hunt v. Hunt, 171 N. Y. 396 479
Hurd v. City of Fairbury, 87 Neb. 745 761
Hurst v. Chicago, B. & Q. R. Co., 280 Mo. 566 778
Hutchinson v. Western Bridge & Construction Co., 97 Neb. 439 ... 365
Huxoll v. Union P. R. Co., 99 Neb. 170 858
Huyett & Smith Co. v. Chicago Edison Co., 167 Ill. 233 650

Iams v. Farmers State Bank, 101 Neb. 778 387
Imhoff v. House, 36 Neb. 28 ..... 597, 706
In re Anderson, 69 Neb. 686 567
In re Appraisement of Omaha Gas Plant, 102 Neb. 782 725
In re Estate of Johnson, 99 Neb. 275 160
In re Estate of Jones, 83 Neb. 841 172
In re Estate of Robinson, 105 Neb. 1 428
In re Estate of Strahan, 93 Neb. 828 700
In re Estate of Willits, 88 Neb. 805 697
In re Kuhns, 36 Nev. 487 47
In re Mook's Estate, 167 N. Y. Supp. 170 26
In re Price, 168 Mich. 527 853
In re Roberson, 38 Nev. 326 853
In re Sawyer, 124 U. S. 200 816
In re Van Sciever, 42 Neb. 772 47
International Coal & Mining Co. v. Nicholas, 293 Ill. 524 766
Inter-Southern Life Ins. Co. v. Duff, 184 Ky. 227 422
Interstate Business Men's Accident Ass'n v. Lewis, 257 Fed. 241.. 579
Irwin v. Jetter Brewing Co., 101 Neb. 409 118
Iske v. Iske, 95 Neb. 603 38

Jackson v. Phillips, 57 Neb. 189 625
Jacobs v. State, 1 Ga. App. 519 847
Jameson v. Butler, 1 Neb. 115 341
Janous v. Columbus State Bank, 101 Neb. 393 207

Jaudon v. Ducker, 27 S. Car. 295 180
Jennings v. Camp, 13 Johns. (N. Y.) 94 650
Jensen v. Palatine Ins. Co., 81 Neb. 523 553
Johns v. State, 88 Neb. 145 ..... 442, 779
Johnson v. Carter, 143 Ia. 95, 100 798
Johnson v. Fehsefeldt, 106 Minn. 202 648
Johnson v. Leman, 131 Ill. 609 372
Johnson v. St. Paul Fire & Marine Ins. Co., 104 Neb. 831 128
Johnson v. State, 1 Okla. Cr. Rep. 321 842
Johnston v. Indiana & Ohio Live Stock Ins. Co., 94 Neb. 403 270
Jolley v. Foltz, 34 Cal. 321 757
Jonasen v. Kennedy, 39 Neb. 313 865
Jones v. Bankers Trust Co., 239 Fed. 770 686
Jones v. Minks, 188 Ill. App. 45 684
Jones Nat. Bank v. Yates, 93 Neb. 121, 240 U. S. 541 637

Kafka v. Union Stock Yards Co., 87 Neb. 33 525
Kaley v. Northwestern Mutual Life Ins. Co., 102 Neb. 135 ..... 678, 683
Kanscheit v. Garrett Laundry Co., 101 Neb. 702 536
Kaup v. Schinstock, 88 Neb. 95 592
Keating v. State, 67 Neb. 560 442
Keating Implement & Machine Co. v. Marshall E. L. & P. Co., 74 Tex. 605 263
Keeley Institute v. Wade, 61 Neb. 313 573
Keenan v. Sic, 91 Neb. 582 500
Keller v. Keller, 18 Neb. 366 615
Kelly v. Galbraith, 186 Ill. 593 630
Kennedy v. State, 107 Ind. 144 242
Kentucky Hotel Co. v. Camp, 97 Ky. 424 777
Kottenbach v. Omaha Life Ass'n, 49 Neb. 842 855
Kincaid v. Hardin County, 53 Ia. 430 369
King v. Mason, 42 Ill. 223 651
King v. State, 50 Neb. 66 62
Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. (Unof.) 340 297
Klabunde v. Byron Reed Co., 69 Neb. 126 599
Klug v. Seegabarth, 98 Neb. 272 177
Knights of Pythias v. Ferrell, 83 Kan. 491 482
Knoll v. Randolph, 3 Neb. (Unof.) 599 386
Koch v. Rhodes, 57 Mont. 447 593
Kofka v. Rosicky, 41 Neb. 328 ..... 332, 737
Korth v. State, 46 Neb. 631 255
Koschman v. Ash, 98 Minn. 312 336
Kotouc v. State, 104 Neb. 580 ..... 426, 812
Kriss v. Union P. R. Co., 100 Neb. 801 778
Kurtz v. St. Paul & D. R. Co., 48 Minn. 339 709
Kyd v. Cook, 56 Neb. 71 553

Kyle v. Perfection Mattress Co., 127 Ala. 39 535

Lacey v. Collins, 134 Ia. 583 177
Lamb v. Wilson, 3 Neb. (Unof.) 496 639
Lampman v. Bruning, 120 Ia. 167 336
Lancaster v. Augusta Water District, 108 Me. 137 730
Landfried v. Milam, 214 S. W. (Tex. Civ. App.) 847 684
Larkin v. Buck, 11 Ohio St. 561 643
Larsen v. Johnson, 78 Wis. 300 482
Leedom v. State, 81 Neb. 585 829
Leo v. State, 63 Neb. 723 442
Leonard v. State Exchange Bank, 236 Fed. 316 401
Lesiur v. Sipherd, 84 Neb. 296 18
Levy v. Nevada-California-Oregon R. Co., 81 Or. 673 805
Levy v. Timble, 94 N. Y. Supp. 3 301
Lewis v. Darling, 16 How. (U. S.) 1 177
Lewis v. Ocean Accident & Guarantee Corp., 224 N. Y. 18 579
Lewis Poultry Co. v. New York C. R. Co., 117 Me. 482 153
Library Ass'n v. Pelton, 36 Ohio St. 253 115
Lillie v. Modern Woodmen of America, 89 Neb. 1 696
Lincoln Gas & Electric Light Co. v. City of Lincoln, 250 U. S. 256.. 778
Lincoln Gas & Electric Light Co. v. Crowley, 104 Neb. 701 ..403, 536
Lindley v. Polk County, 84 Ia. 308 369
Lindsay v. State, 46 Neb. 177 52
Little v. City of Newburyport, 210 Mass. 414 109
Little v. State, 60 Neb. 749 747
Long v. State, 23 Neb. 33, 55 844
Longbotham v. Longbotham, 119 Minn. 139 702
Louisville & N. R. Co. v. Williams, 183 Ala. 138 778
Low v. Rees Printing Co., 41 Neb. 127 699
Lowe v. St. Paul Fire & Marine Ins. Co., 80 Neb. 499 270
Lowell v. Strahan, 145 Mass. 1 297
Lucas v. County Recorder of Cass County, 75 Neb. 351 300
Luce v. Foster, 42 Neb. 818 .....597, 703
Lyman & Co. v. Waterman, 51 Neb. 283 622
Lynn Shoe Co. v. Auburn-Lynn Shoe Co., 100 Me. 461 535

McAndrews v. Hamilton County, 105 Tenn. 399 369
McArthur v. Clarke Drug Co., 48 Neb. 899 500
McBride v. Aetna Life Ins. Co., 126 Ark. 528 326
McCarthy v. Village of Ravenna, 99 Neb. 674 336
McClay v. Foxworthy, 18 Neb. 295 163
McClellan v. Hein, 56 Neb. 600 859
McClurg v. Price, 59 Pa. St. 420 651
McComb v. Gilkeson, 110 Va. 406 435
McCullough v. Colfax County, 4 Neb. (Unof.) 543 881
McDonald v. DeVito, 103 N. Y. Supp. 508 653

McDonald & Penfield v. Dodge County, 41 Neb. 905 354
McDuff v. McDuff, 187 Pac. (Cal. App.) 37 588
McGarrah v. State, 10 Okla. Cr. Rep. 21 671
McGavock v. City of Omaha, 40 Neb. 64 723
McGoldrick v. Bodkin, 125 N. Y. Supp. 101 180
McIntyre v. Hauser, 131 Cal. 11 336
McKay v. State, 6 Ga. App. 527 846
McKennan v. Omaha & C. B. Street R. Co., 97 Neb. 281 524
McKeon v. Central Stamping Co., 264 Fed. 385 249
McLain v. Howald, 120 Mich. 274 739
McLaughlin v. Sovereign Camp, W. O. W., 97 Neb. 71 .....293, 703
McManus v. Harrigan, 85 N. Y. Supp. 220 162
McMillan v. Malloy, 10 Neb. 228 647
McMillen v. Anderson, 95 U. S. 37 730
Madden v. Lancaster County, 65 Fed. 188 369
Main v. Sherman County, 74 Neb. 155 782
Mallory's Admrs. v. Mallory's Admr., 92 Ky. 316 479
Maloney v. Maryland Casualty Co. 113 Ark. 174 582
Mangold v. American Ins. Co., 99 Neb. 656 605
Manly Building Co. v. Newton, 114 Ga. 245 490
Manning v. City of Orleans, 42 Neb. 712 246
Manning v. Pomerene, 101 Neb. 127 .....408, 536
Mannion v. Talboy, 76 Neb. 570 864
Marion v. State, 16 Neb. 349 441
Maryland Casualty Co. v. Spitz, 246 Fed. 817 580
Matheson's Heirs v. Hearin, 29 Ala. 210 160
Matter of Crandall, 196 N. Y. 127 719
Mauzy v. Hinrichs, 89 Neb. 280 296
Maxwell v. Urban, 22 Tex. Civ. App. 565 169
Metropolitan Trust Co. v. Dolgeville E. L. & P. Co., 71 N. Y. Supp. 1055 265
Metz v. State, 46 Neb. 547 .....41, 476
Meyers v. Smith, 59 Neb. 30 599
Middaugh v. Des Moines Ice & Cold Storage Co., 184 Ia. 969 118
Miller v. Fitzgerald Dry Goods Co., 62 Neb. 270 297
Miller v. Meeker, 54 Neb. 452 800
Miller v. Morris & Co., 101 Neb. 169 .....408, 536
Miller v. Northern P. R. Co., 18 N. Dak. 19 153
Miller v. Paustian, 79 Neb. 196 589
Miller v. Wehrman, 81 Neb. 388 277
Miller v. White, 23 Fla. 301 468
Milwaukee Harvester Co. v. Schroeder, 72 Minn. 393 599
Mitchell v. Marker, 62 Fed. 139 777
Modern Woodmen of American v. Ghromley, 41 Okla. 532 703
Moffitt v. Moffitt, 69 Ill. 641 160
Moline v. Carlson, 92 Neb. 419 737

Moore v. Allen, 26 Colo. 197 480
Moores v. State, 71 Neb. 522 472
Morgan v. State, 51 Neb. 672 ..... 396, 475
Morgenstern v. Insurance Co. of North America, 89 Neb. 450..... 621
Morrill v. Skinner, 57 Neb. 164 589
Morris v. Minneapolis, St. P. & S. S. M. R. Co., 25 N. Dak. 136.... 153
Morris v. Wibaux, 159 Ill. 627 651
Morrison v. Scotts Bluff County, 104 Neb. 254 245
Mott v. State, 83 Neb. 226 366
Moulton v. Kershaw, 59 Wis. 316 8
Mt. Moriah Lodge, A. F. & A. M., v. Otoe County, 101 Neb. 274 .. 98
Murphey v. Illinois Trust & Savings Bank, 57 Neb. 519 572
Murphy v. Fidelity Mut. Fire Ins. Co. 69 Neb. 489 708
Murphy v. Omaha, 33 Neb. 402 494
Murray v. Mace, 41 Neb. 60 552
Myers v. Anderson, 238 U. S. 368 762

Nabower v. State, 105 Neb. 848 426
National Bank of Ashland v. Cooper, 86 Neb. 792 338
National Bank of Commerce v. Bossemeyer, 101 Neb. 96 75
National Elevator Co. v. Great N. R. Co., 137 Minn. 217 155
National Life Ass'n v. Brown, 103 Ga. 382 422
National Surety Co. v. Love, 102 Neb. 633 579
National Union Fire Ins. Co. v. School District, 122 Ark. 179 272
Nax v. Travelers Ins. Co., 130 Fed. 985 579
Neal v. Delaware, 103 U. S. 370 762
Neal v. Missouri P. R. Co., 98 Neb. 460 553
Nebraska Hay & Grain Co. v. First Nat. Bank, 78 Neb. 334 79
Nebraska Seed Co. v. Harsh, 98 Neb. 89 8
Neininger v. State, 50 Ohio St. 394 162
Nelson v. Nelson, 95 Neb. 523 301
New England Water Works Co. v. Farmers Loan & Trust Co., 136 Fed. 521 263
New Lincoln Hotel Co. v. Shears, 57 Neb. 478 260
Newman v. United States, 238 U. S. 537 816
Nightingale v. Scannell, 18 Cal. 315 553
Nollkamper v. Wyatt, 27 Neb. 565 470
Norman v. Olney, 64 Mich. 553 163
Norris v. Harris, 15 Cal. 226 650
North Chicago Street R. Co. v. Rodert, 203 Ill. 413 583
Northwestern Mutual Life Ins. Co. v. Neafus, 36 L. R. A. n. s. 1211 271
Nourse v. Weitz, 120 Ia. 708 162
Noyes v. Des Moines Club, 186 Ia. 378 778
Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co., 105 Neb. 151 152

O'Connor v. Timmermann, 85 Neb. 422 168
O'Connor v. Waters, 88 Neb. 224 737
Ogden v. Saunders, 12 Wheat. (U. S.) *213 735
Ogden v. Sovereign Camp. W. O. W., 78 Neb. 804, 806 868
Oil Trough Gin Co. v. Director General of Railroads, 141 Ark. 133 153
Oliphant v. Liversidge, 142 Ill. 160 458
Olive v. State, 11 Neb. 1, 20 844
Olmsted v. Noll, 82 Neb. 147 864
Omaha Alfalfa Milling Co. v. Pinkham, 105 Neb. 20 .....678, 683
Omaha Street R. Co. v. Larsen, 70 Neb. 591 524
Omberg v. United States Mutual Accident Ass'n 101 Ky. 303..... 579
Osborn v. Village of Oakland, 49 Neb. 340 815
Oswald v. Nehls, 233 Ill. 438 458
Otis Elevator Co. v. Miller & Paine, 240 Fed. 376 309

Palmer v. State, 70 Neb. 136 474
Parks v. Supreme Circle, Brotherhood of America, 83 N. J. Eq. 131 223
Paterson General Hospital Ass'n v. Blauvelt, 72 N. J. Eq. 725 177
Patrick Land Co. v. Leavenworth, 42 Neb. 715 266
Pawnee County v. Storm, 34 Neb. 735 732
Payn's Sons Tobacco Co. v. Payette, 149 N. Y. Supp. 183 535
Pease v. Fitzgerald, 31 Cal. App. 727 685
Peck v. Equitable Accident Ass'n, 52 Hun (N. Y.) 255 579
Peek v. Peek, 77 Cal. 106 480
Pendleton v. Knickerbocker Life Ins. Co., 5 Fed. 238 421
People v. Barnes, 182 Mich. 179 55
People v. Cole, 219 N. Y. 98 749
People v. Gargan, 168 N. Y. Supp. 1027 47
People v. Mol, 137 Mich. 692 847
People v. Pearne, 118 Cal. 134 54
People v. Tallman, 36 Barb. (N. Y.) 222 725
People v. Troy, 96 Mich. 530 845
Peoria Grape Sugar Co. v. Babcock Co., 67 Fed. 892 39
Pepper v. Labrot, 8 Fed. 29 293
Perkins v. Fairfield, 11 Mass. 227 163
Peterson v. Bauer, 83 Neb. 405 737
Peterson v. O'Connor, 106 Minn. 470 277
Peterson v. State, 72 Neb. 132 560
Peterson v. Tillinghast, 192 Fed. 287 401
Petty v. Petty, 4 B. Mon. (Ky.) 215 481
Philadelphia v. Women's Christian Ass'n, 125 Pa. St. 572 110
Pisar v. State, 56 Neb. 455 475
Plath v. Brunken, 102 Neb. 467 795
Plumbing Supply Co. v. Board of Education, 32 S. Dak. 270 354
Polk v. Mutual Reserve Fund Life Ass'n, 207 U. S. 310 202

Pollak v. Brush Electric Ass'n, 128 U. S. 446 651
Pollock v. Smith, 49 Neb. 864 ..... 592, 677
Ponder v. Altura Farms Co., 57 Colo. 519 593
Pope County v. Sloan, 92 Ill. 177 491
Pospisil v. State, 106 Neb. 40 475
Potter v. State, 162 Ind. 213 53
Potts v. Francis, 43 N. Car. 300 652
Priestly v. State, 19 Ariz. 371 845
Pugh v. Leeds, 2 Cowp. (Eng.) 714 541
Pullman Palace Car Co. v. Woods, 76 Neb. 694 803

Quarton v. American Law Book Co., 143 Ia. 517 10
Quigley v. McEvony, 41 Neb. 73 165
Quimby v. Bee Building Co., 87 Neb. 193 777

Racine-Sattley Co. v. Popken, 102 Neb. 635 207
Rainbolt v. Lamson Bros., 259 Fed. 546 76
Rakow v. Tate, 93 Neb. 198 ..... 696, 798
Randall v. Randall, 37 Mich. 563 464
Rathbun v. Miller, 6 Johns. (N. Y.) *281 725
Rawitzer v. Mutual Benefit Health & Accident Ass'n, 101 Neb. 219 582
Reagan v. National Equitable Society, 202 S. W. (Tex. Civ. App.) 157 686
Reasoner v. Yates, 90 Neb. 757 301
Rector v. Retton, 3 Neb. 171 164
Reed v. State, 66 Neb. 184 442
Reichert v. Milwaukee County, 159 Wis. 25 494
Reid v. Corrigan, 143 Ill. 402 180
Reilley v. Kinkead, 181 Ia. 615 599
Reinhardt v. Seaman, 208 Ill. 448 166
Remington v. Savage, 148 Minn. 405 684
Renner v. Bank of Columbia, 22 U. S. 581 634
Reynolds v. Moore, 9 Wend. (N. Y.) 35 816
Reynolds v. Reynolds, 27 R. I. 520 177
Reynolds v. Supreme Council, Royal Arcanum, 192 Mass. 150 204
Rhea v. Rhenner, 26 U. S. 105 32
Rhea v. State, 63 Neb. 461 393
Rhoades v. Rhoades, 78 Neb. 495 699
Rich v. Hartford Accident & Indemnity Co., 208 Ill. App. 506 581
Richardson v. Hitchcock, 28 Vt. 757 757
Richardson v. Webster City, 111 Ia. 427 288
Riddle v. Littlefield, 53 N. H. 503 297
Rine v. Rine, 100 Neb. 225 457
Roberts v. Thompson, 82 Neb. 458 489
Robbins v. Springfield Street R. Co., 165 Mass. 30 523
Robbins v. State, 106 Neb. 423 817

Robison v. Troy Laundry, 105 Neb. 267 245
Roger Williams Nat. Bank v. Groton Mfg. Co., 16 R. I. 504 372
Roper v. Milbourn, 100 Neb. 739 357
Roseberry v. Hart-Parr Co., 145 Minn. 142 684
Rosencrans v. Modern Woodmen of America, 97 Neb. 568 293
Ross v. Craven, 84 Neb. 520 277
Rowell v. Barber, 142 Wis. 304 479
Rudolph v. Winters, 7 Neb. 125 530
Rueber v. Negles, 147 Ia. 734 240
Russell v. Russell, 156 Ia. 674 162

St. Joseph v. Geiwitz, 148 Mo. 210 731
St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co., 201 U. S. 173 324
St. Louis Lodge, B. P. O. E., v. Koeln, 262 Mo. 444 98
St. Paul Fire & Marine Ins. Co. v. Kelley, 2 Neb. (Unof.) 720 270
Salt Lake Lodge, B. P. O. E., v. Groesbeck, 40 Utah, 1 97
Saltonstall v. Riley, 28 Ala. 164 160
San Antonio & A. P. R. Co. v. De Ham, 54 S. W. (Tex. Civ. App.) 396 288
Sanford v. Sanford, 5 Day (Conn.) 353 702
Sargent v. McLeod, 52 L. R. A. (n. s.) 381 651
Sargent Mfg. Co. v. Travelers Ins. Co., 165 Mich. 87 317
Savannah & Ogeechee Canal Co. v. Shuman, 91 Ga. 400 65
Sawyer v. Sovereign Camp, W. O. W., 105 Neb. 395 204
School District v. Wolf, 78 Kan. 805 816
Schott v. Swan, 21 S. Dak. 639 153
Schuber v. McDuffee, 169 Pac. (Okla.) 642 131
Schultz v. State, 89 Neb. 34 52
Scott v. Flowers, 61 Neb. 620 707
Scoville v. Trustees, 65 Ill. 523 652
Scribner v. State of Oklahoma, 3 Okla. Cr. Rep. 601 842
Seaboard Air-Line Ry. v. Miller, 5 Ga. App. 402 773
Security Savings Bank v. Rhodes, 107 Neb. 681
See v. Wabash R. Co., 123 Ia. 443 288
Seeds v. Grand Lodge, A. O. U. W., 93 Ia. 175 703
Sessinghaus Milling Co. v. Hanebrink, 247 Mo., 212 553
Seton v. Hoyt, 34 Or. 266 493
Sharpe v. New York Life Ins. Co., 5 Neb. (Unof.) 278 420
Shaw v. Jones, Newton & Co., 133 Ga. 446 553
Shellabarger Elevator Co. v. Illinois C. R. Co., 212 Ill. App. 1 155
Shepard v. Pabst, 149 Wis. 35 684
Shepperd v. Bankers Union of the World, 77 Neb. 85 202
Shriro v. Paganucci, 113 Me. 213 147
Shroyer v. Richmond, 16 Ohio St. 455 707
Sieward v. Denechaud, 120 La. Ann. 720 298

Sigmond v. Bebber, 104 Ia. 431 166
Silver v. State, 13 Ga. App. 722 55
Sim v. Rosholt, 16 N. Dak. 77 820
Simpson v. Armstrong, 20 Neb. 512 289
Slack v. Orillion, 13 La. 56 463
Smith v. First Nat. Bank, 45 Neb. 444 131
Smith v. Mutual Reserve Fund Life Ass'n 140 Ill. App. 409 204
Smith v. Woodward, 4 East (Eng.) 585 634
Snethen v. Harrison County, 172 Ia. 81 354
Sodomka v. Cudahy Packing Co., 101 Neb. 446 ..... 245, 336
Sofield v. State, 61 Neb. 600 744
Southern Electrical Supply Co. v. Rolla E. L. & P. Co., 75 Mo. App. 622 263
Southern R. Co. v. Bennett, 233 U. S. 80 775
Spanogle v. Maple Grove Land & Live Stock Co., 104 Neb. 342 276
Sparks v. Commonwealth, 3 Bush. (Ky.) 111 55
Spence v. Damrow, 32 Neb. 112 249
Spokane & I. E. R. Co. v. Whitley, 237 U. S. 487 120
Staats v. Mangelsen, 105 Neb. 282 609
Stag Mining Co. v. Missouri Fidelity & Casualty Co., 209 S. W. (Mo. App.) 321 326
State v. Administrator of Frank, 51 Mo. 98 162
State v. Babcock, 20 Neb. 522 548
State v. Ball, 90 Neb. 307 ..... 382, 519
State v. Baurens, 117 La. 136 853
State v. Board of Assessors, 52 La. Ann. 223 110
State v. Buswell, 40 Neb. 158 747
State v. Cherry County, 58 Neb. 734 159
State v. Churchill, 37 Neb. 702 172
State v. City Council of City of Lincoln, 98 Neb. 634 473
State v. City of Kearney, 25 Neb. 262 472
State v. Clark, 79 Neb. 263 491
State v. Cornell, 54 Neb. 647 490
State v. Cox, 105 Neb. 75 759
State v. Currens, 111 Wis. 431 734
State v. Dangler, 74 Ohio St. 49 853
State v. De Fonti, 34 R. I. 51 55
State v. Dewey, 73 Kan. 735 254
State v. Dick, 125 Wis. 51 684
State v. Dimond, 44 Neb. 154 ..... 816, 881
State v. Dvoracek, 140 Ia. 266 853
State v. Employers of Labor, 102 Neb. 768 90
State v. Farmers State Bank, 103 Neb. 194 383
State v. Farrington, 80 Neb. 628 491
State v. Farrington, 86 Neb. 653 494
State v. Fick, 140 La. 1063 853

State v. First Nat. Bank, 103 Neb. 280 878
State v. Grand Island & W. C. R. Co., 31 Neb. 209 730
State v. Grimes, 96 Neb. 719 172
State v. Hanson, 80 Neb. 724 160
State v. Hart, 106 Neb. 61 59
State v. Harvey, 12 Neb. 31 491
State v. Hill, 10 Neb. 58 439
State v. Hill, 20 Neb. 119 439
State v. Hoctor, 98 Neb. 15 64
State v. Home Street R. Co., 43 Neb. 830 62
State v. Horton, 139 N. Car. 588 53
State v. Junkin, 85 Neb. 1, 11 735
State v. Justis, 85 Minn. 114 853
State v. Keever, 177 N. Car. 114 55
State v. Laflin, 40 Neb. 441 172
State v. Lincoln Medical College, 81 Neb. 533 64
State v. Longfellow, 95 Mo. App. 660 670
State v. McFadden, 46 Neb. 668 439
State v. Marsh, 106 Neb. 547 761
State v. Mayor & City Council, 28 Neb. 103 815
State v. Minor, 105 Neb. 228 439
State v. Mortensen, 69 Neb. 376 515
State v. Mote, 48 Neb. 683 816
State v. Northup, 79 Neb. 822 816
State v. Olson, 107 Minn. 136 816
State v. Peacock, 15 Neb. 442 439
State v. Pfeifer, 96 Kan. 791 448
State v. Public Service Commission, 272 Mo. 627 349
State v. Quimby, 104 Neb. 590 302
State v. Ramsey, 8 Neb. 286 439
State v. Roper, 46 Neb. 724 439
State v. Several Parcels of Land, 80 Neb. 11 816
State v. Several Parcels of Land, 83 Neb. 13 728
State v. Smith, 145 La. 913 853
State v. State Journal Co., 77 Neb. 771 600
State v. Stearns, 11 Neb. 104 439
State v. Stein, 13 Neb. 529 816
State v. Stout, 7 Neb. 89 515
State v. Trollinger, 162 N. Car. 618 54
State v. Union Stock Yards Co., 81 Neb. 67 347
State v. Uridil, 37 Neb. 371 816
State v. Van Beek, 87 Ia. 569 816
State v. Van Camp, 36 Neb. 91 439
State v. Warrick, 106 Neb. 750 817
State v. Weisengoff, 85 W. Va. 271 59
State v. Weston, 67 Neb. 385 159

State v. Whitney, 41 Neb. 613 816
State v. Wilson, 24 Neb. 139 439
State v. Withnell, 91 Neb. 101 560
State v. Woods, 102 Kan. 499 857
State Public Utilities Commission v. Bethany Mutual Telephone Ass'n, 270 Ill. 183 349
State Public Utilities Commission v. Okaw Valley Mutual Telephone Ass'n, 282 Ill. 336 349
Stearns L. & P. Co. v. Central Trust Co. 223 Fed. 962 263
Steele v. Ashenfelter, 40 Neb. 770 261
Steger v. Arctic Refrigerating Co., 89 Tenn. 453 263
Stender v. Stender, 181 Mich. 648 20
Stephenson v. Murdock, 88 Neb. 796 297
Sterritt v. Young, 14 Wyo. 146 726
Stevens v. Luther, 105 Neb. 184 448
Stocker v. Nemaha County, 4 Neb. (Unof.) 230 369
Stow v. Kimball, 28 Ill. 93 164
Strassheim v. Daily, 221 U. S. 280 47
Stratton v. Dole, 45 Neb. 472 496
Strauss v. Mutual Reserve Fund Life Ass'n, 126 N. Car. 971 228
Stripland v. State, 115 Ga. 578 254
Stuart v. Palmer, 74 N. Y. 183 726
Sturtevant v. Bohn Sash & Door Co., 59 Neb. 82 697
Sullivan v. Connecticut Indemnity Ass'n, 101 Ga. 809 422
Sunday Lake Mining Co. v. Wakefield, 72 Wis. 204 147
Supreme Council, Catholic Knights of America, v. Fenwick, 169 Ky. 269 225
Supreme Council, Royal Arcanum, v. Green, 237 U. S. 531 204
Supreme Lodge v. Bieler, 58 Ind. App. 550 226
Supreme Lodge, Knights of Pythias, v. Mims, 241 U. S. 574 204
Supreme Lodge, Knights of Pythias, v. Smyth, 245 U. S. 594 204
Sutton v. Des Moines Bakery Co., 135 Ia. 390 336
Swift & Co. v. Prince, 106 Neb. 358 782
Sycamore Marsh Harvester Co. v. Grundrad, 16 Neb. 529 868
Symonds v. Board of Supervisors, 71 Ill. 355 369

Tacoma Mill Co. v. Gilcrest Lumber Co., 90 Neb. 104 500
Tanning Co. v. Telegraph Co. 143 N. Car. 376 8
Taylor v. Davis' Admx., 110 U. S. 330 372
Taylor v. Independent School District, 181 Ia. 544 818
Taylor v. Taylor, 232 U. S. 363 119
Thomas v. Knights of Maccabees of the World, 85 Wash. 665 226
Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240 397
Thurston v. Thurston, 58 Minn. 279 702
Tischler v. Fishman, 68 N. Y. Supp. 787 162
Titterington v. State, 75 Neb. 153 839

Tobler v. Union Stock Yards Co., 85 Neb. 413 446
Tousey v. Roberts, 114 N. Y. 312 777
Traver v. Shaefle, 33 Neb. 531, 548 615
Treasurer of State Lunatic Asylum v. Douglas, 77 Mo. 647 162
Trustees Y. M. C. A. v. Paterson, 61 N. J. Law, 420 110
Turner v. Gibb, 48 N. J. Eq. 526 177
Turner v. Townsend, 42 Neb. 376 574
Tusant v. Grand Lodge, A. O. U. W., 183 Ia. 489 228
Twing v. O'Meara, 59 Ia. 326 702

Underhill v. Dennis, 9 Paige (N. Y.) 202 710
Underwood v. Overstreet, 188 Ky. 562 639
Union Central Life Ins. Co. v. Phillips, 102 Fed. 19 630
Union Ins. Co. v. Barwick, 36 Neb. 223 620
Union Lime Co. v. Chicago & N. W. R. Co., 233 U. S. 211 347
Union P. R. Co. v. Connolly, 77 Neb. 254 776
United States v. Burr, 25 Fed. Cas. 55, 77 841
United States v. Smith, 27 Fed. Cas. 1246 847

Vandalia Coal Co. v. Moore, 69 Ind. App. 311 583
Van Doren v. Wiedeman, 68 Neb. 243 164
Vanderpool v. Partridge, 79 Neb. 165 336
Van Kleek v. Eggleston, 7 Mich. 511 757
Van Skike v. Potter, 53 Neb. 28 340
Veith v. Ress, 60 Neb. 52 ..... 697, 703
Village of Kenesaw v. Chicago, B. & Q. R. Co., 91 Neb. 619 65
Village of Osmond v. Matteson, 62 Neb. 512 881
Village of Osmond v. Smathers, 62 Neb. 509 881
Vogt v. City of Louisville, 173 Ky. 119 98

W. B. Mfg. Co. v. Rubenstein, 236 Mass. 215 535
Wagener v. Jungels, 102 Neb. 123 284
Wakefield v. Wakefield, 97 Neb. 652 297
Walker v. Klopp, 99 Neb. 794 448
Wallenburg v. Missouri P. R. Co., 86 Neb. 642 523
Ward v. Aetna Life Ins. Co., 82 Neb. 499 582
Ward v. Sweeney, 106 Wis. 44 816
Wardell v. Wardell, 71 Neb. 774 165
Washburn v. United States Casualty Co., 108 Me. 429 417
Washington Rock Co. v. Young, 29 Utah, 108 468
Washington Township Farmers C. F. & G. L. Co. v. McCormick, 19 Ind. App. 664 288
Watkins Land Mortgage Co. v. Mullen, 62 Kan. 1 166
Watson v. Boone Electric Co., 163 Ia. 316 523
Weatherington v. Smith, 77 Neb. 363 588
Webber v. Jones, 94 Me. 429 739

Webster v. Hillsdale County, 99 Mich. 259 369
Wehn v. Commissioners of Gage County, 5 Neb. 494 369
Weld v. Weld, 71 Kan. 622 481
Wellington v. Petitioner, 16 Pick. (Mass.) 87 734
Wells v. Christian, 165 Ind. 662 263
Wells v. Stout, 9 Cal. 479 464
Welsh v. State, 60 Neb. 101 475
Wenck v. Carroll County, 104 Ia. 558 370
Wesner v. O'Brien, 56 Kan. 724 701
Westinghouse Electric Mfg. Co. v. Citizens Street R. Co., 24 Ky. Law Rep. 334 263
Wheeler v. State, 79 Neb. 491 779
Whitcomb v. State, 102 Neb. 236 825
White v. Pomeroy, 7 Barb. (N. Y.) 640 710
White v. Wright, 16 Mo. App. 551 653
Whitehouse v. Gerdis, 95 Neb. 228 277
Whitner v. State, 46 Neb. 144 254
Wilber v. Reed, 84 Neb. 767 724
Wilcox v. Southern Railway, 91 S. Car. 71 583
Wiley v. Shars, 21 Neb. 712 622
Wilken v. Capital Fire Ins. Co., 99 Neb. 828 272
Williams v. American Ins. Union, 107 Kan. 214 204
Williams v. Supreme Conclave, I. O. H., 172 N. Car. 787 223
Williams v. Williams, 189 Ill. 500 180
Wilson v. Beardsley, 20 Neb. 449 678
Wilson v. Hayes, 40 Minn. 531 821
Wilson v. Supreme Conclave, I. O. H., 174 N. Car., 628 227
Wineland v. Knights of Maccabees, 148 Mich. 608 204
Wiruth v. Lashmett, 85 Neb. 286 249
Wise Memorial Hospital Ass'n v. Peyton, 99 Neb. 48 33
Woodruff v. State, 72 Neb. 820 342
Woods v. Colfax County, 10 Neb. 552 ..... 369, 494
Wright v. Minnesota Mutual Life Ins. Co., 193 U. S. 657 202
Wylie v. Kirby, 115 Md. 282 147
Wyman v. Campbell, 6 Port. (Ala.) 219 163

Yonda v. Royal Neighbors of America, 96 Neb. 730 855
Young v. Ruhwedel, 119 Mo. App. 231 277
Young Men's Christian Ass'n v. Douglas County, 60 Neb. 642 ..97, 109
Young Men's Christian Ass'n v. Keene, 70 N. H. 223 113
Young Men's Christian Ass'n of Lincoln v. Rawlings, 60 Neb. 377.. 442

Zulch v. Roach, 23 Wyo. 335 47

STATUTES AND CONSTITUTIONAL PROVISIONS CITED AND CONSTRUED

NEBRASKA

CONSTITUTION

Art. I, sec. 3 723
Art. I, sec. 10 667
Art. I, sec. 11 837
Art. VI, sec. 22 515
Art. IX, sec. 2 96

SESSION LAWS

1897

Ch. 57, sec. 1 276

1913

Ch. 198 536

1915

Ch. 108 877
Ch. 164 668

1917

Ch. 85, sec. 7 782
Ch. 85, sec. 21 887
Ch. 103 547
Ch. 187, sec. 50 277

1919

Ch. 26 487
Ch. 44 62
Ch. 55 60
Ch. 67 763
Ch. 70 438
Ch. 91 785
Ch. 91, sec. 4 403

Ch. 103, sec. 2 126
Ch. 105, sec. 1, subd. 5 126
Ch. 190, p. 750, art. II, sec. 8 742
Ch. 190, p. 791 342
Ch. 205, secs. 3, 4, 6 668
Ch. 222, sec. 28 442
Ch. 222, sec. 29 443
Ch. 222, sec. 31 446
Ch. 243 819
Ch. 243, sec. 6 ..... 750, 812, 817
Ch. 244 719
Ch. 244, secs. 3, 6 722

ANNOTATED STATUTES

1907

Sec. 8605 724

COMPILED STATUTES

1889

Ch. 37, sec. 6 452

1909

Ch. 78, sec. 147 53

REVISED STATUTES

1913

Sec. 312 129
Secs. 555, 558 875
Sec. 559 870
Sec. 725 215
Sec. 952, subd. 5 491
Secs. 954, 956-960 760
Secs. 954, 6420, 6437, 6447 490
Secs. 1162, 1163 253
Sec. 1177 515
Sec. 1269 457
Sec. 1295 18
Secs. 1399, 1400 170
Secs. 1421, 1606 718
Secs. 1428, 1429 116
Secs. 1453, 1461 156
Secs. 1485, 1486 157
Sec. 1487 158

Secs. 1567, 7580, 7627 695
Sec. 1579 589
Sec. 1584 698
Sec. 1587 699
Secs. 1652, 7588 740
Sec. 1690 163
Secs. 1718-1755 351
Secs. 2441, 3541, 5738 357
Sec. 2625 ..... 33, 275
Sec. 2628 ..... 273, 299
Sec. 2630 477
Sec. 2650 273
Sec. 2724 742
Secs. 2737, 2738 60
Secs. 2956, 6456 484
Secs. 2971, 3001 487
Sec. 3077 586
Sec. 3079 588
Secs. 3080-3088 164
Sec. 3187 ..... 81, 126, 856
Secs. 3210, 3211, 3212 128
Sec. 3291 525
Sec. 3296 192
Secs. 3652, 3656, subd. 3 886
Sec. 3653 885
Sec. 3659 305
Sec. 3662 782
Sec. 3666 ..... 403, 785
Sec. 3687 887
Sec. 4862 560
Secs. 5015, 8279 62
Sec. 5090 879
Sec. 5119 547
Sec. 5374 530
Secs. 5563, 5564, 5566 516
Sec. 5638 493
Sec. 6124 342
Sec. 6301 ..... 95, 105
Sec. 6343 877
Sec. 6565 233
Sec. 6703 819
Sec. 6823 438
Sec. 6832 436
Sec. 6833 437
Sec. 7418 343

Sec. 7585 ..... 91, 266
Sec. 7619 219
Sec. 7627 799
Sec. 7713 304
Secs. 7858, 7862, 8008 249
Sec. 7892 ..... 243, 336, 524
Sec. 7894 454
Sec. 7906 439
Sec. 7909 137
Sec. 8006 248
Sec. 8158 826
Sec. 8198 ..... 206, 815
Sec. 8207 595
Sec. 8207, subds. 4, 7 596
Sec. 8466 147
Sec. 8467 ..... 143, 167
Sec. 8581 395
Sec. 8583 48
Sec. 8614 848
Sec. 8744 242
Secs. 8904, 9063 668
Sec. 9022 251
Sec. 9024 853
Sec. 9106 835
Sec. 9109, subd. 2 837
Sec. 9179 540

CODE

Sec. 121 500

UNITED STATES

CONSTITUTION

Nineteenth Amendment, Fed St. Ann. Supp. (2d ed.) 1920, p. 821.. 761

COMPILED STATUTES

1918

Sec. 9762 397

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1921.

BELMONT IRRIGATING CANAL & WATER POWER COMPANY, APPELLANT, V. BRIDGEPORT IRRIGATION DISTRICT ET AL., APPELLEES.

FILED APRIL 11, 1921. No. 21291.

Waters: PETITION: SUFFICIENCY. Substance of petition for injunction set out in the opinion, and *held* that it does not state facts showing plaintiff entitled to the relief prayed.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed.*

C. G. Perry and *Ritchie & Canaday,* for appellant.

Williams, Hurd & Neighbors, contra.

MORRISSEY, C. J.

This is an appeal from a judgment sustaining a demurrer to plaintiff's petition.

Plaintiff filed its petition in the district court for Morrill county seeking to enjoin defendant Bridgeport Irrigation District from delivering to John Marshall Hanway, his tenants or employees, water for irrigation purposes upon the W.½ of the S.W.¼ of section 26, and the E.½ of the S.E.¼ of section 27, in township 19, north of range 49, in Morrill county, Nebraska. The petition alleges that plaintiff is a corporation organized under the laws of Nebraska for the purpose of applying for an appropriation of water for the irrigation of certain lands lying between its canal and the North Platte river; that

it did secure such an appropriation, and, for the purpose of conducting water to the land to be supplied, constructed what is commonly known as the "Belmont Canal;" that from the headgate "the said canal follows a contour line for more than 41 miles from the headgate, and was built to irrigate various tracts of land," including the land above described; that thereafter plaintiff acquired title to a large acreage of land for which the appropriation was made, and built laterals to carry water to a controlling point on or near most of the governmental subdivisions of the land described in the appropriation, and, in constructing the laterals to carry water to much of the land owned by the plaintiff, they were necessarily constructed adjacent to or across some intervening lands, the title of which was not held by the plaintiff, and such was the land herein involved; that after plaintiff had constructed a canal it offered to sell and deliver water to parties having land within the proper boundaries at the rate of $16.25 an acre for a perpetual right, subject to an annual charge for the cost of maintenance of the canal; that defendant Bridgeport Irrigation District was organized under the law of Nebraska for the purpose of taking over and operating plaintiff's canal, and plaintiff sold and conveyed to the defendant district "its irrigating canal, * * * together with its right of way, * * * and its franchise." It is further alleged that it was agreed that, before admitting other lands into the district, the grantee under the deed would require applicants to show that they had acquired the right to water from plaintiff, and plaintiff stipulated that such right might be acquired for $16.25 an acre, on terms. Plaintiff had theretofore obtained appropriations for land, a part of which was beyond the limits of the original irrigation district, and it was agreed that defendant district should carry water for and distribute the same to such lands upon terms specified in the contract. It is alleged that the land hereinbefore described lay within the boundaries of defendant district and was owned by one John Marshall

Hanway; that by fraud, misrepresentation, or mistake it had been included within the limits of defendant district as land that had already obtained or else had consummated negotiations for the purchase of a perpetual water right from plaintiff, and that it had been so included without the knowledge, consent, or approval of plaintiff, and that plaintiff did not acquire such knowledge until June 1, 1918; that defendant Bridgeport Irrigation District has delivered water to such land, and that same has been used for the irrigation of crops grown thereon, and that the land was not entitled to water. Plaintiff claims the right to sell a perpetual water right to the land mentioned, and denies the right of defendant district to furnish water for the Hanway land until the owner concludes the necessary negotiations with plaintiff.

The petition shows that after the organization of defendant district plaintiff executed its deed conveying the property mentioned in the petition. It is expressly alleged that the Hanway land then formed a part of defendant district. It is not alleged that defendant district practiced any fraud upon plaintiff in procuring the deed, nor is any mutual mistake alleged. It does not appear that defendant district has violated the contract as written. It is not bound under its contract to collect any sum whatever for the benefit of plaintiff for water furnished to land lying within its boundaries. To be sure the petition alleges that the Hanway land was "by fraud, misrepresentation, or mistake included within" defendant district, but the party guilty of the fraud is not named, nor is any specific mistake or fraudulent act pointed out except the statement that plaintiff did not have knowledge that this land was included within the district until June 1, 1918. However, no effort has been made to reform the deed; it is in full force and effect; and the demurrer was properly sustained.

AFFIRMED.

POPOSIA COAL COMPANY, APPELLEE, V. NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT.

FILED APRIL 11, 1921. No. 21286.

1. **Sales:** OFFER SUBJECT TO WITHDRAWAL. The letter of plaintiff, dated August 10, 1916, set forth in the opinion, giving its list price of coal at that time, does not constitute a contract. It was an invitation to the recipient to purchase coal on the terms stated therein. It was not a continuing or standing offer, but was subject to modification or revocation by plaintiff at any time before a contract was entered into.
2. ———: OFFER: ACCEPTANCE. Where, in such case, a purchaser sends an order two months afterwards for 84 car-loads of coal, a contract is not complete until the order is accepted.
3. ———: ———: ———: COUNTER OFFER. Where, on receipt of the order, it is accepted by the seller subject to conditions stated in the letter of acceptance, these conditions constitute a counter proposal. If accepted by the buyer, the contract consists of the list price as modified by the conditions.
4. ———: CONTRACT: CUSTOMS. Where a custom, or usage, of the coal trade with reference to the time of payment for coal delivered is recognized and understood by both parties at the time a contract is entered into, such custom becomes a part of the contract.
5. ———: ———: ABANDONMENT. Where one party to an executory contract for the sale of coal refuses to carry out the provisions of the contract with reference to payment for coal delivered, at a stated date, and notifies the other party that, unless certain conditions are complied with, it will purchase the goods elsewhere to the seller's account and charge it with the extra cost, the seller may elect to treat the contract as renounced and abandoned, and is under no obligations to continue shipments or to respond in damages for failure to deliver thereafter.
6. ———: ———: CONSTRUCTION. Under a contract a seller agreed to furnish lump and egg coal to the buyer in its "turn." The evidence establishes that in the coal trade this means in turn after prior orders were filled and prior contracts complied with, and when sufficient small grades of coal had been sold so as to keep the mines running.
7. ———: BREACH OF CONTRACT: DAMAGES. Where the evidence fails to show that any prior customer has failed to receive coal as ordered, and it is proved that orders for coal were sent the

seller by later customers and filled within a few days, for coal of the grade contracted to be delivered to the buyer, the seller then being in default of filling the buyer's orders according to contract, the buyer is entitled to recover damages for nondelivery of the coal diverted and delivered to such later customers when it should have been delivered to the buyer.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed in part, and reversed in part.*

Courtright, Sidner, Lee & Jones, for appellant.

Brogan, Ellick & Raymond, contra.

LETTON, J.

Plaintiff is a corporation engaged in mining coal in Wyoming. Defendant is a corporation engaged in selling coal at retail in a number of towns and cities in Nebraska. The action was brought to recover for the purchase price of a number of car-loads of coal sold and delivered by plaintiff to defendant.

The answer practically admits the selling and delivery, but by way of cross-petition sets forth certain correspondence between the parties which it is alleged constitutes a contract by the plaintiff to sell to the defendant coal until April 1, 1917, at prices specified therein, and that plaintiff failed to deliver coal ordered under the contract. It is also alleged that defendant's damages for breach of the contract are $1,679.73 in excess of the amount due plaintiff for coal purchased and delivered.

The reply in substance denies that the correspondence pleaded constitutes any agreement to furnish coal other than that delivered, and further pleads that, as a part of the agreement, defendant was bound to make payment in full for the shipments of coal made during each month, on or before the 10th day of the succeeding month; that it failed to pay for the coal shipped to it in December, 1916, on or before the 10th day of January, 1917, and still refuses to pay for the same, and that by reason of such violation and refusal plaintiff was released from any further

obligation to furnish coal to defendant.

A jury was waived. The court found "that the letter of August 10, 1916, was not a contract but a mere price-list, and that the later correspondence does not aid;" found generally for the plaintiff for the value of the coal delivered, and dismissed defendant's cross-petition. Defendant appeals.

The initial letter of the correspondence between the parties is dated August 10, 1916, and is in substance as follows:

"Nye-Schneider-Fowler Co., Fremont, Nebraska. Gentlemen: Our list prices in effect at this time are lump 7", $1.75. * * * These prices, subject to the concession of 10c per ton as heretofore, will remain unchanged and apply to your orders until April 1, 1917, except west of Valentine after August 15, 1916, the price will be $2 list and subject to change. Yours truly, Poposia Coal Co., by G. F. Collins."

On October 12 defendant ordered "one car Poposia egg, no hurry." The next letter in evidence is dated October 16, 1916. It is directed to Mr. Thomas, the manager of the defendant company. In substance it states that the writer, Mr. Barber of the plaintiff company, had made a trip over part of the territory of the defendant and talked to its local managers. It urges that defendant push the sale of its coal, and incidentally says: "There is never any question but what they can get plenty of it." In reply to this on October 21 defendant sent a letter, the essential part of which is as follows:

"We have your letter of the 16th, and between the superintendents and myself we made up orders for 43 cars of lump and 41 cars of egg in addition to those already sent you. If you would rather bill these cars to some point, for instance, Clearwater (except those that go west of that point) and let us do the diverting to points we might need the coal the worst, you may do so, as I take it for granted it would be pretty hard for you to ship all of these within a very short period, and by the time the

last car got to destination it might be needed pretty badly and some others might not need them so badly. However, we merely make that suggestion, but believe it a pretty good one. Would be glad to have you write me what you think about it."

A list of towns and the number of cars to be shipped to each was inclosed. On October 23 plaintiff replied as follows:

"Mr. A. R. Thomas, Fremont, Nebr. Dear Sir: We are just in receipt of your orders and also your telegram, advising us that they were coming. I am glad you sent the telegram as we were not in shape to stand a heavy shock at that particular time. We expected you to jog things along there and asked you to do it, but did not suppose that you were going to land on us with such a bunch all at once. However, we will place them on our file and give them their turn which we presume will be all right with you as, no doubt, there is no particular hurry about most of them. Before this order came, we already had on file about 200 orders and our output on lump and egg is limited, so it will take quite a while to fill what we have on hand."

The real question in the case is whether a meeting of the minds occurred by the communication of August 10, and the letter of October 21, so as to constitute a contract, or whether the letter of October 21 was an offer to buy the 84 cars of coal mentioned therein which required acceptance. If, as defendant asserts, a contract was offered by the first letter and closed by the letter of October 21, it was unconditional, and the plaintiff would be liable if a breach occurred.

The letter of August 10 does not appear to have been written in answer to a specific inquiry by defendant. It is a general statement of the "list prices in effect *at this time.*" We think it was nothing more than an invitation to defendant to enter into new business relations with the plaintiff. It is true it is said "these prices * * * will remain unchanged and apply to your orders until

April 1, 1917;" but, until an offer to purchase was made by the defendant, there was no mutuality in the transaction and the plaintiff had the right to change its quotation at any time. *Moulton v. Kershaw,* 59 Wis. 316; *Tanning Co. v. Telegraph Co.,* 143 N. Car. 376; 23 R. C. L. 1280-1291, secs. 96-107.

In *Nebraska Seed Co. v. Harsh,* 98 Neb. 89, Harsh stated he had about 1,800 bushels of millet seed, of which he mailed a sample, and said: "I want $2.25 per cwt. for this seed f. o. b. Lowell." Two days afterwards plaintiff wired an order for 1,800 bushels of millet at defendant's price. The court said: "The language used is general, and such as may be used in an advertisement or circular addressed generally to those engaged in the seed business, and is not an offer by which he may be bound, if accepted by any or all of the persons addressed." A number of cases holding the like are cited in the report and annotation of this case at L. R. A. 1915F, 824, 825.

Plaintiff was offering coal to any purchaser at the list price of $1.75 a ton, but a special concession of 10 cents a ton was continued to defendant in accordance with a previous custom. The list price was quoted on August 10, the order for 84 cars was not sent until October 21, a delay of more than two months. Plaintiff did not accept this unconditionally, but on October 23 advised defendant that it was not able to accept an order of such magnitude at that time, and made the counter proposal that it would place the orders on file "and give them their turn," also stating that, "before this order came, we already had on file about 200 orders and our output on lump and egg is limited so it will take quite a while to fill what we have on hand." The letter also stated that its output of lump and egg could not be increased "without getting some business on the nut and steam coal." This letter was a distinct notification that plaintiff did not accept the offer of defendant to purchase the 84 cars of coal on the terms of the letter of August 10, and constituted a counter proposal to accept the order on the conditions specified in the

letter. About a week or ten days later plaintiff in other letters explained and emphasized the condition that, unless it had orders for smaller grades and screenings, it would be unable to ship lump and egg coal as ordered.

In its amended cross-petition defendant first pleads that the letter of August 10 was a written contract, but in another paragraph seems to consider the contract completed by the acceptance of the counter proposal of October 21, because it pleads as follows: "The defendant, as shown in the correspondence, exhibits C to S, inclusive, agreed to place defendant's orders on file and to ship the same in regular turn with other orders according to the priority of the receipt of orders and and the plaintiff failed to ship the cars shown in exhibit B as being in default in the order of placing of orders with the plaintiff, and plaintiff therefore committed a breach of said agreement, and plaintiff also agreed to ship all of said cars shown in exhibit B within a reasonable time, and failed, neglected and refused to do so."

We are of the opinion that no contract was consummated until the order for 84 cars had been accepted, and, since the acceptance of this and later orders was conditional, the conditions formed part of the contract, and there could be no breach until the conditions had all been fulfilled. The subsequent correspondence and the acceptance of the coal shipped after October 21 was an assent to the counter proposition and completed the contract.

It is shown that the custom of the trade was that all shipments made during one month were to be paid for by the 10th of the next month. Defendant failed to pay for the coal furnished in December, and plaintiff notified it by wire on January 6, 1917, that, unless it did so, it would cease shipping, on account of a threat made by defendant that, unless ten cars were shipped by a certain date and an average of three cars a day thereafter, it would purchase elsewhere and charge the extra cost to plaintiff. No coal was shipped thereafter.

The failure of defendant to pay for the coal shipped in

December and the notification that plaintiff would refuse to ship more coal until this account was paid constituted a rescission or abandonment of the contract, and no damages can be claimed for a failure to ship after that date. *Quarton v. American Law Book Co.*, 143 Ia. 517. Whether there was a breach of the contract by plaintiff before that time depends on the meaning of the phrase, "giving them their turn," as used in the letter and in the coal trade when construed in connection with the statement that the shipment of lump and egg coal depended on the proportion of nut and pea coal ordered. Mr. Barber testifies that the term has a definite meaning in the coal business, that " 'turn' wouldn't mean to take a list of orders that came in and ship the coal according to the way the orders came in, as the orders would have to be for the coal in proportion to the way it had to be mined. For instance, if some one sent 100 orders for lump coal and no orders for screenings, it would be impossible for the mine to fill a single order, as the railroad company would not allow us to load up the screenings and let them stand on the track in cars. * * * If we had orders for the lump and no orders for the screenings, the mine would have to close down until we disposed of the screenings; so, if one firm would order all lump and egg and no screenings, it would be impossible to fill the order. * * * And the trade meaning among dealers and mine operators of the phrase, 'furnishing coal in their turn,' means not in the order of the dates that the orders are received, but means in the order that you are able to dispose of the entire output of the mines."

The evidence shows that plaintiff supplied the Chicago & Northwestern Railway Company, the United States Soldiers Home at Hot Springs, South Dakota, Sunderland Bros. Company, and some others, during October, November, and December under previous contracts and orders, and that an emergency arose in certain towns in Wyoming on account of the scarcity of cars and the limited supply of coal from other sources, which demanded that the neces-

sary coal to preserve life and property from the severity of the winter should be furnished by the plaintiff. The evidence is that these towns had no other opportunity to procure coal. The dictates of humanity required that this coal be supplied. *Salus populi suprema lex.* These conditions were communicated to the defendant. For furnishing this coal to the extent actually necessary, we think plaintiff should not be penalized.

It is not shown that other coal shipped was not under prior orders, except that 14 cars of lump and egg coal were shipped in November to two customers in Omaha on orders sent in November after the contract with defendant had been made. The price of coal had advanced materially on account of the war and shortage in supply. We are convinced from the evidence that these cars were delivered to the purchasers when they should have been sent to defendant. Plaintiff contends that it may have made up this preference by January 5, but we find no evidence to support this. The evidence clearly shows that defendant would have made a substantial profit if these 14 cars had been shipped to it instead of to later customers. It is said that other prior customers may also have been damaged, and that the damages should be prorated. There is no proof that contracts with other customers had not been complied with at that time.

The judgment of the district court dismissing the cross-petition is therefore reversed, and the cause remanded, with instructions to ascertain the difference between the contract price of the 14 cars of coal mentioned and the market price of coal of like grade and quality, and to allow defendant credit for the same. In all other respects the judgment is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

GRAND LODGE, ANCIENT ORDER UNITED WORKMEN, OF NEBRASKA, APPELLANT, V. GRAND LODGE, ANCIENT ORDER UNITED WORKMEN, OF IOWA, ET AL., APPELLEES.

FILED APRIL 11, 1921. No. 21305.

Insurance: USE OF NAME: INJUNCTION. The "Grand Lodge of the Ancient Order of United Workmen of the State of Iowa" may be enjoined from transacting a fraternal insurance business in Nebraska in that name, though licensed by the state insurance board of Nebraska to do so, where such use of its name, its methods and its conduct will have a tendency to mislead the public in dealing with the "Grand Lodge of the Ancient Order of United Workmen of the State of Nebraska" and result in injury to the latter, a fraternal beneficiary association previously organized under the laws of Nebraska and transacting a fraternal insurance business therein in that name.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

Edward F. Leary, John Stevens, E. J. Lambe and *Nelson C. Pratt,* for appellant.

Byron G. Burbank, Saunders & Stewart, Gray & Brumbaugh and *E. B. Evans, contra.*

ROSE, J.

This is a suit in equity to enjoin defendants from transacting in Nebraska the insurance business of a fraternal beneficiary association under a name similar to plaintiff's. The district court denied the injunction. Plaintiff has appealed.

The name of plaintiff is the "Grand Lodge of the Ancient Order of United Workmen of the State of Nebraska." It is a fraternal beneficiary association. It has a lodge system, composed of a grand lodge and subordinate lodges, with ritualistic work and a representative form of government. Its operations are confined to Nebraska. It was organized under the laws of Nebraska, and since 1886 has been regularly licensed for statutory periods by the in-

surance board of the state. It has been in continuous operation with many subordinate lodges and a large membership. In law it owes no allegiance or pecuniary obligation to any parent society. Its assessments were originally too low to fully meet its maturing insurance obligations. It raised its rates to conform to the rates adopted by the "Fraternal Congress." Dissatisfaction with the increase arose in its membership. The new rates were sustained. *Funk v. Stevens,* 102 Neb. 681. Plaintiff makes and collects assessments and its financial condition has improved. The report of a special examination indicated to the state insurance board a favorable possibility of rehabilitation. *Grand Lodge, A. O. U. W., v. Insurance Board,* 103 Neb. 99. Plaintiff has not become insolvent in the sense that a mere nonresident rival with a similar name can ignore its existence, appropriate its name, invade its territory, and use its organization, data and records. It has the right to sue in its own name for any equitable relief to which it is entitled. On the record presented these propositions are too plain for justifiable controversy.

The name of the defendant association is the "Grand Lodge of the Ancient Order of United Workmen of the State of Iowa." Its name would be the same as plaintiff's, if the geographical feature were eliminated. It was organized under the laws of Iowa. It is transacting a fraternal insurance business identical with that of plaintiff. It is operating in the field formerly occupied by plaintiff without a rival in similarity of name. Its system is the same—grand and subordinate lodges with ritualistic work and a representative form of government. It applied to the state insurance board of Nebraska for a license for the year 1918. Its application was rejected for the following reason:

"Because of the similarity in names of the A. O. U. W. of Nebraska and the A. O. U. W. of Iowa, the admission of the latter order to this state would cause confusion in the minds of many present and prospective members, and

thus still further retard the efforts of the Nebraska order to fulfil its obligations to its members." *Grand Lodge, A. O. U. W., v. Insurance Board,* 103 Neb. 99.

Upon an appeal, which finally reached the supreme court, it was held that the state insurance board of Nebraska was without power to deny a license to the defendant association on account of similarity of names, a controversy of that nature being considered one of exclusive judicial cognizance. In this ruling, however, the writer hereof did not concur. *Grand Lodge, A. O. U. W., v. Insurance Board,* 103 Neb. 99, 104. As a result of the decision mentioned, the defendant association procured from the insurance board of Nebraska a license to transact in this state a fraternal insurance business in 1919 in competition with plaintiff.

The use of a similar name and the conduct of defendants in transacting a like business in Nebraska and in successfully negotiating for the transfer of members, insurance and subordinate lodges of plaintiff to the defendant association are urged as grounds for an injunction.

The granting of equitable relief to plaintiff is resisted on the grounds, among others, that there is no similarity of names to mislead any one or to injure plaintiff; that defendants have committed no fraud; that the action of plaintiff's members and lodges in uniting with the defendant association was voluntary and unsolicited and was taken for the purpose of procuring insurance from a solvent insurer; that members of the defendant association were accepted only on individual applications; that all of the acts of the defendant association were authorized by law and were performed in good faith without injury to plaintiff.

Is plaintiff entitled to an injunction? A number of subordinate lodges chartered and established by plaintiff in Omaha and Fremont surrendered their charters to plaintiff, and under their original names became subordinate lodges of the defendant association with prac-

tically the same membership. In some of these lodges of plaintiff not a member was left. From this source the defendant association procured about 1,800 of plaintiff's members from the subordinate lodges in Omaha and Fremont. The negotiations leading to the transfer of insurance, members and lodges were conducted in the following manner: Each of plaintiff's seceding lodges appointed a committee of two members to act with a like committee of the others. These appointees acted as a joint committee, representing subordinate lodges and members of plaintiff in dealing with each other and in negotiating with the defendant association. Among other things the joint committee resolved that it was the duty of plaintiff's respective lodges "to take such action as shall perpetuate the order and the name 'A. O. U. W.'" They solicited from the defendant association "a proposition for taking over, adopting and accepting lodges and members of lodges within the state of Nebraska." The proposition made and accepted required each lodge of plaintiff to forward to the home office of the defendant association at Des Moines, Iowa, a copy of a resolution accepting the terms offered, together with a list of members showing the age of each and the amount of his insurance. No physical examination was required and there was no mention of moral character, vocation, business, or profession. In these respects good standing in the subordinate lodge of plaintiff was the test. While each member was required to make an individual application promising to comply with the charter and the by-laws of the defendant association, the effect of the proposition and of the acceptance thereof was to transfer plaintiff's seceding lodges in a body to the defendant association. The proposition itself, upon a resolution accepting its terms, declares:

"The Grand Lodge of Iowa will issue its charter to said lodge and adopt it as one of its subordinate lodges under the same name as heretofore borne by said lodge, or such other name as shall be designated in said resolution."

The subordinate lodges that seceded from plaintiff were built up by years of fraternal activity, enterprise and expense under a charter from plaintiff. They used plaintiff's by-laws and ritual. Under their charter they had the support and the prestige of the grand lodge. Their fraternal insurance was the mutual obligation of all beneficial members in hundreds of other subordinate lodges throughout the state. The members, when originally accepted by plaintiff, were selected and scrutinized according to ethical standards established by plaintiff for the benefit of the membership as a whole. They were not found in groups with the applicants for membership already named, listed, classified and qualified. The insurance risks of the members of the lodges that renounced their obligations to plaintiff and to their fraternal brethren in all subordinate lodges were examined and approved by a medical expert employed by plaintiff for the protection and the benefit of all subordinate lodges and members. The lists containing the name, age and insurance risk of each member of a seceding subordinate lodge represent fraternal enterprise, funds and assets, not only of the supreme lodge, but of all existing subordinate lodges and members. This harvest of fraternity is not subject to the whim or the caprice of any subordinate lodge. It was not created for that purpose. It is a mutual and fraternal asset of plaintiff and of all lodges and members. It is not a subject of barter by any individual lodge or the members thereof without regard to the rights or the wishes of the supreme lodge and the membership as a whole. It was never intended for a rival. It belongs to the fraternal entity. The seceding lodges and their officers and committees misused plaintiff's organization, records and data, abused their trust, and violated their mutual and fraternal obligations to their supreme lodge and to other subordinate lodges and members to the injury of plaintiff. The defendant association, in ignoring plaintiff and its rights, in negotiating independently with plaintiff's subordinate lodges, in exacting from subordi-

nate lodges plaintiff's organization, records and data, and in appropriating under a similar name the fruits of plaintiff's fraternal enterprise, participated actively in the wrongs committed by plaintiff's seceding lodges, officers and committees, and thus injured plaintiff. The wrongful transactions and the results thereof, in connection with the use of a similar name, will have a tendency to confuse or mislead the public in dealing with plaintiff and its subordinate lodges. The methods employed by defendants in participating in the destruction of plaintiff's organizations and subordinate lodges in Omaha and Fremont, and the conduct of the defendant association in accepting the benefits of the wrong-doing without consulting or compensating plaintiff, were unfair. They were unworthy of a fraternal rival and cannot be sanctioned by a court of equity.

Defendants should be enjoined from soliciting or accepting in Nebraska, in the name of the Grand Lodge of the Ancient Order of the United Workmen of the State of Iowa, new members, but the injunction should not disturb existing insurance contracts or interfere with subordinate lodges as their membership now stands. For this purpose the judgment of the district court is reversed and the cause remanded.

REVERSED.

LETTON, J., not sitting.

ROLAND M. HILL ET AL., APPELLANTS, V. ELIJAH CURTIS HILL, JR., ET AL., APPELLEES.

FILED APRIL 11, 1921. No. 21132.

1. **Wills: REVOCATION BY IMPLICATION.** Fifteen years elapsed between the date of the execution of a will and the death of the testator. The will provided that his wife, whose death preceded his by about two years, should have as her share of the estate "the provisions made by law for her." In the interim a section of farm land in Canada was purchased that was not devised by

the will. A life estate in a house and lot was devised to an only daughter, of the value of $5,000 or $6,000, which the testator subsequently sold; he also devised a life estate in 190 acres of land to his daughter's only son, with remainder to her in event that her son died childless. When the will was executed the testator had practically no personal property, but he then owned 1,000 acres of farm land worth about $50,000; when he died he had about $25,000 in money and owned property worth more than a quarter of a million dollars. *Held*, that the "changes in the conditions or circumstances of the testator" did not, under section 1295, Rev. St. 1913, work a revocation of the will by implication of law.

2. ———: ———. "The common-law doctrine that the revocation of a will may be implied from subsequent changes in the conditions or circumstances of the testator obtains in this state in so far as it has not been modified by statute." *Baacke v. Baacke*, 50 Neb. 18.

3. ———: ———. There is no fixed rule by which the revocation of a will may be implied from subsequent changes in the condition or circumstances of the testator. Each case must be governed by its own peculiar facts.

4. ———: DEVISE: PERPETUITIES. Where a testator devises a life estate in land to a married son and upon his son's death a life estate in a part of the same land is devised to "his wife, if living," the son's wife being alive when the will was executed and when the testator died, the words "his wife" relate solely to the then present wife of the son and she would take upon the death of her husband. *Held*, that such devise to the wife does not violate the rule against perpetuities.

5. ———: CONSTRUCTION. In the construction of a will, the intention of the testator, as disclosed by the language used therein, considered in connection with the surrounding circumstances, will govern, provided that, in so doing, no rule of law is violated or sound policy disturbed. *Lesiur v. Sipherd*, 84 Neb. 296.

6. ———: DEVISE: PERPETUITIES. The rule against perpetuities is not violated, unless the testator devises his land so that an estate therein is created that will vest beyond a life or lives in being and 21 years thereafter, and the period of gestation.

7. ———: ———: ———. A succession of life estates devised to the children of unborn children *ad infinitum*, if permitted, might prevent the alienation of lands for generations. Hence, the rule against perpetuities.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed as modified.*

Burkett, Wilson, Brown & Wilson and *J. R. Wilhite,* for appellants.

Fawcett & Mockett, Kelligar, Ferneau & Gagnon and *C. J. Campbell, contra.*

DEAN, J.

Elijah Curtis Hill, Sr., widower, died in Richardson county April 1, 1916, aged 84 years. He was then the owner of 1,000 acres of land in the county of his residence, a section of land in Canada, and personal property, all valued at more than a quarter of a million dollars. As his next of kin and heirs at law he left him surviving five sons, namely, Roland M., Reuben J., Marshall N., Ulysses Grant, and Elijah Curtis Hill, Jr., and a married daughter, Martha Ann Talley. His will was executed August 17, 1900. On May 28, 1901, he added thereto a codicil. The testator's sons, Roland M., Reuben J., Marshall N., Ulysses Grant, and Martha Ann Talley began this action against Elijah Curtis Hill, Jr., executor of the will, to have the will declared null and void. Plaintiffs also caused 29 grandchildren, and the spouses of such as were married, to be made parties defendant. Some of the grandchildren were minors and appeared by guardians *ad litem.* The testator's children are all married and each one is the parent of two or more children. The district court held the will in all respects valid. From the judgment so rendered plaintiffs appealed.

The grounds on which plaintiffs base their contention that the will is invalid will be discussed separately. In their brief they first argue that "the changed conditions of the nature, amount, and value of the property of the deceased between the making of the will in 1900 and his death in 1916 constitute a revocation under the law."

The changed conditions and circumstances of the testator, and of his property, as alleged by plaintiffs in the present case, that occurred subsequent to the making of the will, with the exception of a devise to Mrs. Talley that will be presently noted, are substantially these: His

wife died about 14 years after the will was written and about two years before he died; that "the property had changed in its proportions by the elimination of the wife's dower and homestead;" that the section of Canada land was purchased; that when he made the will the 1,000 acres of Richardson county land was worth about $50,000, and that he then had practically no personal property; that when he died, in 1916, he had about $25,000 in cash, and was then the owner of property valued at about a quarter of a million dollars, and that its value was greatly increased when the case was tried.

Plaintiffs cite section 1295, Rev. St. 1913, which, after providing generally how a will may be revoked, concludes with an exception, namely, that nothing contained in section 1295 "shall prevent the revocation implied by law from subsequent changes in the conditions or circumstances of the testator." They rely on the exception in the act.

In support of their argument on revocation by implication of law plaintiffs cite several cases, but they apparently rely on *Stender v. Stender,* 181 Mich. 648. That case fairly embodies the theory that is discussed in the other citations. Stender was the owner of about $200,000 worth of property, nearly all consisting of real estate. He was unmarried, and died 16 months after he executed his will. To his brother, Carl, he bequeathed practically all of his personal property, including a cigar manufacturing business. To Carl, William and Emil and to his sister, Thusnelda, and to the children of Mathilda, a deceased half sister, he bequeathed the residue of his estate, namely, one-fifth to each of his three brothers and his sister, respectively, and one-fifth to the children of his deceased half sister as representative of their mother. The persons named were his nearest surviving relatives. Between the date of the will and the date of his death the testator sold about $150,000 worth of real estate. Carl claimed the proceeds of the real estate under the will, but was defeated in the circuit court, and on appeal the judgment

was affirmed. The court said that there was nothing to show that Stender's intention to dispose of his estate was changed, "so that one brother should receive approximately $160,000 and the other four brothers and sisters only $10,000 each." In the *Stender* case it is obvious that, if Carl's plea had prevailed, the intention of the testator with respect to the body of his estate would have been defeated. The bequest of the cigar business, and some other personalty, to his brother, Carl, was the testator's only departure from the intention, plainly apparent throughout his will, to distribute the body of his estate equally among those who were his nearest of kin. And the court so interpreted the will that, in the distribution of the estate, notwithstanding changed conditions in the property, the manifest intention of the testator was executed.

Neither the *Stender* case nor the other cases cited by plaintiffs on this point, that are in substantial accord with it, are applicable to the facts before us, except as they hold to the fundamental rule that the intention of the testator as disclosed by the language of the will shall, within the bounds of the law, control in the interpretation of that instrument. *Lesiur v. Sipherd,* 84 Neb. 296.

New Hampshire has a statute on this subject that is substantially the same as ours. Gen. Laws N. H. 1878, ch. 193, secs. 14, 15. The act was construed in *Hoitt v. Hoitt,* 63 N. H. 475. The court said: "The revocation of a will is not effected by the death of legatees or devisees named in it; nor by the marriage of the testator, there being no issue of the marriage; nor by the alienation of the larger portion of his estate, which was specifically disposed of by the will; nor by the acquisition of other estate to an amount much greater than he possessed at the time the will was made; nor by the concurrence of all the above circumstances." 40 Cyc. 1210; *Forney's Estate,* 161 Pa. St. 209; *Borden v. Borden,* 2 R. I. 94. The present case seems fairly to come within the rule announced in the *Hoitt* case.

The common-law rule that a will may be revoked by implication of law, in a proper case, obtains in this state, except as modified by statute. *Baacke v. Baacke,* 50 Neb. 18. But there is no well-defined rule by which such revocation may in all cases be determined. The weight of authority, in the jurisdictions where the rule obtains, is that each case shall be governed by its own peculiar facts. It is clear that the revocation of the will before us cannot be implied from subsequent changes in the condition or circumstances of the testator.

The parties ask that the will be construed. In the present case the testator devised a life estate in his Nebraska land to each of his five sons and to one grandson. The devises vary from 110 to 250 acres to each devisee. A few of his grandchildren were substantially remembered in his will, as remaindermen, while many of them were not named therein. He expressly declared in his will that the grandchildren who were not named were "purposely and intentionally" omitted, and that such omission "was not through any accident or mistake." When he died, and when the case was tried, there were living grandchildren, of the respective classes, that is to say, male and female, whom he named as remaindermen, and all were capable of taking under the will.

Plaintiffs assail the several devises of the will separately. On this assignment they allege these grounds: "Because the will is unjust and disinherits natural heirs, contrary to the expressed intention of the testator by the will itself. Because the will itself is an incompetent and void one under the law, in that it provides for limitations over after the vesting of the fee; that it cannot be interpreted and executed; that it violates the law of perpetuities; that it entails estates, to an extent, and in a manner which violates our public policy, and is contrary to law; and that in some instances the fee title is not vested."

In the body of the will the testator bequeathed to his daughter, Mrs. Talley, a $2,000 bequest. In a codicil,

written about one year after the date of the will, he devised a life estate in a Lincoln residence property to her to take the place of this bequest. Subsequently he sold the Lincoln property for $5,000 or $6,000, and the proceeds were invested in the Canada section of land, or became a part of the residue of the testator's estate. Plaintiffs' complaint on this point is that the will "disinherits natural heirs;" that being a part of their argument that is hereinbefore pointed out, and that is also applied by them to other parts of the will.

With respect to Mrs. Talley, plaintiffs' objection seems to be without merit. It seems that she was twice married and that Carl Van Fleet is a son by a former marriage. Carl had attained his majority when his grandfather died. To this grandson the testator devised a life estate in 190 acres of his land, with the provision, and another that will be noticed presently, that his daughter, Mrs. Talley, should be the remainderman in case Carl should die childless.

It appears, however, that Mrs. Talley made a settlement after suit was begun by accepting $4,000 in cash from her brother, Elijah, and $8,000 from her son, Carl, and to the latter she executed a quitclaim deed to the 190-acre tract of land, conveying to him her contingent interest therein. Following this settlement she withdrew from the case, as one of the plaintiffs, and joined the defendants in resisting the claims of the remaining plaintiffs. Hence, this feature of the case, so far as Mrs. Talley is personally concerned, appears to be a closed incident. On this point the court found that she "was the only living remainderman, and as such owned a vested remainder interest therein," and that, by her quitclaim deed to Carl, "the fee simple title * * * became merged and vested in * * * Carl Van Fleet."

It appears, however, that, if Carl dies childless, the land shall, under the will, vest in Mrs. Talley, his mother. It plainly appears, from the will, that it was the intention of the testator that Carl should take a life estate, and that

the fee title should vest in his unborn children, if any he should have. So that, under the terms of his grandfather's will, Carl takes a life estate in the land devised to him, and by the conveyance from his mother he takes the interest that was devised to her. These estates are therefore merged. To that extent, with respect to the devise to Carl Van Fleet, the judgment must be modified. Whether the rights of such contingent remaindermen have been destroyed by the deed from Mrs. Talley to her son is a question we are not called upon, in the present state of the record, to determine at this time. Such contingent remaindermen are not parties and their rights are not represented in the present case by any class or by any party to this suit.

With respect to the devising clauses of the will the court found: "That said paragraphs 5 to 10, both inclusive, * * * devise a life estate to the sons and grandsons respectively" of the testator, "with remainder as to each of said devisees, as stated" in the will; that by paragraph 9 the testator "lawfully devised to the defendant Elijah Curtis Hill, Jr., the lands therein described, for and during the term of his natural life, and at his death to his male children or male child, if he should leave any, or in the event of there being no male child or children surviving the said Elijah Curtis Hill, Jr., then to his female child or children then living;" that, when the testator died, and when the decree herein was entered, Elijah Curtis Hill, Jr., and "two female children * * * were living, to wit, Marguerete Hill and Aileene Hill, who are the only children of said Elijah Curtis Hill, Jr., living" when the testator died, or at the present time; that, when the testator died, Elijah Curtis Hill, Jr., under the will "became vested, *eo instante,* with a life estate in the said lands above described, and the said Marguerete Hill and Aileene Hill became, *eo instante,* the owners of a vested remainder in said lands, subject to and burdened only with the life estate of their father; * * * that the said Elijah Curtis Hill, Jr., and the said Marguerete Hill,

and Aileene Hill are entitled to a decree quieting in them their title to such interests in said lands. It is therefore considered, adjudged and decreed by the court that the will of said Elijah Curtis Hill, deceased, is a valid will. That paragraphs 5 to 10, inclusive, of said will are valid devises to the sons and grandson therein named."

The will with respect to the life estate in the 250-acre tract of land that is devised to Elijah Curtis Hill, Jr., provides, as we have seen, that at his death the fee title thereto shall vest in his male child or children, as the case may be, share and share alike, but that, if he "shall only have female children or (a) female child," such child, or children, shall take the fee simple title share and share alike. It follows that the fee title of Marguerete and Aileene Hill is contingent upon the failure of the birth of a male child, or children, or of a daughter or daughters to Elijah Curtis Hill, Jr. To that extent the judgment must be modified with respect to the devise to Marguerete and Aileene Hill. More than this, it is not incumbent upon us at this time to decide with respect to the nature or extent of the contingent estate taken under the will by Marguerete and Aileene Hill.

In paragraph 9, with respect to the wife of his son Elijah, the testator provided that, if Elijah "shall die without leaving issue of his body capable of inheriting," "his wife if living shall have a life estate in one-third" of the land in which Elijah had a life estate. On this point plaintiffs argue that in the course of events Elijah Curtis Hill, Jr., might marry a wife who is not yet born. They say: "This provision of the will gives this land for life to Elijah, Jr., and then a life estate to his wife, who, under these circumstances, was born after the testator's death," and that if such wife "should live more than twenty-one years and nine months after the death of Elijah, Jr., then it would be longer than allowed by the statute of perpetuities." This point is not well taken. Elijah's wife was living when the testator's will was written and was living when he died. Under such cir-

cumstances the language of the will, in the connection that it is there used, and referring as it does to "his wife if living," cannot be construed to mean any other person than the then present wife of the testator's son Elijah. 40 Cyc. 1456; *In re Mook's Estate,* 167 N. Y. Supp. 170. It may be added that she was living when the case was tried.

Plaintiffs contend that the will "entails estates;" that it "violates the law of perpetuities," and the law against primogeniture. They point out that in some instances the testator in the disposal of his bounty preferred his male grandchildren, present and prospective. Even so, he had a lawful right, in the bestowal of his bounty, to prefer one class of heirs to the exclusion of another class. 21 R. C. L. 307, 308, secs. 35, 36. The will is the testator's. We cannot, of course, make a will for him, but must, if possible, find out the testator's intention from its every word and part, to the end that, if valid, it may be upheld.

The rule against perpetuities is not violated, unless the testator devises his land so that an estate therein is attempted to be created that will vest beyond a life or lives in being and 21 years thereafter, and the period of gestation. This of course cannot be done lawfully. In the present case we are unable to find from the language of the will that the testator even attempted to do so. The theory of the rule against perpetuities is that a succession of life estates devised to the children of unborn children *ad infinitum,* if permitted, would create such an entailment of estates that the alienation of lands might thereby be prevented for generations. The rule prevents such contingency and prohibits the vesting of estates beyond the time herein named.

In discussing the object and scope of the rule against perpetuities, in 21 R. C. L. 287, 288, secs. 9, 10, it is said: "The courts have always experienced difficulty in expressing in explicit terms the definition of a perpetuity, and it has even been asserted that a strictly accurate definition has never been given. Perpetuities have been variously

defined, and the rule against them has been expressed with quite as much variety. * * * The immediate object of the rule against perpetuities is to require the vesting of the future estates within a limited period of time after their creation and to bar the creation of future interests depending on remote contingencies. The fundamental policy of the law embodied in this rule is to prevent property from being tied up in such a manner as to be inalienable, or in such a way as to be taken out of commerce and the general circulation of property."

With respect to the argument on primogeniture, we deem it sufficient to say that the will fails to disclose an attempt by the testator to devise his lands to the eldest son or eldest grandson "in preference to the other children." Bouvier's Law Dictionary (Rawles' Revision) 740; Webster's New International Dictionary.

In passing it may be noted that defendants argue that plaintiffs are estopped from maintaining this action from the fact that each of the plaintiffs, and Carl Van Fleet, long since "entered into possession of the lands devised to each respectively by the will," and have paid general taxes, and also inheritance taxes thereon, based on the value of the respective life estates, and that each of the remaining plaintiffs, almost two years before the case was tried, accepted $4,046.03 bequeathed to them respectively under the terms of the will. But we do not find it necessary to decide the question of estoppel in the determination of the case.

The will cannot be annulled because of the discrimination that appears therein, nor upon any of the grounds urged by plaintiffs. It must be conceded that one of the main objects of a will is to permit discrimination by the testator and, within the rules of law, to direct the channel of inheritance. It is elementary that, within these rules, the testator has a right to make an unnatural, unreasonable, or unjust disposition of his property; in short, to dispose of his estate to whomsoever he will, always provided, of course, that he has the requisite capacity to make

a will. 40 Cyc. 1079. If all must share equally in the ancestor's bounty, if a will must be revoked by the courts on the ground that the testator has exercised discrimination, even amongst his nearest of kin, with respect to the bestowal of his lands and goods, the making of wills may well be abolished.

The will and the codicil consist of nine pages. Together they contain a multiplicity of words and needless repetitions. In upholding the will we do not commend it as a model of testamentary expression. Nevertheless we conclude, upon analysis, that it effects a valid disposition of all of the estate of the testator that is described and named therein.

Except as modified herein, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

ROLAND M. HILL ET AL., APPELLANTS, V. ELIJAH CURTIS HILL, JR., ET AL., APPELLEES.

FILED APRIL 11, 1921. No. 20968.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Burkett, Wilson, Brown & Wilson and *J. R. Wilhite,* for appellants.

Fawcett & Mockett, Kelligar, Ferneau & Gagnon and *C. J. Campbell, contra.*

DEAN, J.

The decision in *Hill v. Hill, ante,* p. 17, controls in the present case. The judgment of the district court is therefore

AFFIRMED.

PETERSON BROTHERS & COMPANY, APPELLEE, V. MAE GUNNARSON, APPELLANT.

FILED APRIL 11, 1921. No. 21447.

Husband and Wife: DESERTION: WIFE LIABLE ON CONTRACT. Where a husband deserts his wife and departs from the state, leaving her without maintenance or support, and remains absent therefrom continuously, with an intent to renounce the marital relation, and leaves her to act as a *feme sole*, and she so acts, she is liable to be sued on her contract the same as though she were unmarried.

APPEAL from the district court for Hamilton county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Hainer, Craft & Edgerton and *J. J. Reinhardt,* for appellant.

C. C. Flansburg and *Roscoe R. Smith, contra.*

DEAN, J.

The plaintiff corporation is engaged in the retail general merchandise business at York. On May 13, 1919, it sued to recover the purchase price of groceries, dry-goods and household necessaries generally that were bought by defendant. A jury was waived. From a judgment for $108.58 against defendant she appealed.

The facts in brief are these: On June 12, 1910, Harry A. Peterson and defendant were married. They lived together until October 15, 1917, when Peterson abandoned his wife and went to California to live and has resided there ever since. They never again lived together, nor did Peterson thereafter, so long as the marriage relation continued, furnish his wife with any support or funds for her maintenance, except for a brief period when he was required by a court decree to furnish "separate maintenance" for her. This feature of the case will be presently noted. They had no children. On November 21, 1918, defendant obtained a decree of divorce from her husband, that is now absolute, and her maiden name of Gunnarson was restored. Subsequent to and while she was living in

a state of abandonment, in the interval between November 1, 1917, and July 1, 1918, defendant purchased from plaintiff, as need arose, the goods in suit and for which she refused to pay. She denies liability on three alleged grounds: First, that they were necessaries of life and were therefore chargeable solely to Peterson, she being his wife when the goods were bought; second, that the goods were not bought with respect to nor upon the faith and credit of her separate estate; and, third, that no judgment was first obtained against her husband and execution thereon returned unsatisfied prior to the commencement of this action. The first and second assignments only need be discussed.

When the divorce was obtained a property settlement was effected between Peterson and his wife, and, pursuant to the settlement, the parties jointly executed an instrument that is called in the record a "deed of separation and settlement." This instrument was introduced in evidence by plaintiff. By its terms it is provided generally that Peterson shall pay to defendant $2,500 and convey to her the title to certain town lots in Aurora and deliver to her all of his furniture and household goods, with the exception of two articles of trifling value which he reserved. The defendant, in consideration of the foregoing, acknowledged "full and complete payment and satisfaction of all claims" against her husband and his present or after-acquired property or estate, "including all claims for support, maintenance, alimony, homestead, inheritance, or otherwise, all of which claims * * * are hereby and by the said Mae Peterson fully satisfied, released, extinguished and barred." The instrument further provides that Mae Peterson will not hereafter claim from Harry A. Peterson, or his estate, "any support, maintenance, or interest in his property, as his wife, widow, heir, or otherwise, * * * all of which, as above stated, have been fully paid, satisfied, and released." There is nothing on the face of the foregoing instrument to show that defendant's husband was obligated to pay

for the goods in suit, nor has it any relation to the matters involved herein; so that it need not be further noticed.

On the merits the general manager of plaintiff's store testified that, before defendant bought any of the goods in suit, he notified her personally that she could not make any purchases from plaintiff on her husband's account, and if she made any more purchases that they would be charged to her. He said they were sold to and charged solely to defendant. The manager's evidence is corroborated by the original slips upon which are charged the several items of goods. There are 30 or 35 of these slips and all of them indicate, by the recitals thereon, that the goods described therein were charged to "Mrs. Harry A. Peterson" or to "Mrs. Harry Peterson" or to "Mae Peterson."

Defendant testified that she was 31; that plaintiff never notified her that it would not sell goods to her on her husband's account; that prior to November 1, 1917, goods bought by her from plaintiff were charged to her husband, for which no bill was presented; that she never told plaintiff to charge the goods to her; that she never agreed to pay for them; and that she bought only on Peterson's credit. She further testified that the clerks in the store told her that they could not charge any goods to her husband, but that she was not so notified by them until after all of the goods involved in this case were purchased.

It is true the verbal evidence conflicts on the question as to whether defendant purchased the goods on the faith and credit of her own estate. But the learned trial court who heard the witnesses testify, and there were only two witnesses, resolved that conflict, in view of all the evidence, in plaintiff's favor. Whether defendant contracted to purchase and pay for the goods was a question of fact that was decided by the trial court adversely to her contention and we do not find any reason to hold that the court erred in this respect. We conclude that the record fairly shows the debt is properly chargeable to defendant. In *Grand Island Banking Co. v. Wright,* 53 Neb. 574, with

respect to the right of a married woman to contract it is said: "She may make contracts only in reference to her separate property, trade or business, or upon the faith and credit thereof and with the intent on her part to thereby charge her separate estate. Whether a contract of a married woman was so made is a question of fact."

That Peterson's separation from and abandonment of his wife was voluntary and with an intent to renounce the marital relation and leave her to act as a *feme sole* is clearly established. The rule is well stated by Shaw, C. J., in *Gregory v. Pierce,* 4 Met. (Mass.) 478: "The desertion of a wife by her husband, which will enable her to sue, and render her liable to be sued, as a *feme sole*, must be an absolute and complete desertion, by his continued absence from the commonwealth, and a voluntary separation from and abandonment of his wife, with an intent to renounce, *de facto,* the marital relation, and leave her to act as a *feme sole.*" In *Rhea v. Rhenner,* 26 U. S. 105, 107, it is said: "The law seems to be settled that, when the wife is left without maintenance or support by the husband, has traded as a *feme sole,* and has obtained credit as such, she ought to be liable for her debts. And the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. It is for the benefit of the *feme covert* that she should be answerable for her debts, and liable to an action in such a case; otherwise, she could not obtain credit and would have no means of gaining a livelihood."

The rule, as disclosed by the authorities, is that, where a husband deserts his wife and departs from the state, leaving her without maintenance or support, and remains absent therefrom continuously, with an intent to renounce the marital relation, and leaves her to act as a *feme sole,* and she so acts, she is liable to be sued on her contract the same as though she were unmarried.

Respecting the decree of separate maintenance hereinbefore referred to. It appears that, on September 24, 1918, defendant obtained a decree against her husband,

pursuant to an action theretofore commenced by her, in the district court for Hamilton county, wherein she was awarded separate maintenance in the sum of $60 a month from October 15, 1917, and thereafter, and her right to possession of the homestead was quieted in her. She was also awarded suit money and attorney's fees and costs. The decree by its terms seems fairly to cover the period of time in which the goods involved herein were purchased. *Wise Memorial Hospital Ass'n v. Peyton*, 99 Neb. 48.

The record does not present reversible error. The judgment is

AFFIRMED.

ROSE and FLANSBURG, JJ., not sitting.

E. E. BARKHURST, APPELLEE, V. J. ALBERT NEVINS, APPELLANT.

FILED APRIL 11, 1921. No. 21271.

1. **Appearance.** When the plaintiff seeks by attachment and garnishment to subject the property of a nonresident defendant to the payment of the debt and to obtain constructive service in the manner provided by law, and when the defendant appears specially for the purpose of objecting to the jurisdiction of the court over his person and his property, and among the reasons assigned therefor disclaims that the garnishee has any money or other property belonging to him, and disclaims any interest or right to the property named in the affidavit of garnishment, such appearance calls for the judgment of the court upon matters outside of the mere question of the jurisdiction of the court, and amounts to a general appearance in the case.
2. **Statute of Frauds:** REQUISITES OF MEMORANDUM. Under our statute of frauds (Rev. St. 1913, sec. 2625) the agreement for the sale of lands may consist of separate instruments, but the statute requires, not only that the contract or some note or memorandum thereof be signed by the vendor, but in the instruments, or some paper to which they refer, the name or some description of the vendee must also appear, so that he can be identified without parol proof.
3. **Evidence** examined, and *held* in part to sustain the judgment.
4. **Remittitur** ordered as a condition of affirmance.

APPEAL from the the district court for Greeley county: JAMES R. HANNA, JUDGE. *Affirmed on condition.*

A. L. Bishop and *Lanigan & Lanigan,* for appellant.

J. R. Swain and *John E. Kavanaugh, contra.*

DAY, J.

By this action the plaintiff seeks to recover damages for a breach of contract for the sale of certain lands, and also to recover the sum of $1,000, with interest thereon, the same being the advance payment upon the contract of sale. A jury was waived, trial had to the court, and judgment rendered in favor of the plaintiff for $2,693.33. From the recitals in the judgment it is very clear that the total sum was made up of an award of $1,600 as damages for the breach of the contract, and $1,000 as the advance payment, with interest thereon. From this judgment the defendant has appealed.

It is first urged by the defendant that the court never acquired jurisdiction over his person, and was therefore powerless to render a personal judgment against him. It is conceded that no summons was ever served upon the defendant within the state, and that the court acquired no jurisdiction over the person of the defendant, unless it can be said that the so-called special appearance filed by the defendant was in fact a general appearance in the case for all purposes.

It is the rule of practice very well settled by our decisions that a defendant may appear specially and object to the jurisdiction of the court over his person and over his property, and, if the objections are well founded, the service will be quashed. But it is equally well settled that, if by his special appearance the defendant invokes the power of the court upon any question except the sole question of the jurisdiction of the court, the special appearance will be regarded as a general appearance for all purposes. Whether this distinction is a salutary one we need not now inquire. It has been observed almost from

the beginning of our jurisprudence.

The plaintiff sought to aid his action by a process of attachment and garnishment and thus subject the defendant's property to the payment of the debt. To this end he had a process in garnishment served upon Frank X. Diessner and the Security State Bank, alleged debtors of the defendant, and was proceeding to obtain service by publication as prescribed by our practice to acquire jurisdiction over the *res*. The defendant thereupon filed his special appearance objecting to the jurisdiction of the court over his person and over his property, assigning some 18 reasons therefor. In the main the reasons assigned were properly directed to matters pertaining to the question of jurisdiction only. Among them, however, were the following:

"8. That the bond attempted to be given by the plaintiff and approved by the clerk of this court is not a bond, the same never having been signed by any bondsmen whatever."

"10. For the reason that this defendant disclaims that the garnishee, Security State Bank, has any money or other property in its possession belonging to him, and that this defendant disclaims any interest or right to any money alleged in the affidavit of garnishment, and has no knowledge of any such money being left with said bank for him or being placed to his credit therein."

In *Aultman & Taylor Co. v. Steinan,* 8 Neb. 109, the court had before it a question of objections to the jurisdiction of the court by a special appearance, one of the reasons assigned being very similar to the eighth reason assigned in this case, and it was held to be a general appearance.

In *Fowler v. Brown,* 51 Neb. 414, it was said: "A formal disclaimer, by one made a party defendant to a proceeding *in rem,* of any interest in the subject of the action is not a special appearance for the purpose of challenging the jurisdiction of the court over his person, but is, in substance, a defense requiring the judgment of

the court, and amounts to a general appearance."

While the facts of the above case are not at all similar to the facts in the case before us, we think the principle announced equally applicable to the case in hand, and we therefore hold that, when the plaintiff seeks by attachment and garnishment to subject the property of a nonresident defendant to the payment of the debt and to obtain constructive service in the manner provided by law, and when the defendant appears specially for the purpose of objecting to the jurisdiction of the court over his person and his property, and among the reasons assigned therefor disclaims that the garnishee has any money or other property belonging to him, and disclaims any interest or right to the property named in the affidavit of garnishment, such appearance calls for the judgment of the court upon matters outside of the mere question of the jurisdiction of the court, and amounts to a general appearance in the case.

The second question presented goes to the sufficiency of the telegrams passing between the defendant and his agent, James L. Walsh, to constitute a written contract between the plaintiff and the defendant. It is claimed that the alleged contract is within the inhibition of the statute of frauds.

The written contract, as set out in the petition, upon which the plaintiff bases his right to recover damages for the breach of the contract, rests in four telegrams passing between the defendant and his agent, as follows:

"Oct. 30, 1917.

"Mr. Albert Nevins, Dawson, Minn.

"Can get you eight thousand six-hundred and forty dollars for your land, terms to suit you. Answer at once. James L. Walsh."

"Dawson, Minn., Oct. 31.

"J. L. Walsh, Spalding, Nebr.

"I want twenty dollars per acre for the three quarters. Half cash down. J. A. Nevins."

"J. A. Nevins, Dawson, Minn.

"I have your land sold for twenty per acre. One thousand in hand, thirty-eight hundred March first. First mortgage for forty-eight hundred at six per cent. interest. Wire me what bank you want contract sent to. My commission to be paid out of first payment. James L. Walsh."

"Dawson, Minn.

"Jas. L. Walsh, Spalding, Nebr.

"Send contract Bank of Dawson. Take your commission out of the one thousand dollars. Deposit balance in Security State Bank there. Send me deposit check. J. A. Nevins."

Section 2625, Rev. St. 1913, being a part of the statute of frauds, provides: "Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made."

This section of the statute clearly contemplates that the contract, or note, or memorandum thereof in writing, shall contain within itself all of the essential elements which go to make up a contract, and, when essential elements of the contract are lacking, the contract must fail, because essential elements cannot be supplied by parol testimony. There are some exceptions to this general rule, as when there has been a payment of the purchase price accompanied by delivery of possession of the land. In such cases it is generally held that payment of the whole or part of the purchase price, together with a delivery of possession, will take the transaction out of the statute of frauds. Mere payment of the purchase price alone, however, is not sufficient. There is no claim that the case falls within any exception to the general rule. The very purpose of the statute was to prevent such contracts from resting in parol.

There is also no question but that a contract for the sale of land may be made up of several connected instruments, and that the signing by the vendor alone is a suffi-

cient signing to meet the requirements of the statute. *Gartrell v. Stafford,* 12 Neb. 545; *Ballou v. Sherwood,* 32 Neb. 666; *Butterfield v. Commercial Cattle Co.,* 72 Neb. 605; *Iske v. Iske,* 95 Neb. 603. It will be noted, however, that the name of the proposed purchaser is nowhere mentioned in the telegrams; neither is he described in any manner. There is no means of determining who he is without resort to parol testimony, and this the law will not permit. One of the essential elements of a contract is the parties to it, and when but one of them is named, or described, it is fatally defective.

A leading case involving this question, and one frequently cited, is *Grafton v. Cummings,* 99 U. S. 100. In that case the court had before it a contract executed in New Hampshire, and it was considered in connection with the statute of frauds of that state, which requires that the contract or some note or memorandum thereof be in writing and signed by the party to be charged; the party to be charged in that state being the purchaser. The rule announced in the syllabus is as follows:

"In order to satisfy the requirements of the statute of frauds of New Hampshire, the memorandum in writing of an agreement of the sale of lands which is signed by the party to be charged must not only contain a sufficient description of them, together with a statement of the price to be paid therefor, but in that memorandum, or in some paper signed by that party, the other contracting party must be so designated that he can be identified without parol proof."

The opinion of the court was prepared by Mr. Justice Miller, who, in his characteristically clear manner, said:

"The statute not only requires that the agreement on which the action is brought, or some memorandum thereof, shall be signed by the party to be charged, but that the agreement or memorandum shall be in writing. In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the

thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it."

The same principle is announced in 25 R. C. L. 655, sec. 288, wherein numerous cases are cited. See, also, *Peoria Grape Sugar Co. v. Babcock Co.*, 67 Fed. 892.

From what has been said it follows that, in an agreement for the sale of lands consisting of separate instruments, our statute of frauds (Rev. St. 1913, sec. 2625) requires, not only that the writing be signed by the vendor, but in the instruments, or some paper to which they refer, the name or some description of the vendee must also appear, so that he can be identified without parol proof.

The record shows, however, that James L. Walsh was the agent of the defendant, and by his express authority received from the plaintiff $1,000 as part payment on the land. From the testimony there seems to be no justification whatever for the defendant withholding this amount.

On the record before us we conclude that the defendant entered a general appearance in the case, and that therefore the court had jurisdiction over his person; that the telegrams set out in the petition, as constituting the contract of sale, are not sufficient under our statute of frauds (Rev. St. 1913, sec. 2625) because the name or description of the purchaser is entirely lacking, and that the name of the purchaser cannot be supplied by parol; that to the extent of $1,000, with interest thereon from October 31, 1917, the evidence supports the judgment.

If the plaintiff, within 20 days, file a remittitur of $1,600, with interest, the same being the part of the judgment for damages for the breach of the contract, the judgment of the district court will be affirmed; otherwise, the judgment will be reversed and the cause remanded.

AFFIRMED ON CONDITION.

LOUIS POSPISIL V. STATE OF NEBRASKA.

FILED APRIL 11, 1921. No. 21528.

Burglary: ERRONEOUS INSTRUCTION. In a prosecution for burglary or larceny, it is error to instruct the jury, when recently stolen goods are found in the exclusive possession of the defendant, that such circumstance is "presumptive, but not conclusive, evidence of defendant's guilt." The rule is that the exclusive possession of recently stolen property is a circumstance to be considered by the jury in connection with all other facts and circumstances in determining the defendant's guilt.

ERROR to the district court for Pierce county: WILLIAM V ALLEN, JUDGE. *Reversed.*

O. S. Spillman, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

DAY, J.

The information upon which defendant was tried contained two counts—one charging burglary and the other larceny. He was convicted of larceny and sentenced to a term in the penitentiary under the provisions of the indeterminate sentence law of the state. He prosecutes error to this court.

A number of errors are assigned, but only one need be considered. The main argument of defendant's counsel is directed against the giving of instruction No. 5, which, it is insisted, was erroneous and prejudicial to the rights of the defendant. The instruction reads as follows:

"If you find from the evidence beyond a reasonable doubt that, very shortly after the alleged burglary of the storehouse of said Frank C. Holbert and Bruce Sires and the larceny therefrom of the articles of personal property or any part thereof described in the information, said property or a portion thereof so stolen was found in the exclusive possession of defendant, Louis Pospisil, you are instructed that this circumstance, if so proved, is pre-

sumptive, but not conclusive, evidence of defendant's guilt."

Referring particularly to the latter part of the instruction, we are of the view that it is an inaccurate statement of the law and out of harmony with the rule to which this court is committed. By this instruction the jury were told, in effect, that, if the recently stolen goods were found in the exclusive possession of the defendant, such circumstance would raise the presumption of his guilt, but that such presumption was not conclusive. The rule adopted by this court with respect to the inference to be drawn from the exclusive possession of recently stolen goods goes no further than to hold that it is a circumstance to be considered by the jury in connection with all the other facts and circumstances in determining the defendant's guilt.

Our court is committed to the rule that in cases of larceny no such presumption exists, but that the effect to be given to the fact of possession of recently stolen goods is solely for the jury to determine, when considered in connection with all the other facts and circumstances in the case. In some jurisdictions the rule is as announced in the instruction, but in this state the exclusive possession of recently stolen goods is a circumstance to be considered by the jury in connection with all the other facts and circumstances in the case in determining the guilt of the accused.

In *Metz v. State,* 46 Neb. 547, the court passed upon an instruction alike in substance to the instruction now before the court. In passing upon the question the court said:

"The instruction under consideration is bad, for the reason it misdirected the jury as to the presumption arising from the possession of stolen property. In a prosecution for larceny, some of the courts say that the exclusive possession by the defendant of the property stolen recently after the theft, unexplained, is *prima facie* evidence of guilt. Other courts, including ours, lay down the

doctrine that in larceny cases no such presumption exists, but that the effect to be given to the fact of possession of stolen property is solely for the jury to determine, when considered in connection with all the other facts and circumstances disclosed on the trial."

The attorney general concedes that the instruction under consideration is within the criticism of the rule announced in *Metz v. State, supra,* but argues that the other rule is more in consonance with "common sense." However this may be, there is a strong reason for the rule as heretofore adopted by this court and we are not disposed tc disturb it.

The other errors assigned relate to matters occurring at the trial, which may not again arise, and therefore will not be considered.

For the error of the instruction, which we hold to be prejudicial to defendant's rights, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

LOUIE OSBORNE FERSON ET AL., APPELLANTS, V. ARMOUR & COMPANY: STANDARD OIL COMPANY ET AL., APPELLEES.

FILED APRIL 11, 1921. No. 21418.

Corporations: SERVICE OF PROCESS. Showing on special appearance, objecting to the jurisdiction of the court over the person of certain defendants, examined, and *held* to justify the holding of the trial court that the person served with summons was not an officer, clerk or managing agent of the defendant companies in Nebraska.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

John O. Yeiser, for appellants.

William H. Herdman, contra.

FLANSBURG, J.

Appeal by plaintiffs from an order, sustaining objec-

tions to jurisdiction over the person of the defendants Standard Oil Company of New Jersey and Standard Oil Company of Ohio, on the ground that service of summons had not been made within the state of Nebraska upon the officer or managing agent or other person authorized to receive service, under sections 7634 and 7636, Rev. St. 1913.

Summons was served upon A. H. Richardson, president of the Standard Oil Company of Nebraska, a Nebraska corporation, capitalized at $1,000,000. The Nebraska corporation is not, however, made a defendant. The sheriff's amended return recites that he served the summons by delivering to the Standard Oil Company of Nebraska, "claimed by plaintiffs to be the managing agent of said Standard Oil Company of New Jersey, by delivering to A. H. Richardson, president of said Standard Oil Company of Nebraska," a copy of the summons. A like return is made for the Standard Oil Company of Ohio. The affidavits of A. H. Richardson and of the officers of the Standard Oil Company of New Jersey and of Ohio set out that the Nebraska corporation is a separate and distinct corporation, and that the New Jersey and Ohio corporations do no business in the state of Nebraska, and that A. H. Richardson is not an officer or managing agent of the New Jersey or Ohio companies and handles no business for those companies in this state. Mr. Richardson's affidavit shows that he acts only for the Nebraska corporation as its president and manages only the business carried on by the Nebraska corporation.

The plaintiffs, in opposition to this showing, filed no affidavits, took no depositions and introduced no testimony of persons who were directly in position to know the facts as to the relation between the three companies mentioned, but plaintiffs filed their own affidavit, attaching to it a copy of an amended petition, formerly filed in the case, and their affidavit recites that all the allegations of this petition are a recital "of things said and done in the presence of, or by, plaintiffs." The entire petition is attached as an exhibit to the plaintiffs' affidavit, without

reference to any specific portions thereof, evidently upon the theory that the court may read it and gather what it wishes, to support the plaintiffs' contention. The petition referred to is printed in small type and consists of 115 double-column pages, and had been previously stricken from the files by the trial court, on the ground that it was substantially composed of redundant, irrelevant and scandalous matter. The trial court no doubt found that the showing made by the plaintiffs, by reference only to allegations in the petition of things said or done in their presence, was entirely too indefinite to show the source of their knowledge, and to give the weight to their statements that would be given to parties who were in a position to know the facts and who made affidavits setting out what the facts were.

Furthermore, though we find in this petition allegations that the original Standard Oil Company of New Jersey had been dissolved and separated into various corporations, and general allegations that all of these companies were, in fact, still one company, aside from such general conclusion and opinion of the plaintiffs, we find no allegations of facts showing that the Nebraska corporation or A. H. Richardson acted as agent in any way to carry on business for the Ohio and New Jersey companies in Nebraska, nor what the relation now existing between those companies is, nor that the Nebraska company did more than carry on its own business in this state.

On such a showing, we are not inclined to disturb the decision of the trial court on that issue. A. H. Richardson is not shown to be such an officer, clerk or managing agent of the defendant companies that service upon him would bind them.

The order of the lower court is, therefore,

AFFIRMED.

H. J. FINCH, APPELLANT, V. E. J. WEST ET AL., APPELLEES.

FILED APRIL 11, 1921. No. 21530.

1. **Habeas Corpus:** GUILT AND PROBABLE CAUSE: JURISDICTION. In an action to procure a writ of habeas corpus, the guilt or innocence, or probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state.
2. ———: EXTRADITION: QUESTIONS TO BE DETERMINED. The questions to be determined in such habeas corpus case are: Whether the person demanded is substantially charged with a crime against the laws of the foreign state; and whether he is a fugitive from justice from that state.
3. Extradition: "FUGITIVE FROM JUSTICE." It is not necessary, in order that one be a fugitive from justice, that he shall have left the demanding state for the purpose of avoiding prosecution, but simply that, having committed an act charged to be a crime under the laws of that state, he has left that jurisdiction and is found in another state.
4. ———: ———. In order that one be a fugitive from justice from a foreign state, it is not necessary that he shall have done every act within the state which is necessary to complete the crime which has been committed, but it is sufficient if he has committed in that state some overt act which is and is intended to be a material step toward accomplishing the crime, and has done the rest elsewhere.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Hotz & Lee and *Kennedy, Holland, De Lacy & McLaughlin,* for appellant.

A. V. Shotwell, Arthur Rosenblum and *Stout, Rose, Wells & Martin, contra.*

FLANSBURG, J.

Habeas corpus action in which it is sought to release appellant, who is held for extradition to the state of Iowa under a warrant issued by the governor of this state. From an order denying the writ, this appeal is taken.

Appellant's contention is that the evidence in this proceeding before the trial court conclusively shows that he was not a fugitive from justice from the state of Iowa, and that there is not probable cause to believe that appellant committed the crime charged. He was indicted by the grand jury in Iowa on the charge of having feloniously obtained property from one Bell under false pretenses. It appears from appellant's testimony in this proceeding that on the date that the crime is charged to have been committed he was at Osceola, Iowa, and that he there engaged in the transaction which is made the basis of the charge. It is charged that he, with intent to cheat and defraud, falsely represented that he was a member of the commission firm of Jackson-Signall Company of Omaha, and was authorized to draw drafts upon that firm, and that, by such representations and the delivery of such drafts drawn by him, he obtained from Bell the delivery of 400 head of sheep. His testimony shows the giving of the drafts, and that Bell delivered the sheep to him and helped to load them for shipment to Omaha. His testimony does not show that he was a member of the commission firm, nor just what authority he had, if any, to draw drafts. The drafts were not paid. Mr. Jackson, of the firm of Jackson-Signall Company, testified that appellant had drawn drafts on the firm before that time, but he does not attempt to explain just what appellant's authority was.

Appellant contends that it is proper for this court to pass upon the question of whether a crime has been committed, in order to determine whether or not he is a fugitive from justice from the state of Iowa, since it appears that all the material evidence that could be introduced in the criminal prosecution is before the court, and since from that evidence it is conclusively shown that the defendant could not have committed the crime.

Such, however, is not the condition of the testimony here. Whether the false representations were made; whether Bell had warranted the sheep and whether the

warranty was broken; whether there was legal excuse for the dishonor of the drafts; and whether appellant acted with felonious intent to cheat and defraud, and did cheat and defraud, are all questions which cannot be conclusively determined from the fragmentary testimony introduced in appellant's behalf. It does not conclusively appear that other testimony cannot be procured to show that an overt act, in connection with the crime charged, has been committed by the appellant in the demanding state. The indictment by the Iowa grand jury, on the other hand, raises the presumption that such testimony is available. The question, therefore, passed upon in the cases of *Ex parte La Vere,* 39 Nev. 214, and *In re Kuhns,* 36 Nev. 487, is not before this court.

The question of the guilt or innocence of the accused, or the question of whether or not there is probable cause to believe that the accused is guilty of the crime charged, cannot, in a case of this kind, be passed upon by the courts in a habeas corpus proceeding. Those questions, in this instance, are for the courts of the state of Iowa to decide. *In re Van Sciever,* 42 Neb. 772; *Drew v. Thaw,* 235 U. S. 432; *Ex parte Montgomery,* 244 Fed. 967; *People v. Gargan,* 168 N. Y. Supp. 1027; *Edmunds v. Griffin,* 177 Ia. 389; note, 21 L. R. A. n. s. 939; 19 Cyc. 100; 21 Cyc. 328.

The defendant claims that if any crime has been committed it was consummated in the state of Nebraska and not in Iowa, since the sheep were shipped to Omaha, and since it is there that the drafts were dishonored and the sheep disposed of. It is only necessary to prove that some overt act, in furtherance of the crime charged, was committed in the foreign state, and when that is shown the locus of the crime will not be determined in the habeas corpus case. *Strassheim v. Daily,* 221 U. S. 280; *People v. Gargan, supra; Zulch v. Roach,* 23 Wyo. 335. In the *Strassheim* case the court said (p. 285):

"We think it plain that the criminal need not do within the state every act necessary to complete the crime. If he does there an overt act which is and is intended to be

a material step toward accomplishing the crime, and then absents himself from the state and does the rest elsewhere, he becomes a fugitive from justice, when the crime is complete, if not before."

Defendant further contends that he was not a fugitive from justice from the state of Iowa, since he left that state with the shipment of sheep and by and with the arrangement and consent of Bell, and not to avoid prosecution, nor to get beyond the jurisdiction of the Iowa courts. Upon that question the supreme court of the United States has recently said (*Hogan v. O'Neill*, 255 U. S. 52):

"To be regarded as a fugitive from justice it is not necessary that one shall have left the state in which the crime is alleged to have been committed for the very purpose of avoiding prosecution, but simply that, having committed there an act which, by the law of the state constitutes a crime, he afterwards has departed from its jurisdiction and when sought to be prosecuted is found within the territory of another state."

For the reasons given, it is our opinion that the judgment of the lower court should be affirmed.

AFFIRMED.

ROSE, J., not sitting.

LAWRENCE THIEDE V. STATE OF NEBRASKA.

FILED APRIL 11, 1921. No. 21819.

1. **Homicide: INVOLUNTARY MANSLAUGHTER: INTENT.** The furnishing of intoxicating liquor to another, though prohibited by law, is not ordinarily such an unlawful act, within section 8583, Rev. St. 1913, as carries with it that intentional wrong toward another which will supply the place of the criminal intent, necessary to prove criminal homicide and support the charge of involuntary manslaughter.

2. ———: ———. But, where a person furnishes to another intoxicating liquor which, by reason of its extreme potency or poisonous ingredients, is dangerous to use as a beverage, and the party

furnishing the liquor knows, or should have known, of the danger, the unlawful act of furnishing the liquor is so characterized by reckless conduct as to be sufficient to support a charge of involuntary manslaughter, where death results from the drinking.

3. ———: ———: DEFENSE. Where the defendant gave intoxicating liquor to another to drink, the fact that the other voluntarily drank it is only a concurring cause with that of the defendant, and, though such other party may have been guilty of contributory negligence, such negligence is not a defense in a criminal homicide.

4. ———: ———: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* sufficient to sustain a submission of the case to the jury on the charge of involuntary manslaughter.

ERROR to the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Reversed.*

J. E. Willits, for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

FLANSBURG, J.

Criminal prosecution for manslaughter, charged to have been committed by defendant through the unlawful act of giving deceased intoxicating liquor, which the deceased drank and which caused his death. Defendant was found guilty and brings the case here for review.

It is his contention that the evidence introduced by the prosecution is insufficient upon which to base the charge.

The evidence in behalf of the state shows that the defendant, Thiede, and others, some weeks previously, had attempted to make intoxicating liquor on the Nelson farm; that they had a coil and a kettle and had distilled some liquor. Just what the nature of the liquor was and what quantity they made is not shown. On the day in question, defendant, with one Stromer and Forney, who were also originally charged with the commission of the offense in this case, went to the Nelson farm. Defendant dug up three jugs of white whiskey which had been buried on the place, and he and Forney then went to the town

of Prosser. In the course of an hour they returned with two girls. Stromer was found lying on the ground in a drunken stupor, with the jugs near him. At this time the farmer, Nelson, was present and defendant gave him a drink from the jug. He testified that it tasted like hot acids and temporarily paralyzed him, and that, at the time of trial, he still felt the effects. The defendant, Stromer and Forney drank of the liquor, and the girls each drank once from a coffee cup, containing a mixture of the liquor and grape juice. One of the girls testified that she had used whiskey before, but that this was the first time she had taken too much.

That evening, at about 7:30, a party was made up with four young men from the town of Prosser, and these seven boys and the two girls went into the country. The four boys from Prosser by name were Lambrecht, Montey, Hendriks, and Kroll, the deceased. When the cars reached their destination, defendant produced one of the jugs and passed it around, with the statement that they might take what they wanted. All of the men then took one drink from the jug. The jug was then placed on the running board of one of the cars, and the party separated, but remained in the near vicinity for from half to three-quarters of an hour, at the end of which time they again all assembled at the cars. The party then seemed gay and hilarious. Defendant again passed the jug and all but one, Montey, took one more drink. The state's testimony shows that neither deceased nor any of the other Prosser boys took more than the two drinks. They then drove to Prosser, a mile and a quarter distant. When they arrived Lambrecht, Hendriks and the deceased were very drunk. Lambrecht went into a picture show, and he testifies that the next he remembered was when he awoke at home the next morning. Hendriks, stupefied, remained in the seat of his car all night and went home at 6 o'clock the next morning. The deceased was unable to talk when he reached Prosser, and was utterly helpless. He began vomiting and was taken home by

his brother and placed upon the floor, where he remained unconscious. A doctor arrived at midnight and administered strychnine and atropin, and at 3 a. m. Kroll was dead. The doctor testified that death was the result of alcoholic poisoning.

Defendant the next morning, before he had heard of the death of Kroll, made a test of the liquor by touching a match to some that had been poured on the ground, and it was found to burn. A chemist testified that he made a gravity test and also an analysis by distilling the liquor, and found that it contained 57 per cent. "pure alcohol," but that he made no analysis for the discovery of other ingredients.

The testimony in defendant's behalf conflicts in many material aspects with that just related, but, to determine the question presented, it is unnecessary to consider his version of the case.

Under our statutes, it is manslaughter to "unlawfully kill another without malice, * * * or unintentionally, while the slayer is in the commission of some unlawful act." Rev. St. 1913, sec. 8583.

It is not questioned that the giving of liquor to the deceased, under the circumstances shown in this case, was in violation of the prohibitory law of this state, and that for the act the defendant was subject to fine and imprisonment. It is the defendant's contention, however, that the act of giving liquor is an act merely *malum prohibitum,* and is not in its nature such an unlawful act as carries with it that intentional wrong toward another which will supply the place of the criminal intent otherwise necessary to any criminal homicide.

In the commission of those unlawful acts which are criminal in their nature and which the law characterizes as *malum in se,* there is always found an intent on the part of the perpetrator of the offense to commit a wrong as against the person or property of another, and, though the wrong or injury committed may not be calculated nor intended to do great injury, nor to produce death, the per-

son committing the act is not allowed to stop with the effect he intended to produce, but is held, in law, responsible for the full consequences of his act, and, where the result in such a case is death, a wrongful intent being present, the act is held to be involuntary manslaughter.

It is obvious, however, that there are acts prohibited by law which are not in their nature criminal, and in the commission of which the perpetrator of the act has no intent to do harm nor to injure another in his person or property. Where such a wrongful intent is not present and the act is wrong only because prohibited, it is an act *malum prohibitum,* and, where in the perpetration of such an act death results, the law will not convert the act, innocently done and done with no intent to injure and with no disregard for the safety of another, into a criminal act and pronounce the act manslaughter. It is therefore necessary to look particularly to the nature of the act committed in this case, in order to determine whether it is such an "unlawful act" as comes within the purview of the statute.

In the cases of *Ford v. State,* 71 Neb. 246; *Lindsay v. State,* 46 Neb. 177, and *Schultz v. State,* 89 Neb. 34, the unlawful acts were held to be sufficient. In the *Ford* case the defendant playfully pointed a pistol at another person, having some reason to believe that it was not loaded. The pistol was accidentally discharged and the person unintentionally killed. The court held, in accord with the general holding in other states on that question (note, 5 A. L. R. 611), that the intentional pointing of a pistol was a criminal assault, and, however unintentional might have been the act of shooting, the act of intentionally pointing the pistol was an act calculated to endanger the safety of the person pointed at, and was an act which might reasonably, by accident, result in death.

In the *Lindsay* case, *supra,* the defendant and another engaged in a prize fight, contrary to the statute. This was not only an unlawful act, but a mutual combat, tending to cause severe personal injuries to the combatants,

and the killing of one during the fight was, therefore, held to be manslaughter.

In the *Schultz* case, *supra,* defendant was convicted of manslaughter by reason of his having killed a person while driving his automobile at an unlawful rate of speed upon the streets of Omaha. The speed statute prohibited the driving of any vehicle at a greater rate of speed than was reasonable and proper, with regard to the traffic, or "so as to endanger the life or limb of any person." Comp. St. 1909, ch. 78, sec. 147. It is apparent that to drive a car so as to endanger the life or limb of any person evidences such disregard for the safety of persons on the street as to supply the intent to do wrong and to inflict injury. In that case it was argued that the violation of the speed statute was an act merely *malum prohibitum,* and was not criminal in its nature, and, therefore, not an unlawful act within the manslaughter law. To this the court said that, since it appeared the act was done with a careless disregard for the safety of others, it was sufficient, and that "there seems to be no conflict in the decisions where the defendant is violating some statute, and where his manner is negligent and careless. The courts in such cases uniformly say that he is guilty of manslaughter if the death of some other person is the result."

We believe the rule to be that, though the act, made unlawful by statute, is an act merely *malum prohibitum* and is ordinarily insufficient, still, when such an act is accompanied by negligence or further wrong, so as to be, in its nature, dangerous, or so as to manifest a reckless disregard for the safety of others, then it may be sufficient to supply the wrongful intent essential to criminal homicide, and, when such act results in the death of another, may constitute involuntary manslaughter.

Such an unlawful act alone, unaccompanied by negligence, is insufficient. *Potter v. State,* 162 Ind. 213, 64 L. R. A. 942; *State v. Horton,* 139 N. Car. 588, 1 L. R. A. n. s. 991; *Estell v. State,* 51 N. J. Law, 182; *Common-*

wealth v. Adams, 114 Mass. 323; *People v. Pearne,* 118 Cal. 154; *State v. Trollinger,* 162 N. Car. 618.

In the case of *Potter v. State,* the court held that the death of one of the participants in a friendly scuffle through the accidental discharge of a pistol, carried in the pocket of the other, contrary to the provisions of a statute, cannot be said to be caused in the performance of an unlawful act so as to render the one carrying the pistol guilty of manslaughter, under provisions of a statute similar to the statute of our state. The court in that case said (p. 217): "As a general rule, the law has such a high regard for human life that it considers as unlawful all acts which are dangerous to the person against whom they are directed, no matter how innocently they may be performed. A person will not be permitted to do an act which jeopardizes the life and safety of another, and then, upon plea of accident, escape liability for a homicide involuntarily resulting from his reckless or careless act or conduct. * * * The case at bar does not fall within that class of cases where the homicide is the result of culpable carelessness or negligence of the accused party in using or handling a dangerous weapon."

In the case of *State v. Horton,* the court held that the mere violation of the statute, making it unlawful to hunt on another's property without a permit, is not such an unlawful act as to render an accidental homicide, committed while so doing, a criminal offense.

In the case of *Estell v. State,* the defendant attempted to drive a wagon through a toll gate, in violation of law, and the toll gate keeper ran in front of the horses to stop them and was run over and killed. There the court said (p. 185): "In this case the jury should have been told that the defendant was guilty as charged, if he did the unlawful act in question under conditions that were dangerous to the toll gate keeper; as, if he drove through the gate at a rapid pace, or urged his team of mules on after they had been seized by the deceased, * * * the criminality consisting of the two elements, of the unlaw-

fulness of the act, and the unlawfulness and danger in the mode of its execution."

In the cases of *People v. Barnes,* 182 Mich. 179; *Commonwealth v. Adams,* and *People v. Pearne, supra,* it was held that driving in excess of the specific number of miles an hour fixed by law, when not accompanied by carelessness, was insufficient; the court in the *Pearne* case saying that it was not a sufficiently unlawful act "unless at the time of the accident he (the defendant) was driving in a 'dangerous manner.'"

On the other hand, where the act which is unlawful is *malum prohibitum* merely, but is accompanied by negligence and, in its performance, the safety of others is recklessly disregarded, it is held sufficient. *Sparks v. Commonwealth,* 3 Bush (Ky.) 111, 96 Am. Dec. 196; *Brittain v. State,* 36 Tex. Cr. Rep. 406; *Silver v. State,* 13 Ga. App. 722; *State v. De Fonti,* 34 R. I. 51; *State v. Keever,* 177 N. Car. 114.

In the case of *Sparks v. Commonwealth, supra,* a young man, walking along the streets of the town, drew a revolver and said, "Let us have a Christmas gun," inquired how much the fine was, and, wheeling half about and pointing the gun backwards over his shoulder, fired and killed a bystander. The law prohibited the discharge of fire arms within the town. It was held manslaughter in the commission of an unlawful act, and, though the court declared the unlawful act was an offense *malum prohibitum,* went on to point out that (p. 115): "Sparks drew his pistol with the avowed intent illegally to shoot it then and there in the town, along its streets, where he not only had the right to infer that people lived in close proximity and might be passing, but when he actually knew several then of his company were passing. His throwing it over his shoulder, with a half-face about, with the muzzle toward those in his rear, manifests such recklessness and want of caution as to indicate not only an entire absence of every precaution to prevent the pistol from firing, but impresses the mind that he did recklessly

and intentionally so fire it; and whether he intended thereby to wound or kill any one, it was so highly disregardful of law, order, and the personal rights and safety of others, who may then have been in the streets, as to make him criminally responsible for its results."

In the case of *Brittain v. State, supra,* under a statute prohibiting the carrying of a pistol upon the person, a boy, in a party of young people, drew a revolver, and, when flourishing it about, it was discharged and another boy killed. The court said (p. 413): "We fail to see how the act of displaying the pistol on the occasion alluded to can be severed from the act of carrying a pistol on and about the person of the appellant; and, if he was so displaying it, and such display was negligent, and in a manner calculated to endanger the lives of persons standing around, and it was discharged, and deceased was killed, it would constitute the act of negligent homicide of the second degree." Under the Texas statute, a second-degree homicide is homicide in the commission of an unlawful act.

In the case of *Silver v. State, supra,* a person, not a physician and therefore in violation of a statute, administered, by means of a hypodermic, morphine to another in such quantity as to cause death, and was held guilty of manslaughter in the commission of an unlawful act. The court held that, though the act was merely *malum prohibitum,* it was sufficient to support the charge. The question of negligence was not, in that case, discussed, though the administration of such a potent drug by one unskilled in the use of it would seem to us to have justified the finding that such action was reckless conduct.

In the case of *State v. De Fonti, supra,* the defendant was charged with the unlawful sale of intoxicating liquor, in which wood alcohol had been negligently mixed and mingled, and which the purchaser had drunk and, as a result, died. The court held that the mere sale of liquor, in violation of the prohibitory law, was only *malum prohibitum,* and not such an unlawful act as to be sufficient

in itself to support the charge of manslaughter, but upon the matter of negligence, under a statute apparently not similar to our own, the court held that the defendant was sufficiently charged in the indictment with "negligent manslaughter," saying (p. 57): "Either the accused knew that he was delivering wood alcohol, a deadly poison, in place of whiskey, or he negligently represented the liquid so delivered to be whiskey without having any knowledge whether it was or was not the whiskey which had been called for. So acting in either event he must be held liable for the consequences of his act if it be proved at the trial."

A case somewhat similar to that is *State v. Keever, supra,* where intoxicating liquor had been unlawfully sold which contained 38 per cent. of wood alcohol, and the drinking of which caused the death of the recipient. The court held that it was manslaughter in the commission of an unlawful act, saying (p. 117): "If the defendant put wood alcohol in the liquid to produce intoxication, without knowledge of its poisonous quality, and proceeded to sell such decoction, he was engaged in an unlawful as well as a reckless business, and if death ensued because of such poison he is guilty of manslaughter. * * * When the defendant sold this liquid to the deceased he was engaged in an unlawful act, and if the deceased died in consequence of the poison put in it by defendant, although innocent of any purpose to kill, he is guilty of manslaughter." It is apparent that the decision in that case turned largely on the question of defendant's negligence, though the court declared that the unlawful act alone would have been sufficient.

Turning, then, to the case under consideration, it is our opinion that the giving or furnishing of intoxicating liquors, unaccompanied by any negligent conduct, though unlawful, is but an act merely *malum prohibitum.* The person who treats his friend, even though the act be unlawful, has no intent to harm, nor is such an act calculated or intended to endanger the recipient of the liquor. We

cannot go so far as to say that such an act, prompted perhaps by the spirit of good-fellowship, though prohibited by law, could ever, by any resulting consequence, be converted into the crime of manslaughter; but, where the liquor by reason of its extreme potency or poisonous ingredients, is dangerous to use as an intoxicating beverage, where the drinking of it is capable of producing direct physical injury, other than as an ordinary intoxicant, and of perhaps endangering life itself, the case is different, and the question of negligence enters; for, if the party furnishing the liquor knows, or was apprised of such facts that he should have known, of the danger, there then appears from his act a recklessness which is indifferent to results. Such recklessness in the furnishing of intoxicating liquors, in violation of law, may constitute such an unlawful act as, if it results in causing death, will constitute manslaughter.

The evidence here was sufficient, as we view it, to warrant a submission of the charge of manslaughter to the jury.

The defendant, it seems, distilled this liquor himself. It was at least home-made whiskey. The danger of drinking such liquor, by reason of its extreme potency and its frequently containing poisonous ingredients, is commonly known. The defendant may have been dealing with an unknown quantity, but, as was said in the *Keever* case, he was handling a dangerous weapon. There is evidence to show that he knew this particular liquor was extremely powerful. He saw its effect on Chris Nelson and on Stromer in the morning; yet that evening he offered it to the Prosser boys and invited them to drink all they wanted. There is substantial proof that the liquor was dangerous. That two drinks of it should paralyze three men within a few minutes after drinking, and that one of these men, as a result, should die in a few hours, as happened in this case, sufficiently raises the issue of its dangerous character for the jury.

Defendant contends that the drinking of liquor by de-

ceased was his voluntary act and served as an intervening cause, breaking the causal connection between the giving of the liquor by defendant and the resulting death. The drinking of the liquor, in consequence of defendant's act, was, however, what the defendant contemplated. Deceased, it is true, may have been negligent in drinking, but, where the defendant was negligent, then the contributory negligence of the deceased will be no defense in a criminal action. *Schultz v. State,* 89 Neb. 34; *State v. Weisengoff,* 85 W. Va. 271; 21 Cyc. 766. The act of the deceased, as we view it, was no more than a concurring cause.

Defendant complains of the court's instructions, which directed the jury that, if defendant furnished intoxicating liquor to deceased, and the liquor caused death, defendant was guilty, but failed to instruct upon the question of recklessness on the part of the defendant. We believe the instructions are erroneous in that regard, and that the defendant is entitled to a new trial.

REVERSED AND REMANDED.

STATE, EX REL. HARVEY E. GLATFELTER ET AL., APPELLANT, V. ERNEST CLARK ET AL., APPELLEES.

FILED APRIL 11, 1921. No. 21825.

Mandamus: SUFFICIENCY OF PLEADINGS. Pleadings examined, and, as against the objections made, *held* sufficient to warrant a writ of mandamus.

APPEAL from the district court for Merrick county: A. M. POST, JUDGE. *Reversed, with directions.*

W. T. Thompson and *J. C. Martin,* for appellant.

Walter R. Raecke and *Horth & Ryan, contra.*

FLANSBURG, J.

This is a companion case to *State v. Hart,* p. 61, *post.* This action is to procure a writ of mandamus against the county board of health of Merrick county, to require it to

abate a nuisance, such as is set up and described in the petition in the *Hart* case. One of the ponds declared to be a nuisance in that case extended beyond the city limits and, therefore, as to such part outside of the city, was within the jurisdiction of the county board, and is the part here involved. The petitions and the alternative writs which were issued in the two cases are substantially alike.

The duties and powers of the county board are fixed by section 2737, Rev. St. 1913 (as amended by chapter 55, Laws 1919), and section 2738, Rev. St. 1913. By the latter section, the county board is ordered to obey the rules and regulations of the state board of health, one of which, by the admissions in the briefs, appears to be: "It shall be the duty of the county board of health to formulate rules and regulations to protect the people against communicable diseases, nuisances, and the exposing of offensive matter, and such other rules and regulations as will prevent the introduction and spread of disease, and the exposing of offensive accumulations that will in any way tend to discomfort the person or endanger the health of any or all members of the community. * * * Nuisances shall be abated according to the law, and according to rules and regulations."

Whether or not, when such a nuisance is admitted to exist, the statute itself is mandatory upon the county board that it shall abate the nuisance, or whether the statute simply confers the power, is not raised nor argued (28 Cyc. 269), though it seems to be conceded that the statute in such event may be construed as mandatory, and it is not disputed that the above regulation, made by the board, is one which the county board is required to obey.

Respondents in this case demurred to the alternative writ, raising specifically the same objections as in the other case. Having admitted that the nuisance exists, as alleged, it seems to us that, under the statute and regulations above set out, it became the affirmative duty of the

county board to act, and that such duty could be required by mandamus.

It is to be further noted in this case that the county board had specific statutory power to make rules and regulations to prevent nuisances and unsanitary conditions, and to provide penalties for the violation thereof. Such a rule or regulation, with proper penalties provided, might have been found sufficient to cause an abatement of the nuisance.

The same questions are raised in this case as in *State v. Hart, supra,* and for the reasons therein given the case is reversed and remanded. It is therefore ordered that unless further answer is made by respondent, judgment be entered in favor of the relators upon the pleadings, and that a peremptory writ issue.

REVERSED.

STATE, EX REL. HARVEY E. GLATFELTER ET AL., APPELLANT, V. BERTRAND E. HART ET AL., APPELLEES.

FILED APRIL 11, 1921. No. 21826.

1. **Mandamus: ABATEMENT OF NUISANCE: BOARD OF HEALTH: INTERFERENCE WITH BOARD'S DISCRETION.** In an action of mandamus to compel a board of health to abate a nuisance, where, by the pleadings, it is admitted that a nuisance exists and that it is the duty of the board, under the law, to abate it, it is not an interference with the board's right to exercise a discretion on the question of the determination of whether a nuisance exists, for the court to peremptorily order that the board abate the nuisance.
2. ———: ———. Where the board has a legal discretion to determine the manner of abating nuisances, though the court cannot control that discretion, it may, in a clear case, order that the board act and exercise its powers in that regard.
3. ———: ———: PLEADING. Where the ordinance of a city of the second class requires the city board of health to abate nuisances and delegates to such board full power to take all measures necessary, the fact that the alternative writ does not disclose that the board has funds, or show what funds are at its disposal for such purposes, is not fatal to a statement of the cause of action, since

lack of funds, or the means of procuring funds, is a matter that must affirmatively appear, and, where it does not appear, must be set up as a matter of affirmative defense.

APPEAL from the district court for Merrick county: A. M. POST, JUDGE. *Reversed, with directions.*

W. T. Thompson and *J. C. Martin,* for appellant.

Walter R. Raecke and *Horth & Ryan, contra.*

FLANSBURG, J.

Mandamus action to compel the board of health of Central City, Nebraska, to abate, or cause to be abated, a nuisance. The court allowed an alternative writ to issue, requiring the board to show cause why it should not abate the nuisance or cause it to be abated. To this writ the respondents filed a demurrer, which the court sustained. The respondents elected to stand upon the demurrer, and judgment of dismissal was entered.

The statute (Rev. St. 1913, sec. 8279) provides that mandamus cases shall be tried upon a writ and answer. The demurrer to the writ is, therefore, irregular, but will be treated as an admission of the facts alleged in the alternative writ, and the writ only will be considered. *King v. State,* 50 Neb. 66; *State v. Home Street R. Co.,* 43 Neb. 830.

The lower court's decision was based upon the ground that the alternative writ disclosed a defect of parties defendant, in that those persons, maintaining the nuisance, were not joined in the suit; and, on the further ground, that the alternative writ did not contain facts sufficient to constitute a cause of action.

The alternative writ, among other things, discloses that the respondents were members of the board of health, under section 5015, Rev. St. 1913 (as amended by chapter 44, Laws 1919); that the ordinances of the city provided that—"The board of health * * * shall exercise general supervision over the health of the city, and shall have full power to take all measures necessary to promote the

health and cleanliness thereof, to abate nuisances of every description on public and private property," and that "the board of health shall cause all nuisances to be abated with reasonable promptness." It was further set out that there was a pond of stagnant water, within the city limits and near the residences of the relators, which was being used by the citizens of the town as a dump for refuse, garbage, junk, sewage, and vegetable and animal matter, and which, "in process of decomposition, create a breeding place for flies, disease germs, and mosquitoes, producing a vile, sickening, offensive odor, contaminating the waters in said pond or pit, which have no outlet on the surface, but which polluted waters percolate through the sand and gravel in the vicinity of said pond or pit and pollute and render unsanitary and unfit for use the water in the wells of the relators, greatly endangering the health and lives of the citizens and creating a nuisance." And it is further set out that the respondents had been requested by the relators to abate said nuisance, but had failed, neglected, and refused to do so.

The first objection is that the owners of the property, upon which these ponds are situated, should have been made parties defendant, so that they would become bound by the order of the court. It is true that a writ of mandamus issued against the board of health would not be binding upon the owners of the property, nor would the order protect the members of the board of health in their actions in abating the nuisance, should their actions, as to property owners, later be determined to be unlawful. 12 R. C. L. 1285, sec. 26. If the nuisance, however, actually exists—and it is not denied nor argued that the allegations of the alternative writ sufficiently show that one does exist—then we fail to see how the board of health would need any judgment to protect it in its actions to abate, or cause to be abated, the nuisance. It is only where it is doubtful whether a nuisance, in fact, does exist that the board of health, for its own protection, need proceed by some legal action. The alternative writ

does not attempt to control the board as to the manner in which the nuisance shall be abated. That is left entirely with the option of the board. It seems clear to us that the owners of the property were not necessary parties.

It is further objected that the facts alleged are insufficient to show a cause of action, since the matter of determining whether or not a nuisance exists is a matter left to the sound discretion of the board, and that the court cannot intervene to direct or control the exercise of that discretion. Had it appeared from the allegations of the writ that an investigation was necessary, or that the exercise of judgment would be required, in order to determine whether or not a nuisance does, in fact, exist, or had it appeared that the board had exercised its judgment and had determined that a nuisance did not exist, the objection might have been well taken, but, where the board admits that a nuisance exists, and admits that by the ordinances of the city it is peremptorily commanded to abate such nuisance, and, where it is not denied that its duty to do so under the law is clear, it is quite apparent that a writ of mandamus would not interfere with nor control the exercise of the board's discretion, but such a writ would simply compel the performance of a duty which the board itself admits devolves upon it. The manner in which the nuisance shall be abated, or be caused to be abated, is within the discretion of the board, and that discretion the court cannot usurp. Nevertheless, the court may order that the board act and exercise its judgment and choice of the means and manner to be adopted for the abatement of the nuisance. *State v. Hoctor*, 98 Neb. 15; *State v. Lincoln Medical College*, 81 Neb. 533; 26 Cyc. 158.

It is further suggested by respondents that no affirmative allegation of the writ discloses that the board was furnished with sufficient moneys to abate the nuisance. It is argued that the prayer of the petition in mandamus is that the ponds be filled with dirt, and that this manner of abating the nuisance would entail enormous expense.

The alternative writ, however, does not require that the ponds be filled, but only that the board "abate, or cause to be abated," the nuisance. It is possible that a discontinuance of the use of the ponds for a dump, together with the use of disinfectants, may be all that is necessary. Furthermore, the board is left to decide whether it shall proceed directly or shall bring an action to compel the owners of the properties to abate the nuisance at their own expense, which action it no doubt has sufficient delegated authority to institute. *Village of Kenesaw v. Chicago, B. & Q. R. Co.*, 91 Neb. 619; *Board of Health of City of Yonkers v. Copcutt*, 140 N. Y. 12, 23 L. R. A. 485. But the objection that the writ does not disclose what funds are at the disposal of the board is not fatal. Where the city has ordered certain things to be done and constituted the board its agent, with full power to take all measures necessary, it is to be presumed that the city has provided, or is ready to provide, the necessary expenses for the carrying out of such measures. Moreover, if the board was without funds, or the ability to procure funds, that was a matter for affirmative defense, to be set up by answer to the alternative writ, and, had a peremptory writ been issued and the board been without funds or ability to abate the nuisance, a showing of those facts made to the district court would no doubt be sufficient ground to release it from the order. *Savannah & Ogeechee Canal Co. v. Shuman*, 91 Ga. 400.

For the reasons given, it is our opinion that the relators were entitled to a judgment on the pleadings and to the issuance of a peremptory writ. It is therefore ordered that the case be reversed and remanded and that opportunity be given respondent to make further answer and in case no such answer is made that judgment on the pleadings be entered.

REVERSED.

SENA JENSEN, APPELLANT, V. GRAND LODGE, ANCIENT ORDER UNITED WORKMEN, OF NEBRASKA, APPELLEE.

FILED APRIL 11, 1921. No. 21376.

1. **Insurance:** SUSPENSION. Laws of a fraternal benefit association provided for automatic suspension, without notice, upon failure to pay a monthly assessment within the time limited. The insured made his last payment in May, and died in September, having been in suspension on the records since June. His beneficiary claimed the May payment was on the June assessment, that the suspension was wrongful, and that the insured was excused from tendering subsequent assessments. No such claim was made by the insured, there was no communication between him and the lodge after May, and no tender of later assessments. *Held*, no basis for the theory that neglect to make such tender was excused.
2. ———: VALIDITY OF ASSESSMENT. Where, by mutual consent, the holder of a certificate of insurance in a fraternal benefit association surrenders the same and accepts a new certificate, his beneficiary, in an action upon the latter, can raise no question as to the validity of the assessment rates levied upon the original certificate, which were paid in full without protest.
3. ———: ———: TENDER. In an action upon a fraternal benefit certificate, the beneficiary will not be heard to claim that the insured was excused from paying or tendering assessments because the amount thereof was increased by an amendment to the by-laws not validly enacted, in the absence of evidence that payment thereof was tendered at the rate established prior to the attempted amendment.
4. **Evidence** examined, and held to establish that the insured abandoned his insurance and his rights as a member.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Gray & Brumbaugh and *Byron G. Burbank*, for appellant.

Nelson C. Pratt, *E. J. Lamb* and *Edward F. Leary*, *contra.*

DORSEY, C.

John M. Jensen became a member of the Ancient Order of United Workmen and received a benefit certificate for $2,000 therein on October 9, 1903. In April, 1917, he surrendered his certificate and accepted another for $1,000. He paid all dues and assessments up to June 1, 1917. On June 29, 1917, he was suspended for alleged nonpayment of the assessment due on the first of that month, and died September 29, 1917, without having been reinstated. This action is brought by his widow, as beneficiary, to recover upon the certificate. The trial court, upon motion of both parties for a directed verdict, withdrew the case from the jury and rendered judgment dismissing plaintiff's action, and she seeks a reversal of that judgment.

When Jensen first became a member, the monthly rate upon his $2,000 certificate was $1. This continued until October 1, 1909, when it was increased to $1.70. There was also an additional emergency fund of 70 cents a month on each $2,000 certificate, created May 1, 1905, which ran until October 1, 1909. Jensen paid these increased rates and continued to pay them, when, after September 1, 1915, the regular monthly assessment was increased to $2.30. On May 1, 1917, there was an amendment to the by-laws requiring the payment of $2.83 a month on a $1,000 certificate. Jensen had reduced his certificate from $2,000 to $1,000 on April 24, 1917. He paid only one assessment at the rate of $2.83, in May, 1917.

The plaintiff, in her petition, alleged that Jensen, who for many years had been a member in good standing, received on April 24, 1917, from the defendant the benefit certificate for $1,000 sued upon, in which plaintiff was named as beneficiary; that on September 29, 1917, he died while in good standing, and that the defendant thereby became indebted to the plaintiff upon the certificate in question; that Jensen had done and performed everything required of him up to the time of his death; and that the plaintiff had given proper notice and otherwise performed the contract.

In its answer, the defendant admitted that Jensen became a member on October 9, 1903; alleged that thereupon he paid $1 to the local lodge upon a beneficiary certificate of $2,000, which he surrendered in April, 1917, when he took the certificate sued upon. It was further averred that, preliminary to becoming a member in October, 1903, Jensen signed an application in which he agreed to be bound by all by-laws then in force or subsequently enacted. The answer set forth the laws in force when Jensen became a member, by which it was provided that there should be due on the first day of each month from every member holding a $2,000 certificate the sum of $1, payable on or before the 28th day of that month; that upon failure to pay within that time the member would stand suspended, without any action being required of the lodge or of any officer thereof, and that the suspended member might be reinstated upon certain conditions. The facts with reference to the various increases of the assessment rate, as hereinbefore set forth, were also pleaded in the answer, and it was alleged that all laws and rules by which the same were put in effect had been filed with the insurance commissioner, as required by law. It was further alleged that, by virtue of one of these laws, which became effective May 1, 1917, Jensen became liable on that date, and on the first of every month thereafter, for an assessment in the sum of $2.83 on his $1,000 certificate; that he failed to pay the assessment falling due on June 1, 1917, and by reason of his default had forfeited his rights and become suspended; that he made no effort to be reinstated, and thereafter made no tender or payment of any sum whatever; whereby he abandoned his insurance. To this answer a general denial was pleaded by way of reply.

It is undisputed that Jensen paid no assessment after the first one for $2.83 paid in May, 1917, after he surrendered his original $2,000 certificate and accepted the $1,000 certificate sued upon, although his death did not occur until September 29, 1917. Under the admitted law

of the defendant, which appears never to have been changed since Jensen became a member, there was a regular assessment falling due on the first day of each month and payable on or before the 28th day of that month, and, if it was not paid at that time, the member stood suspended without any affirmative action by the lodge. Thus, in order to sustain the plaintiff's contention that Jensen was in good standing when he died, it is necessary to find some explanation for his failure to pay or tender the assessments which, on the surface at least, appear to have been delinquent for the months of June, July, August, and September.

The plaintiff's theory is that, when he first became a member and paid his first dollar on October 9, 1903, it was, in reality, not in payment of the October assessment which was due October 1, and was therefore past due when he joined, but an advance payment of the assessment falling due November 1; in other words, that, when a member joined after the 1st day of any month, he was not liable for the assessment of that month, but his liability would commence on the first day of the following month. In support of this theory, the plaintiff relies upon an interpretation of the laws of the order made by its own law committee and considered and upheld by this court in an unpublished opinion by McGirr, C., in *Carey v. Ancient Order United Workmen*, No. 20397. From this it is argued that the dollar which he paid October 9, 1903, should have been credited in payment of November, instead of October, and that this mistake in bookkeeping continued through the entire period of Jensen's membership. When, therefore, he paid $2.83 in May, 1917, it should have been credited, so the plaintiff contends, in payment of the June, 1917, assessment, his suspension for nonpayment of the assessment for that month was wrongful, and he was thereby excused from tendering the subsequent assessments.

Assuming that the May, 1917, payment should have been credited upon the June assessment and that it was paid,

does it follow that Jensen was thereby excused from tendering the July assessment? In considering that question it is necessary to bear in mind the laws of the order relative to suspension in connection with the conduct of Jensen. The record does not show any move on his part after he made the May, 1917, payment; it was not as if he had tendered it in payment of the June assessment, and the lodge had refused to so credit it, and suspended him in consequence thereof. It was the law of the order that a delinquent member should stand suspended on the 29th day of the month without any notice on the part of the lodge. If, on the other hand, notice of some sort had been prescribed as a condition precedent to legal suspension, and notice had been given Jensen on the wrongful supposition that his assessment for June, 1917, was unpaid, there would be ground to argue that he would thereby be excused from the tender of subsequent assessments, because, in that case, it would have been the affirmative wrongful act of the lodge that suspended him, and the defendant would be in no position to urge that his rights were forfeited by failure to make later tender.

There is nothing in the record to show that, if he had tendered the July assessment, the lodge would have refused to receive it because of the nonpayment of the June assessment. It does not appear that he ever called to the attention of the lodge any claim that he was entitled to have his payment in May, 1917, applied upon the June assessment, or, in fact, that he ever made or entertained such a claim in his lifetime. There is nothing to indicate that when the time came to pay the July assessment anything had in the meantime transpired from which he could have had any right to assume that he was suspended, unless it be taken for granted that he was aware of the fact that his payment in May applied to that month's assessment and not to June. If Jensen in good faith thought when he paid in May that he was paying and was entitled to credit for June, in the absence of any

notice to him from the lodge of his suspension, it cannot be inferred that he refrained from tendering the July assessment because he was suspended in June.

There was no evidence that the lodge ever notified Jensen that it considered him suspended or that he ever knew that he was suspended. There was simply the customary notation "suspended" marked opposite his name on the lodge books on June 29. He made no tender or other move and gave no sign, from May until he died on September 29, indicating that he continued to regard himself as a member in good standing. There was nothing to distinguish his attitude after his last payment in May from that of a member who had made up his mind to drop his insurance. When he first became a member he agreed to be bound by the provision for automatic suspension, without affirmative notice. Such a provision has been held valid and self-executing. *Field v. National Council, K. & L. of S.*, 64 Neb. 226. Jensen had no knowledge or notice that he had not been credited with the June assessment, or that the lodge would not have credited him therewith if he had demanded it, if in good faith he thought he had paid it, and, in that event, if he desired to keep his certificate in force, it was incumbent upon him to tender the July assessment.

From the time when Jensen took out his original $2,000 certificate down to April, 1917, when he surrendered it in exchange for the $1,000 certificate sued upon, there were successive increases in the assessment rates from the original $1 a month to $2.30, all of which Jensen paid. The defendant offered the various amendments to its laws establishing these increases, and the plaintiff objected to them because there was inadequate proof that they had been enacted and promulgated in conformity with the laws of the order. Jensen having paid all these increased assessments on his old certificate without protest and surrendered it, accepting a new contract, we think that his beneficiary cannot complain of any lack of validity in the rates applicable to the old contract, and that these objec-

tions are therefore immaterial.

There remains the objection of the plaintiff that the amendment to the by-laws establishing the rate of $2.83 a month on the new $1,000 contract, effective May 1, 1917, was not validly enacted or promulgated. In the light of the views hereinbefore expressed, we consider it unessential to determine whether or not the amendment in question was properly adopted. Jensen was bound by the law which had existed unchanged ever since he first became a member, that a regular monthly assessment was due on the first day of each month, payable on or before the 28th day of that month. It was therefore necessary for him to pay or tender some amount—if not $2.83, then the sum that he considered sufficient according to the proper interpretation of the laws of the order—on or before the 28th day of July, 1917, assuming that his June assessment was paid, as the plaintiff contends. He could not stand aloof on some objection to the rates which he did not communicate to any officer of the lodge, but kept concealed within his own breast, and refrain from taking any step whatever to comply with the law requiring the payment of monthly assessments.

The plaintiff cannot claim that Jensen was excused from paying the amended rate on the ground that it was invalid and excessive, without showing a disposition to keep the insurance in force by tendering the old rate. Having failed to pay or tender any assessment after his payment in May, 1917, we think that the defense that Jensen abandoned his insurance was conclusively established, and we therefore recommend that the judgment of the court below be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

STANDARD GRAIN COMPANY, APPELLEE, V. STATE BANK OF OMAHA, APPELLANT.

FILED APRIL 11, 1921. No. 21413.

1. **Carriers:** BILLS OF LADING: CONVERSION. Under rules of the Omaha Grain Exchange, when a car of grain is sold and the bill of lading is assigned, the buyer issues a receipt stipulating that title shall remain in the seller until the grain is paid for, and a notation of the issuance of the receipt is stamped upon the bill of lading, thereby giving notice to Exchange members that negotiation of the bill of lading is prohibited until the seller is paid. *Held*, that a bank to which a bill of lading bearing such notation is indorsed, with accompanying draft, for deposit and credit, and through which the said paper is negotiated and the grain wrongfully sold, is liable to the owner for conversion, if knowledge on the bank's part of the meaning of said notation and of the Exchange rules is directly shown or can reasonably be inferred from its previous experience and dealings.
2. ———: ———: NOTICE. Evidence examined, and *held* that the appellant bank was shown to have had knowledge of the meaning of the restrictive notation upon the bills of lading and was therefore put upon inquiry and chargeable with notice of the appellee's title to the grain.
3. ———: ———: ———: LIABILITY OF AGENT. The fact that a bank acts as agent for the collection of a draft with bill of lading for grain attached, and not as purchaser thereof, will not relieve it from liability to the owner of the grain if, from a notation appearing on the face of the bill of lading, the bank, under the circumstances of the case, is chargeable with knowledge that its principal is without authority to negotiate it.
4. ———: ———: LAW GOVERNING. Subsequent transfers of a bill of lading constitute new and independent contracts which are governed by the law of the state where made.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Gaines, Van Orsdell & Gaines, for appellant.

Brogan, Ellick & Raymond and *C. Y. Offutt, contra.*

DORSEY, C.

This case was commenced by the appellee, a corporation

dealing in grain on the Omaha Grain Exchange, in the form of a suit in equity, praying for an accounting by the appellant, a banking institution of Omaha, for the value of the contents of three cars of corn which the appellee alleged had been converted to its own use by the appellant as the result of wrongful negotiation through it of the bills of lading therefor, and asking that the amount thereof be applied upon the notes of the appellee which the appellant held. In its answer, the appellant pleaded a denial of the alleged conversion and a counterclaim for the amount due on the notes. The cause was tried to the court, sitting in equity without a jury, and the court found that the conversion had taken place as alleged, and entered judgment in favor of the appellee for a balance remaining after the amount due upon the notes was deducted from the value of the corn.

A brief statement of the rules and customs applicable to business upon the Omaha Grain Exchange and to the dealings between members thereof and the local banks is necessary to a clear understanding of the issues. When a car of grain is sold it must be unloaded, weighed and graded in order to ascertain the exact price, and, in order to make the seller safe in the meantime, the rule is that, when the bill of lading is assigned by the seller to the buyer, the latter at the same time gives the seller a receipt, specifying the car number and other details of the transaction, and stating therein that the title to the grain shall remain in the seller until paid for. A notation that the receipt has been issued is stamped upon the bill of lading, and this, under the Exchange rules, imparts conclusive notice to members of the Exchange of the rights of the seller and of the fact that the holder of the bill of lading has only a conditional title to the car of grain covered thereby. It is the custom of banks loaning money to dealers on the Grain Exchange to require the deposit either of the original bill of lading or, if the car has been resold, of the receipt issued as aforesaid, as collateral security.

The appellee's right to recover rests, in substance, upon one or both of the following propositions:

(1) There was stamped upon each of the bills of lading a notation in these words: "Receipt issued for this bill of lading under the rules of Omaha Grain Exchange. Standard Grain Company." This, under the rules, was notice to members of the Exchange that the appellee had reserved title to the grain, and that Richter, to whom the appellee had assigned the bill of lading, was prohibited from negotiating it until the grain had been paid for. The contention is that, by reason of its familiarity with such notations upon bills of lading taken by the bank in the usual course of its business with dealers upon the Grain Exchange, the appellant was chargeable with such knowledge of the meaning and effect thereof as all banks habitually dealing with members of the Exchange had, or with reasonable diligence should have had. When, therefore, it took the assignment of the bills of lading and credited Richter with the amount of the drafts drawn thereon, the appellant is presumed to have known that the sale of the grain thereby negotiated was unlawful and in prejudice of the appellee's rights.

(2) The appellant held as collateral security the identical receipts referred to in the notations on the bills of lading which it assisted Richter in negotiating, and thus knew, or with reasonable care and caution in the protection of the securities held by it should have known, that, in permitting Richter to negotiate the bills of lading through the bank, it was in effect aiding in the destruction of the collateral security which it held in trust.

When Richter indorsed the drafts and the attached bills of lading to the appellant bank, and the latter gave him credit in his general account for the amount thereof, the bank became the holder of the drafts for value in due course, and, as between the appellant and Richter, the bank had title to the paper. *National Bank of Commerce v. Bossemeyer,* 101 Neb. 96; 7 C. J. 635, sec. 314. And it is also true that the bank would be regarded as the

owner of the grain covered by the bills of lading as against an attaching creditor of Richter. *Cox Wholesale Grocery Co. v. National Bank of Pittsburg,* 107 Ark. 601.

But it is not a question here of the rights or equities of the bank as against Richter or his creditors. The question is whether, by acting as a medium through which the drafts with bills of lading attached are negotiated, a bank makes itself liable as a wrongdoer to the real owner of the grain in case the party with whom it deals is without authority to negotiate them. This question, we think, must be resolved upon the general principle that, in conducting its business, a bank must not knowingly trespass upon the rights of another or assist in perpetrating a wrong. It turns, then, upon whether the circumstances were such that it could be reasonably inferred that the appellant knew that Richter was without authority. The appellant is chargeable with such knowledge as a reasonable inspection of the bills of lading would convey, in the light of its previous experience and information gained from similar transactions. The notation as to the receipt having been issued to the appellee under the rules of the Exchange clearly appeared upon the face of each of the bills of lading. A precisely similar notation was referred to and discussed in *Rainbolt v. Lamson Bros.,* 259 Fed. 546, in which the following observations were made in the opinion:

"In the uninitiated this unusual notation would arouse attention. To such as were initiated it would be ample notice as to how the grain was held, and put them upon inquiry as to whether the receipt was still outstanding. Defendants belong to the latter class. They had a branch office at Omaha; they had a membership on the Omaha Grain Exchange, and dealt thereon through this membership. They cannot be heard to plead ignorance of the rules under which members operated."

While the case from which we have quoted deals more particularly with the knowledge imputable to a member of the Exchange from the fact of his membership, the under-

lying principle is, we think, the same with reference to a nonmember bank which had opportunities to acquire knowledge of the rules and customs of the Grain Exchange. While in the case of a member the existence of such knowledge would be presumed, and a member would not be heard to dispute it, in the case of an outside party dealing with a member of the Exchange it would become a question of fact, to be determined from the circumstances of the case, whether such knowledge existed, and in determining that fact it is proper to take into consideration such inferences as might reasonably be drawn indicative of such knowledge.

There is, it seems to us, abundant evidence in the record from the officers of the appellant bank themselves that the bank was constantly holding receipts issued upon bills of lading of the same import as those involved in the case at bar, as well as handling bills of lading on which the notation in question appeared, and there was sufficient proof along that line to warrant the court in inferring that the appellant's officers were fully informed of the rules of the Exchange reserving title in the seller until the grain was paid for and prohibiting the negotiation of bills of lading stamped with that notation. If other proof were wanting, there is the fact that the appellant at the very time it dealt with Richter was holding the receipts referred to in the notations upon his bills of lading, as collateral security upon the appellee's notes. The possession of these receipts was convincing proof that the bank knew and relied upon the Exchange rules protecting the seller of grain against the negotiation of bills of lading, because it treated the outstanding receipts as sufficient to show the real ownership of the grain and as valid collateral security.

The remaining proposition asserted by the appellee is that, in cooperating with Richter in negotiating the bills of lading through the bank, the appellant, which held the receipts issued thereon as collateral, in effect made possible the destruction of the security which it was in duty

bound to protect. Appellant's counsel resist that proposition upon the ground that it would impose upon the bank a degree of care incompatible with the transaction of its routine business. It is argued that it would be impracticable to delay the forwarding of drafts until the bills of lading attached to them could be checked with all the collateral in the bank to see whether receipts issued thereon were held by the bank as collateral in its loan department. It does not seem to us that it would impose too onerous a burden or create any undue delay for the bank to list receipts issued upon bills of lading held by it as collateral, with reference to the car number, and thus enable the officers of the bank to know positively when bills of lading were presented whether the bank held the corresponding receipts. But, in view of the foregoing discussion, since the appellant bank was bound by its knowledge of the rules of the Grain Exchange to refrain from participating in the negotiations of any bill of lading bearing the notation that a receipt had been issued, the fact that it was the pledgee of the receipts issued upon the particular bills of lading involved in this suit merely makes more emphatic its duty in that respect and the probability that it had knowledge of the rules and customs of the grain trade. Our conclusion as to the liability of the appellant springs from the notice imparted by the notation upon a bill of lading to any bank or other party acquainted with its meaning, and is the same whether the party thus notified might or might not chance to hold the receipt referred to.

The appellant relies upon two contentions to defeat the action. One is that the bank acted as a mere agent for Richter in the transaction, and therefore did not, and was under no duty to, scrutinize the bills of lading; that it was not a purchaser, but a mere forwarder, of the drafts and bills of lading to the Chicago and St. Louis banks through which the real purchasers acquired the grain. The fact remains, nevertheless, that the appellant gave Richter immediate credit for the amount of the drafts as

a deposit in his checking account and, by so doing, succeeded to all of Richter's title and rights to the extent, at least, of the amount that it advanced. It thereby associated itself in the unlawful disposition of the grain which might have been detected and prevented if it had given heed to the notice of the appellee's title appearing upon the face of the bills of lading. Assuming that the appellant acted as Richter's agent in the transaction, it does not follow that it would be relieved of liability because of that fact, if it had knowledge. "In accordance with the rule that an agent is liable for injury resulting from his misfeasance or malfeasance, an agent may be held liable in damages to third persons for conversion, unless he acts solely for his principal, by his direction, and without any knowledge, actual or constructive, of the wrongful conversion being committed by the principal." 2 C. J. 827, sec. 501.

Counsel for the appellant cite *Nebraska Hay & Grain Co. v. First Nat. Bank,* 78 Neb. 334, wherein the bank was held not liable for a forged bill of lading attached to a draft negotiated through the bank as collecting agent. In that case, however, nothing irregular or out of the usual course appeared upon the face of the bill of lading, and the decision was based upon the fact that the bank was without notice or knowledge of any wrongdoing.

Finally, it is contended by the appellant that, because the bills of lading were originally issued in Iowa and the cars were originally consigned from one point in Iowa to another point in Iowa, all subsequent transfers thereof are governed by the laws of that state. An Iowa statute is pleaded, to the effect that any alteration or addition to the bill after its issue without authority of the carrier shall be void, and it is argued that therefore the notation relating to the issuance of a receipt appearing upon the bills of lading under consideration was of no effect and imparted no notice. Counsel for the appellee maintain, however, that the subsequent assignments and transfers took place in Nebraska, and, since they constituted new

and independent contracts, they are governed by the laws of Nebraska, which do not prohibit or declare void such notations. In this, we think, the appellee's position is correct, and that the same rule that applies generally to contracts of indorsement of bills and notes, that the law of the place where the contract is made shall govern, is applicable here. 8 C. J. 100, sec. 173.

We are of the opinion that the judgment of the court below is the only one that could be justified under the evidence, and recommend that it be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

CENTRAL GRANARIES COMPANY, APPELLEE, V. NEBRASKA LUMBERMEN'S MUTUAL INSURANCE ASSOCIATION, APPELLANT.

FILED APRIL 20, 1921. No. 21403.

1. **Appeal:** SUFFICIENCY OF EVIDENCE. In testing the sufficiency of the evidence to sustain a verdict in favor of plaintiff, admissible testimony tending to support plaintiff's case should be accepted as the truth.
2. **Insurance:** REFORMATION OF CONTRACT. In a suit on a fire insurance policy to recover a loss, the evidence outlined in the opinion *held* sufficient to establish the fact that the parties, in reducing their insurance contract to writing, made a mutual mistake in omitting from the description of the land on which the insured property was situated a railroad right of way.
3. ———: ———. The power of a court to correct a mutual mistake of parties in reducing their contract to writing implies the admissibility of proper and necessary proof of such mistake.
4. ———: ———: SEPARATE SUIT. A separate suit in equity to reform a fire insurance policy to correct a mutual mistake of the parties in omitting to describe part of the land on which the insured property is situated is unnecessary, and the insured may recover his loss under a single petition stating the necessary facts,

whether the case is considered an action at law or a suit in equity, or both.

5. Trial: EQUITY: SUBMISSION OF ISSUES OF FACT TO JURY. A court exercising equity powers may submit an issue of fact to a jury and adopt their finding, if it is the proper deduction from the evidence.

6. Insurance: REFORMATION OF POLICY. A mutual correction of an unexpired fire insurance policy to cover a future loss does not prevent the insured from seeking the correction of the original draft to cover a past loss covered by the contract actually made but, through a mutual mistake, not correctly reduced to writing.

7. ———: ———. In respect to correcting a mutual mistake in reducing a contract of insurance to writing, a mutual insurance company is bound by the rules of equity and the principles of law applicable to other corporations and individuals.

8 ———: APPLICATION: IMMATERIAL REPRESENTATIONS. Under the statutes of Nebraska, in an action on a fire insurance policy, the right to recover for the loss of the insured property is not defeated by misrepresentations in the application for the insurance, if they did not contribute to the loss or deceive the insurer to its injury. Rev. St. 1913, sec. 3187.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

C. C. Flansburg, for appellant.

Hall, Baird & Williams, contra.

ROSE, J.

This is an action on a fire insurance policy, issued to plaintiff by defendant September 15, 1917, to recover the loss of a warehouse and its contents which were destroyed by fire August 6, 1918. Plaintiff's claim is composed of two items, one for $614.20 on the warehouse and the other for $828.76 on the contents. The loss by fire and the amounts claimed are not controverted, but defendant pleads that the property destroyed was not covered by the policy in suit. From a judgment on a verdict in favor of plaintiff for the full amount of its claim, defendant has appealed.

It is argued by defendant that the trial court erred in

overruling a motion to direct a verdict in favor of defendant on the ground that plaintiff failed to make a case.

Plaintiff is a dealer in lumber and other building materials at Adams. Its lumber yard is on lots 4, 5, 6 and 7, and its warehouse and office are on the adjoining right of way of the Chicago, Burlington & Quincy Railroad. The application and the policy describe the lots as the location of the insured property, but make no mention of the adjoining right of way on which the warehouse was situated. Plaintiff pleads that the failure to include the right of way in the description of the land on which part of the insured property was situated was a mutual mistake and demands relief according to the policy correctly reduced to writing. Defendant contends, among other things, that the evidence is insufficient to prove the mutual mistake pleaded; that the policy as written states correctly the terms of the only contract made, and that defendant is a mutual insurance corporation having no authority to make an oral contract of insurance. The verdict of the jury was in favor of plaintiff. It follows that in determining the sufficiency of the evidence to prove the mutual mistake the testimony tending to support the affirmative of that plea must be accepted as the truth, though in some respects it is contradicted by other testimony. What, then, are the established facts and the proper deductions?

The negotiations for the insurance began between E. W. Taylor, treasurer of plaintiff, and E. E. Hall, secretary of defendant, both acting within their authority and both having offices in the Terminal Building in Lincoln. A few days before the policy was issued Taylor called on Hall and inquired about insurance on plaintiff's plant at Adams, consisting of lumber sheds, warehouse and office, the lumber sheds being on lots 4, 5, 6 and part of lot 7, and the warehouse and office being on the adjoining right of way of the Chicago, Burlington & Quincy Railroad. Taylor asked about the amount of insurance obtainable on the

plant, and was told by Hall that the maximum was $5,000. The day this conversation took place, or the next day, Hall called at Taylor's office and pursued the negotiations. On a plat or blue print Taylor pointed out to Hall the lumber sheds on the lots and the warehouse and the office on the adjoining right of way. A pencil line made at the time, showing where the warehouse leaned against an elevator on the right of way, is still on the plat. Taylor then told Hall that plaintiff wanted insurance on plaintiff's lumber yard, office, warehouse and contents at Adams. Hall said he could have it to the extent of $5,000. Without further conversation L. J. Thurn, secretary of plaintiff, who had taken no part in the negotiations, received a blank application for insurance, perhaps from Hall. Knowing that the warehouse, part of the lumber plant, was on the right of way, Thurn, through an oversight, failed to mention the right of way in describing the location of part of the insured property, but took the description alone from the deed to plaintiff's adjoining lots. The policy, repeating the mistake in the application, came back to Thurn, who handed it to a clerk to be filed in plaintiff's office. Plaintiff paid the membership fee and the subsequent assessments. In the written policy defendant could have covered the warehouse just as well as not. Hall said so after the fire, and without requiring any additional compensation, or exacting any increase in the cost of the insurance, changed the policy in suit to cover the warehouse, and likewise corrected other policies covering risks of plaintiff at other yards without demanding any change to lessen the hazards. The purpose in applying for and in procuring insurance on the lumber sheds was no different from the purpose to apply for and to procure a like protection for the warehouse on the right of way. Plaintiff had no other insurance on the warehouse.

The facts and conclusions narrated are proper deductions from the evidence, though there is a conflict of testimony in some respects. The evidence shows clearly that

the minds of the parties never met on an insurance contract excluding the warehouse. The inference is equally clear that both parties understood the right of way was to be included in the description of the land on which insured's property was situated. The omission of the right of way in drawing the policy was obviously a repetition of the mistake in the application. That the mistake was mutual is the logical and reasonable conclusion to be drawn from all the circumstances surrounding the negotiations, conditions and acts of the parties. The verdict is not only sustained by the evidence, but the evidence shows that the jury reached the correct conclusion. Not only that, the evidence showing the mistake and how it occurred was properly admitted.

The power of a court to correct a mutual mistake implies the admissibility of competent and necessary proof of such mistake.

There is no occasion for a separate suit in equity to correct a mutual mistake like that described and for a subsequent action at law on the reformed policy. Without the delay and the expense incident to two actions, equity and justice can be administered in a single suit. Considered as an action at law on the insurance contract actually made, the issue of mutual mistake was correctly determined by the jury in favor of plaintiff. Considered as a suit in equity to correct the mistake and to recover the insurance, the finding of the court should be the same as the verdict of the jury in favor of plaintiff, but the trial judge had authority, in the exercise of equity jurisdiction, to submit questions of fact to the jury. There was therefore no error in the overruling of the motion for a directed verdict in favor of defendant on the issue of a mutual mistake.

Another reason urged for a nonsuit is that the parties mutually construed the policy to exclude the warehouse as insured property. This point seems to be based on the fact that the written policy, after the fire, was changed, with the consent of both parties, to include the right of

way as a part of the land on which insured property, including the warehouse, was situated. The real import of this fact is that the change related to the policy as it was erroneously reduced to writing, and not to the contract upon which the minds of the parties had met—a contract needing no construction but insuring plaintiff's warehouse.

Defendant invokes the doctrine that the contract of a mutual fire insurance company consists of the statute authorizing its creation, the articles of incorporation, the by-laws, the application for membership and the policy issued. In this connection it is argued that such an insurer can make no oral contract of insurance. If this is the law, a question not decided, it does not prevent oral negotiations for insurance, nor an oral understanding of the terms to be inserted in the application and in the written policy, nor prevent the parties from making an amicable correction of a mutual mistake in reducing those terms to writing, nor prevent the court from correcting such a mutual mistake, where one of the parties, though retaining the consideration for the contract actually made but not correctly reduced to writing, tries to take advantage of the mutual mistake. In these respects a mutual insurance company is governed by the same rules of equity and the same principles of law as all other corporations or individuals having the power to make contracts.

Another argument is directed to the proposition that the insurance is defeated by misstatements in the application. The evidence shows conclusively that plaintiff made no misstatement contributing to the loss or deceiving defendant to its injury. It follows that under the laws of this state plaintiff did not lose its insurance on account of misrepresentations. Rev. St. 1913, sec. 3187.

In view of the conclusions reached on the questions discussed, there is no prejudicial error in the giving or in the refusing of instructions, or elsewhere in the record.

FLANSBURG, J., not sitting. AFFIRMED.

HOME BUILDERS, APPELLEE, V. ANDREW C. BUSK ET AL., APPELLANTS.

FILED APRIL 20, 1921. No. 21126.

1. **Contracts**: BUILDING CONTRACT: DELAY: DAMAGES. A contract between an owner and a builder failed to provide that the builder should not be liable in damages for delay of completion, within the time agreed on, that arose from strikes or otherwise. Completion was delayed by strikes, and by world war conditions, for a period of 7½ months, and the building cost was thereby greatly increased. The court found that 22 weeks of the delay was attributable to the owner and the remainder was attributable to the builder. The owner did not file a cross-appeal. The builder in its cross-petition sought to recover approximately $5,500, as alleged damages, on account of increased cost of labor and material and the like that was occasioned by the delay. The owner recovered judgment for $11,499.25. *Held*, that, under the facts, neither party should be permitted to recover damages.
2. ———: ———: ———: ———. A contract between an owner and a builder for the construction of a building failed to provide for nonliability of the builder for damages, arising from strikes and the like. *Held*, that, in an action in equity for an accounting and for damages, neither party can recover from the other for damages arising from delays that were caused by strikes and by world war conditions, when it appears that both parties were to some extent chargeable with negligence and so contributed to the delay complained of.
3. **Qnestions Not Decided.** Whether plaintiff is a "trustee of an express trust" and whether the contract sued on is "an agency contract," we do not find it necessary to decide.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Reversed and dismissed.*

Byron G. Burbank, for appellants.

James H. Adams, Stout, Rose, Wells & Martin, McGilton & Smith, H. L. Mossman, Montgomery, Hall & Young, Ross L. Shotwell and *Nolan & Woodland, contra.*

DEAN, J.

Home Builders, plaintiff herein, recovered a judgment

against Busk & Wind, the defendant partnership, for $11,499.25 in an equity suit for an accounting. The defendant partnership appealed.

The suit grew out of the erection by the partnership of a six-story and basement, stone, concrete and iron building in Omaha, known as the "Morris Hotel Apartments." The contract on which the suit is based is dated August 26, 1916. By such of its terms as are material here, the recitals in the contract disclose that the partnership agreed to furnish all labor, material and equipment for the construction and completion of approximately 60 per cent. of the building, as shown on certain designated plans and specifications, and that the work should not cost to exceed $107,500, including a commission of $6,000, in addition to the cost of all labor and materials used, and that the work that devolved upon the partnership should be completed by March 1, 1917; that the parties should cooperate to the end that they might work out "any saving in the cost of the building;" that the partnership should furnish plaintiff weekly statements of labor performed and amounts of material used; that before any changes in the plans and specifications were made, or extras ordered, the partnership should consult plaintiff and the architect and obtain a written order from the architect therefor; that for all extra work and material, not included in the contract, the partnership should receive a commission of 6 per cent. of the cost of such extras; and that plaintiff should maintain fire and tornado insurance on the building during the progress of the work.

It seems to be conceded that the remaining 40 per cent. of the building, having to do with the gas-fitting, installation of the heating plant and accessories, the plumbing and accessories, and wiring for and furnishing lighting fixtures and the like, were all to be installed by plaintiff, at its own expense, under separate contracts with subcontractors who were not under the direction of nor responsible to the partnership. None of the subcontractors, so employed by plaintiff, are parties to this action.

Plaintiff prayed that the partnership be compelled to pay all damages that it sustained "by reason of the failure of said defendants to perform their said contract, including the reasonable rental value of said premises during the period of delay in completion of said building, after March 1, 1917."

The Pantel Realty Company, a corporation, is a party defendant, being the owner of the ground on which the apartment house was built. In its cross-petition the Pantel Company, hereinafter called the company, prayed that plaintiff have judgment against the partnership for all damages sustained on account of alleged failure to fulfil its contract with plaintiff, and that such sum as plaintiff should recover, if any, be decreed to be a payment *pro tanto* upon the company's mortgage indebtedness of $148,000, to plaintiff, for a part of the purchase price of the ground on which the building was erected and for money advanced in the construction of the building.

In its answer and cross-petition the partnership pleaded that plaintiff was not a competent suitor and could not lawfully maintain the action, and that the contract is, from any viewpoint, "an agency contract," under which plaintiff should be denied any recovery. The partnership prayed for affirmative relief, in a sum approximating $5,500, for an increased cost of labor and the like, as alleged, that it was compelled to pay on account of the delays that were brought about by plaintiff.

The court found that the building cost plaintiff $119,054.29; that the two conditions in the contract, namely, with respect to the cost of the building and the date of its completion, and the covenants generally therein, were made for the benefit of George T. Porter and George J. Morris, the owners and proprietors of the building enterprise and of the ground on which the building was erected; that Porter and Morris after the making of the contract in suit conveyed the property to the Pantel Realty Company, a corporation organized by them, and assigned all

of their rights under the building contract to plaintiff; that the Pantel Realty Company owed plaintiff $132,000, as evidenced by notes secured by a mortgage on the premises, and that plaintiff was entitled to receive the avails of the present suit to be applied on the debt owing to it by the company; that the partnership did not perform the part of the work that devolved upon it to perform, under the building contract, until October 15, 1917, but that considerably more than one-half of the delay, namely, 22 weeks thereof, was caused by and was attributable to plaintiff; and that the remainder of the delay was attributable to the partnership. On this point the decree reads:

"The court finds that the following delays to the progress of the work which Busk and Wind were obligated to perform were caused by the plaintiffs or by subcontractors under Home Builders, who were not under the control and direction of Busk and Wind, namely, three weeks delay caused by Morris Brothers, subcontractors of the plumbing, heating, and gas-fitting; three weeks delay caused by Bennett & Company, the subcontractors of the electric wiring; six weeks delay caused by changing the window frames and sash in the south and east walls from wood to steel; eight weeks delay caused by the addition of a sun-parlor on the roof; and that two weeks additional delay is chargeable to strikes that would not have been encountered except for the delays attributable to plaintiff. The court finds all other delays in the completion of said contract are attributable to defendants, Busk & Wind, and that after extending the time of completion fixed by the contract by all of the delays legally excusable or attributable to the plaintiff, or to persons independently employed by plaintiff, the said defendants should by the exercise of due diligence have completed their contract by the 15th day of July, 1917."

No cross-appeal was prosecuted by plaintiff.

In view of the record in the present case, it is proper that we should notice the local situation at Omaha, in

the spring and summer of 1917, as disclosed by the evidence, as affecting the building and other trades in that city. It may be observed too that the unsettled labor condition in Omaha at that time is fairly reflected in *State v. Employers of Labor,* 102 Neb. 768. And this aside from world war conditions that will be presently noticed.

The evidence before us shows, and as pointed out in the *Employers of Labor* case, that industrial disturbances of considerable magnitude occurred in Omaha, in the spring and summer of 1917, that interfered with the welfare of large classes of the community, and that culminated "in lockouts, strikes, disorderly assemblages, assaults, and damage to property;" that numerous strikes resulted because employers refused to discharge employees who would not join a labor union; that there was a general teamsters' strike because some nonunion men were employed; that a lockout followed in all the fuel and building material yards; that fuel and building material dealers refused to sell to the public generally; that this unfortunate situation "interfered with the conduct of building operations and caused the idleness of building craftsmen;" that disorders, breaches of the peace and assaults were common and conditions generally were becoming chaotic.

It is elementary that, unless provision therefor is expressly reserved in the contract, a builder cannot plead the effect of a strike in extenuation of his failure to complete a structure within the time specified in his contract with the owner. But can the owner be heard to complain in a court of equity, when it is shown that, by his own negligent conduct, he has occasioned much the greater part of the delay and the resultant increased cost of which he complains? A man cannot, of course, be permitted to profit by his own wrong.

The strike situation at Omaha was not the only disquieting circumstance that was there encountered. The world war was on. The court will of course take judicial notice of the conditions that attended the prosecution of

that war and the effect of such conditions upon the country at large, and as affecting building and other construction activities generally. For its effective prosecution the government required practically all available man power and much of the iron and steel products and other material that is ordinarily used in the building trades and in other enterprises. The delay complained of in the present case threw the building enterprise in question into the midst, not only of the local "chaotic conditions" that are discussed in the *Employers of Labor* case, but into the midst of the troublous world war conditions as well. The result was that the price of labor was enormously increased, in some instances almost three-fold, and its efficiency was greatly decreased, in many instances as much as 50 per cent.

True, the building was not completed on March 1, 1917, the date fixed for its completion in the contract. But, in view of the established fact that 22 weeks of the delay complained of is attributable to plaintiff, we are not prepared to say that defendants should be holden, in a court of equity, for the damage claimed by plaintiff. Besides, there is evidence on the part of the partnership, tending to prove that but for the delays so occasioned by plaintiff the building would have been completed on the date specified in the contract. But the evidence, all together considered, shows that the partnership was not blameless. We conclude that, in view of the record before us, the partnership should not be held for the damages assessed against it on account of delays, nor for the resultant additional expense, when it was not wholly responsible for either. The partnership's prayer for recovery must also be denied.

The partnership argues that, under the pleadings and the facts, plaintiff is not competent to maintain this suit. Plaintiff contends that it comes within the meaning of section 7585, Rev. St. 1913, and that the contract in suit was in fact made by it and prosecuted for the benefit of the Pantel Company, assignee of Porter and Morris, in

plaintiff's name. However, in view of our decision, we do not find it necessary to decide that question. Nor have we found it necessary to decide whether the contract sued on is "an agency contract," as contended by the partnership.

From a review of the voluminous record, in which it clearly appears that both parties are in part to blame for the delay complained of, and for the damages arising therefrom, we conclude that neither party is entitled to recover.

The judgment must therefore be reversed and the action dismissed.

REVERSED AND DISMISSED.

LETTON, J., dissents.

ROSE and DAY, J.J., not sitting.

PEDER SKRIVER, APPELLEE, V. WILLIAM A. HABERSTROH, APPELLANT.

FILED APRIL 20, 1921. No. 21289.

Vendor and Purchaser: BREACH OF CONTRACT: RIGHT TO RECOVER DAMAGES. When A., who is a party to a contract, fails to perform his part and thereby places it beyond the power of B., the other party to the contract, to perform his part, B. is entitled to recover in an action for damages.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

John P. Breen, for appellant.

Clark O'Hanlon and *E. C. Page, contra.*

DEAN, J.

This is an action on a contract for an exchange of farm land for an interest in city property. Plaintiff, who owned an option for the purchase of the farm land, alleged nonperformance by defendant and obtained a judgment for $1,050. Defendant appealed.

The contract is dated August 22, 1917, and provides that the transaction should be closed on or before September 1, 1917. By its terms defendant agreed to buy from plaintiff an 80-acre tract of farm land in Washington county, including the crops for that year, for $9,850. As part of the purchase price defendant agreed to assume the payment of a $2,600 mortgage on the land, and for the remaining payments he agreed to assign four real estate contracts, owned by him, on four separate properties in Omaha on which there remained unpaid a sum aggregating $8,076.40. Of this sum any surplus remaining, after the payment of the purchase price of the farm land, was, under the contract, to be repaid to defendant. The farm land was not owned by plaintiff, but was the property of D. J. Coulter and wife, from whom plaintiff had obtained an option of purchase. This was well known to defendant. Plaintiff subsequently obtained a deed of conveyance from the Coulters, wherein defendant was named as grantee. Plaintiff testified that he delivered this deed to defendant and caused it to be recorded in the proper office in Washington county, pursuant to defendant's request, and that defendant made no demand for immediate possession of the land.

It is contended by defendant that plaintiff practiced fraud on him and on the Coulters, in that he gave false deeds purporting to convey to Coulter certain land in Sioux county, Nebraska, to the end that defendant might be induced to believe that plaintiff was paying the Coulters more than the amount that was expressed in the option contract that he entered into with them. It does not clearly appear that such representations were made to defendant, nor does the contract sued on name the amount that plaintiff was obligated to pay to the Coulters.

The record, fairly construed, shows that plaintiff performed his part of the contract, but that defendant refused to assign his interest in the real estate contracts to plaintiff as he agreed to do. He entered into the contract voluntarily with the expectation, it may be assumed, of

profiting thereby. It does not appear that he was misled by plaintiff nor deceived by him. If defendant had demanded possession and it had been refused, a different case would have been presented. But he did not do so.

Defendant argues that plaintiff was unable to pay the Coulters, on September 1, 1917, the purchase price agreed on between them, and was thus unable to fulfil his part of the Coulter contract. But plaintiff gave the Coulters his personal obligation for all of the purchase price, in excess of the incumbrance, and this suit does not concern them. The record is solely concerned with the transaction between plaintiff and defendant. It is clear that defendant cannot be heard to complain if, by his refusal to assign the contracts on the city lots, plaintiff was thereby unable to make payment to the owners. And the record shows that plaintiff relied on such assignment to the end that he might meet his obligation to the Coulters. The record throughout is inconsistent with defendant's contention that plaintiff agreed to get a deed from the Coulters for a commission of $250. It is unreasonable to believe that plaintiff would have given his personal obligation to the Coulters, to secure the land, in a sum in excess of $6,000 if his remuneration had been restricted to a commission.

There is a conflict in the testimony as to whether defendant accepted the Coulter deed from plaintiff and directed plaintiff to have it recorded, and also with respect to possession by defendant. On this point it may be observed that the record contains a warranty deed of the land in controversy from defendant Haberstroh and his wife to D. J. Coulter, dated September 4, 1917. The recitals therein disclose possession, lawful seisin, and lawful right to convey as owners. Within a day or two thereafter the same land was conveyed by the Coulters to defendant's wife. This circumstance does not indicate good faith on defendant's part.

The evidence on the material questions in the case conflicts. Nevertheless we have tried the case *de novo* and

conclude that the record, when considered in its entirety, discloses a violation by defendant of his contract with plaintiff, to the end, apparently, that he might profit in an amount somewhat in excess of $1,000. The judgment of the district court merely placed the parties where they would have been if defendant had performed his part of the contract.

We do not find reversible error. The judgment is therefore

AFFIRMED.

DAY, J., not sitting.

SCOTTISH RITE BUILDING COMPANY, APPELLANT, V. LANCASTER COUNTY ET AL., APPELLEES.

FILED APRIL 20, 1921. No. 21211.

1. **Taxation:** EXEMPTIONS: "CHARITABLE PURPOSES." To be exempt from taxation as property used for charitable purposes, under section 6301, Rev. St. 1913, a building must provide necessary quarters and facilities for an organization devoted, as its dominant purpose, to the dispensation of actual relief to the unfortunate or suffering or to some work of practical philanthropy. The mere fact that the building is used as headquarters by a secret fraternal society which teaches charitable principles and encourages charitable sentiments among its members is not sufficient to constitute a use of the building for charitable purposes within the meaning of the statute.

2. ———: ———: ———. The Scottish Rite cathedral, the headquarters of the Masonic order of that name in the city of Lincoln, is used for meetings and ceremonies of the Scottish Rite and affiliated Masonic bodies and has no other active use. Evidence relating to the revenues, disbursements, and charitable activities of the order examined, and *held* not to show that the Scottish Rite organization was engaged in practical charity as its principal object or to such extent as to warrant a finding that the building in question was used for charitable purposes.

3. ———: ———: "RELIGIOUS PURPOSES." The fact that members of a secret fraternal society are required to believe in the existence of, and accountability to, a Supreme Being, and that, in their

meetings and ceremonies, prayers are said and the precepts of morality and duty to others are taught, will not characterize such society as a religious organization or exempt its property from taxation on the ground that it is used for religious purposes.

APPEAL from the district court for Lancaster county: LEONARD A. FLANSBURG, JUDGE. *Affirmed.*

Burkett, Wilson, Brown & Wilson, for appellant.

Charles E. Matson, Harry R. Ankeny and *Max G. Towle, contra.*

DORSEY, C.

This appeal involves the question whether the building known as the Scottish Rite cathedral, in the city of Lincoln, and the lots upon which it is located are exempted from taxation by the terms of section 6301, Rev. St. 1913, providing for such exemption in the case of property used exclusively for religious or charitable purposes. The property in issue was listed for taxation by the county assessor of Lancaster county for the year 1917. Objections upon the ground of the claimed exemption were filed with the board of equalization and overruled by that body. On appeal to the district court the action of the board was sustained and the property held subject to taxation. From that judgment this appeal is taken.

Section 2, art. IX of our Constitution of 1875, provides: "The property of the state, counties and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation, but such exemptions shall be only by general law." Acting under this power the legislature of 1879 enacted the law which now appears as section 6301, Rev. St. 1913, which reads, in part, as follows: "The following property shall be exempt from taxes: First—all property of the state, counties and municipal corporations; second—such other property as may be used exclusively for agricultural and horticultural

societies, for schools, religious, cemetery, and charitable purposes." Statutes exempting property from taxation are to be strictly construed. *Young Men's Christian Ass'n v. Douglas County,* 60 Neb. 642.

The theory of the appellant, as developed in the argument of counsel, is, in substance, that the Masonic fraternity, in which the Scottish Rite bodies are included, is an order whose aims, objects and practices are mainly charitable and religious in character, and that whatever there may be in its aims and practices that is neither charitable nor religious is incidental merely and does not detract from its main purposes. Charity and religion are, therefore, so blended together in the organization that it may properly be termed exclusively charitable and religious, and the building in question, being devoted to the promotion of the objects of the order, is property used exclusively for charitable and religious purposes within the meaning of the statute.

With reference to that element of the appellant's theory which asserts that the organization is charitable and that the building was used for charitable purposes, it is contended that charity is not restricted, in its meaning, to alms-giving or financial relief, but includes all enterprises that produce no profit to the promoters, but tend to the improvement, welfare and happiness of mankind. It is argued, in that connection, that, entirely apart from any material benefactions, since the Scottish Rite bodies, in their ceremonials, instruct their members in the precepts of duty to others and in kindliness and fraternal feeling, thus encouraging those members who are depressed in spirit and stimulating them, not only to renewed efforts in their own affairs, but to take an interest in the welfare of others, the building in which such principles are taught would be, for that reason, used for charitable purposes. The following cases tend to support that conception of the meaning of the word "charitable:" *Cumberland Lodge, A. F. & A. M., v. Mayor and City Council,* 127 Tenn. 248; *Salt Lake Lodge, B. P. O. E., v.*

Groesbeck, 40 Utah, 1, Ann. Cas. 1914C, 940; *Horton v. Colorado Springs Masonic Building Society,* 64 Colo. 529.

While it is true that the thought expressed in the word "charity" is, in the language of the poet, the philosopher or the moralist, capable of many varieties and shades of meaning, the writer is convinced that it would be unreasonable to attribute to the framers of our constitution any intention to give so broad a signification to the words "charitable purposes" as that contended for by the appellant. They did not, in other words, intend to include in those words the expression or inculcation of charitable sentiments, thereby giving a merely subjective meaning to the word "charitable." What they meant, common sense teaches us, was concrete, practical, objective charity, manifested in things actually done for the relief of the unfortunate and the alleviation of suffering, or in some work of practical philanthropy, as contrasted with the sentimental or ethical viewpoint. The question of fact, therefore, is whether or not the building in question was, in a practical sense, used for charitable purposes, and it cannot be held to have been so used unless charity was actually dispensed there, or unless it provided necessary quarters for an organization whose prime purposes and functions were actively charitable. The following decisions, while rendered upon differing facts and statutory provisions, sustain, in a general way, the foregoing views: *Mt. Moriah Lodge, A. F. & A. M., v. Otoe County,* 101 Neb. 274; *Boston Lodge, B. P. O. E., v. City of Boston,* 217 Mass. 176; *St. Louis Lodge, B. P. O. E., v. Koeln,* 262 Mo. 444, L. R. A. 1915C, 694; *Vogt v. City of Louisville,* 173 Ky. 119; *Attorney General v. Common Council of Detroit,* 113 Mich. 388.

Let us now consider the evidence upon the question of fact involved. The building in question covers about 100 by 142 feet of ground, and cost $150,000. It contains a reception hall, ladies' room, cloak room, smoking room, a large room for conferring degrees, and, underneath the main floor, a dining hall for 1,000 people, pantries, and a

heating plant. About 50 meetings annually are held therein by the Scottish Rite bodies, 4 in number, and the affiliated Masonic orders, the Mystic Shrine, and the Eastern Star. The Scottish Rite uses the building about 25 days, and the Shrine about 18 days, each year. The building has been occasionally loaned to outside bodies, but no rental has been charged. The Scottish Rite and the Shrine use it to hold initiation ceremonies for new members, when large classes, averaging about 100, are put through the various degrees. The initiation of these classes requires sessions of several days, and during these periods meals and banquets are served in the dining hall at the expense of the Masonic organizations, without cost to the individual members. In addition, there are the regular monthly meetings of the Scottish Rite bodies.

The revenues of the Scottish Rite consist of initiation fees, amounting, in each instance, to $150 for all the degrees of the Scottish Rite, and the annual dues, amounting to about $4. Out of every $150 initiation fee, about $50 is expended in entertainment during the initiation ceremony and in fees remitted to the Supreme Council. The remaining $100 goes into the lodge general fund, and the $4 annual dues also.

For the two years preceding the hearing of this case in the court below, the surplus remaining after the payment of expenses was transferred by the Scottish Rite bodies to the building fund and used in paying for the cathedral. Of the $150,000, total cost of the building, there was originally a debt of $82,500, which at the time of the hearing had been reduced to $36,000 by the application thereon of initiation fees and dues. The Mystic Shrine, while temporarily using the cathedral, intend, it appears, to have a building of their own. Their initiation fee is $75, and the record shows that, after their expenses are paid and a small sum remitted to the Supreme Council, the remainder of their initiation fees and dues was placed in their building fund.

As to the active charity dispensed by these bodies, we

find that no fixed percentage of the revenues is set aside for charity. There is an almoner, who is the custodian of the funds set apart for charity and attends to their distribution. Voluntary contributions are taken up at every meeting, to be used for charity. Appropriations are sometimes made by a vote of the lodge, out of its general fund, for that purpose. The secretary of the Scottish Rite bodies summarizes the matter in his testimony: "Of course, we always take care of our brethren and their families. Our charitable work depends upon two things, first, of course, the amount of money we have available for charitable purposes; and, second, the amount of charitable work there is to do. Fortunately, in Lincoln here there is very little chance to spend money for charity. * * * Q. Do you know how much this lodge has given out of the general fund by vote? A. I can't tell you the exact amount. We have not given any great amount in the last six or eight years, for the reason that we have never been asked for it. Every demand that has been made upon us has been promptly met, and the reason why we have not given more is because we have not been asked for it."

The leading facts from which it must be determined whether the building was, in fact, principally used for charitable purposes, as shown by the evidence, are that no fixed percentage of the revenue of the Scottish Rite or the Shrine was regularly set aside for charity; some appropriations were made out of the general fund for that purpose, the amount of which, the record does not show, but which the secretary's testimony leaves us to infer was relatively inconsiderable; voluntary contributions were habitually taken up at each meeting and disbursed by the almoner, the amount of which the record does not disclose; and two minstrel shows were given by the Shrine, presumably elsewhere than in the building in question, netting about $2,000 each.

The secretary's testimony makes plain that the disbursing of charity was not the principal object of the

organization. It was ready to respond to every call, but fortunately, as he says, there was little to do in the way of charity. It will readily be conceded that the organization and its membership were eager to extend assistance when called upon; but the attitude of the society was passive. It was not seeking out objects of charity beyond its own membership, and was in the charitable field only in the same way that any warm-hearted person might incidentally come in contact with need or suffering and hasten to relieve it. The Scottish Rite collected large sums, the surplus of which was enough to pay off nearly $50,000 of its building debt, but no fixed part of this was allotted to charity. All but a negligible amount of it was spent upon the building and in banquets and entertainments for its members and initiates.

There is no ground for reproach in this fact. It was perfectly appropriate for the society to cherish the desire for a magnificent abode for its ceremonies and for the accommodation of its membership, and it is not to be criticized for its hospitality toward initiates or in providing entertainment for its members in the promotion of their social intercourse. It is simply with reference to the aspect of the question which relates to the claim made here on behalf of the Scottish Rite, that it was principally a charitable organization and that its building was used chiefly for charitable purposes, that these observations are made, and there is no intention of intimating that it was deficient in discharging its charitable duties. Nevertheless, persons or institutions of wealth or means, however generous, who, even though they systematically allot a fixed part of their income to charity, are yet engrossed in pursuits and interests in which charity, while not entirely excluded, does not play a leading part, are not entitled to claim that they devote themselves chiefly to charity. Neither is a fraternal order entitled to claim exemption of its property from taxation because it encourages charity among its members and itself makes substantial donations to charity, when the evidence shows that its prin-

cipal activities were not in that direction, but were, for the most part, centered in promoting the interests and in gratifying the tastes of its own membership.

There remains to be discussed that element of the appellant's theory which depends upon the proposition that the building should be exempted because it was used for religious purposes. No judicial precedent is cited for so holding. The religious phase of the appellant's contention is founded upon the fact that the Scottish Rite degrees are conferred in great solemnity; that prayers are said and the candidate is taught and required to believe in God or a Supreme Being, to whom he owes reverence, loyalty, service, and honor; that he is taught that the soul is immortal and that he is accountable to the Supreme Being after death; that God is the Father and we are brethren who owe a mutual duty to each other, and that the purpose of the order is to make men better.

The theory that these facts with regard to the Scottish Rite ritual stamp it as a religious, as distinguished from a secular, organization indicates a misconception of the tenets and polity of the order which, with respect to the so-called religious features mentioned, are shown by the record to be the same as those of Masonry generally. The evidence shows that belief in and reverence for a Supreme Being are required of each and every member; that it makes no difference whether that Supreme Being is "God" or "Allah;" that belief in Christianity is not exacted, and that people may belong who do not believe in the divinity of Christ. The fact that belief in the doctrines or deity of no particular religion is required, of itself, refutes the theory that the Masonic ritual embodies a religion, or that its teachings are religious. Is it conceivable that the Scottish Rite bodies, or the Masonic order generally, set themselves up as exponents of a new religion? For if they belong to none of the old established religions, and yet assume to preach or expound religion, they must be embarking upon a new theology and setting up a religion of their own.

The true interpretation of the Masonic attitude in that respect is that no religious test at all is applied as a condition of membership. The guiding thought is not religion but religious toleration. The order simply exacts of its members that they shall not be atheists and deny the existence of any God or Supreme Being. Each member is encouraged to pay due reverence to his own God, the Deity prescribed by his own religion, and to obey those precepts of human conduct, which, while taught by all religions prevalent in civilized society, do not appertain to the mysteries or doctrines of any religion, as such, but are common to all. The Masonic fraternity, in other words, refrains from intruding into the field of religion and confines itself to the teachings of morality and duty to one's fellow men, which make better men and better citizens.

The distinction is clear between such ethical teachings and the doctrines of religion. One cannot espouse a religion without belief and faith in its peculiar doctrines. If a Christian, for instance, one must believe in the divine mission and revelation of the Saviour, with all that is implied and included therein; if a Mohammedan, one must believe in the revelation of the doctrine of that religion through the Koran, of which Mohammed was the prophet. A fraternity, however, broad enough to take in and cover with its mantle Christian, Moslem, and Jew, without requiring either to renounce his religion, is not a religious organization, although its members may join in prayer which, in the case of each, is a petition addressed to his own Deity. Neither can belief in the immortality of the soul be denominated religious, in the sense that it is typical of any religion, of any race, or of any age. It constitutes, to be sure, one of the most beautiful and consolatory features of our own religion, but it is equally to be found in almost every other. It is so universal and spontaneous that it is not so much a belief or dogma as it is an instinct of the human soul. Neither does it imply or require adherence to any system of religious worship;

many pagan and infidel philosophers have asserted it. It is so generally subscribed to by everybody that it does not run counter to any one's religious belief, and, as in the case of belief in the Supreme Being, the profession of belief in the immortality of the soul does not create any religious division among the members of the Masonic order.

It cannot but occur to the thoughtful mind that in putting forward the resemblance of its ceremonies to the observances of religious worship, and in claiming the right to exemption for its property from taxation upon that ground, counsel have assumed a position which, when carried to its final analysis, would, if sustained, go farther than the order itself has clearly contemplated, and would lead to results alike harmful and impracticable. For the Scottish Rite bodies to be pronounced by law, or court decision, religious organizations would mean that their meetings must be construed to be the equivalent of divine worship, and their officiating officers to be clergymen or ministers—of what gospel, it is impossible to say. Owing to the perfect liberty of conscience which people of every religious faith enjoy under our institutions, it has become a marked characteristic of religious worship in this country that it should be held in public and with open doors. It would be an anomaly, to say the least, if it should become the practice to give religious sanction to the meetings of secret societies and to rites and services carried on in the guise of religious worship to which the public would be denied admittance.

The fact that they display in their ceremonies a becoming reverence for the Deity and strive to inculcate the principles of morality does not change the essentially temporal or secular character of the Scottish Rite bodies, or clothe them with the spiritual or sacred attributes of a religious or ecclesiastical institution, any more than the custom of family prayers, or of religious or moral instruction in the home, would have that result. *St. Louis Lodge, B. P. O. E., v. Koeln,* 262 Mo. 444. The evidence

will not bear out the assumption that the ceremonies in question are religious rites or services.

The finding of the trial court that the dominant use of the building has not been such as to establish that it was used chiefly, still less exclusively, for either charitable or religious purposes is clearly right and should be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

TIBBETS, C., dissents.

FLANSBURG, J., and CAIN, C., not sitting.

YOUNG MEN'S CHRISTIAN ASSOCIATION OF THE CITY OF LINCOLN, APPELLEE, V. LANCASTER COUNTY ET AL., APPELLANTS.

FILED APRIL 20, 1921. No. 21276.

1. **Taxation: EXEMPTIONS.** Provisions for the exemption of property from taxation should be given a fair and reasonable interpretation in order to ascertain the true intent as to their scope, and then should be strictly applied and enforced so that the limits thus defined shall not be unduly enlarged or extended.

2. **———: ———: "CHARITABLE ORGANIZATION."** A Young Men's Christian Association, incorporated to promote the moral, physical and educational welfare of young men, and supported in large part by voluntary contributions from the public, which in its practical work, as outlined in the opinion, actually carries out those purposes by a system of moral, physical, religious and educational training and influence for the betterment of its members and the general benefit of the community, is a charitable organization, and its building, in so far as it is actually and necessarily used for those purposes, is exempt from taxation under section 6301, Rev. St. 1913.

3. **———: ———.** Where certain floor space in a building owned and occupied by a charitable organization is leased to outside parties

for the operation of a cafeteria, open to and patronized by the general public as well as the membership, the rentals being applied to the purposes of the organization, that portion of the building so leased is not exempt from taxation, although the maintenance of the cafeteria therein is not only financially helpful to the organization but promotes its charitable purposes by attracting people to the building.

4. ———: ———. The fact that a certain portion of the building of a charitable organization which is not exempt from taxation cannot be separated from the residue by definite lines is no obstacle to the assessment of the property for taxation to the extent of the value of that portion thereof which is taxable, having due reference to the taxable value of the entire property.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed, with directions.*

Charles E. Matson, Harry R. Ankeny and *Max G. Towle,* for appellants.

Burkett, Wilson, Brown & Wilson, contra.

DORSEY, C.

The Young Men's Christian Association of the city of Lincoln is the owner of two lots, covering 100 by 142 feet of ground, in the business district, upon which stands a five-story brick building occupying nearly the entire two lots. This real estate was valued by the county assessor for taxation for the year 1917 at $100,000. Objections were filed with the county board of equalization on the ground that the property was used exclusively for religious, educational and charitable purposes, and was therefore exempt from taxation. The objections were overruled, but the valuation was reduced to $80,000. Appeal was then taken to the district court, where the objections were sustained and the property held to be exempt. The cause is now before this court for review on appeal by the taxing authorities.

The main part of the building, 100 by 100 feet in size, is occupied on its first floor by the offices of the association, a lobby and a cafeteria; on the second floor is another cafeteria, and the remainder of that floor is devoted to

assembly rooms for the general use of the members, and for holding meetings connected with the various activities of the association, also by library, reading and study rooms and class rooms in connection with the religious and educational work. Part of the third floor is also utilized for the foregoing purposes; the remainder of the third floor and all of the fourth and fifth floors are divided into sleeping-rooms occupied by members who lodge there. On the north side of the main part of the building, and as a part of the same structure, there is a space 42 by 100 feet occupied, all but the two top stories, by the gymnasium and other rooms devoted to physical exercise, with baths, swimming pool, bowling alleys and billiard tables in the basement, where there are also a tailor repair shop and a barber shop. The two floors above the gymnasium in this part of the building are also occupied by sleeping-rooms.

The general purpose of the association is to promote the moral, physical and educational welfare of young men, to bring them under moral and religious influences, to improve their characters and to stimulate in them higher ideals of life and conduct.

The active work by which the association seeks to carry out these aims is partly among its own membership and partly in the effort to extend its influence outside, into and over the general community. The advantages and opportunities offered to its members are designed to influence young men to join the association and thus to bring as many as possible under its direct influence and supervision. At the same time, meetings participated in by organizations or groups interested in religious and other phases of community and home life are welcomed and accommodated, without charge, in its assembly rooms constantly throughout the year. Among these are lectures to parents on their relations and duties to boys, and also boy scout meetings. A boys' department is maintained of which boys may become members, entitling them to the use of the gymnasium, baths, games and other

privileges. There are also meetings of the Sunday-school institute, in which instruction is given in Bible study and Sunday-school teaching, to aid and supplement the local church work along that line.

The members of the association and others who come to the building are given the benefit of religious influences by means of Bible classes and meetings of a religious character regularly held on Sunday and throughout the week. The educational work, under the supervision of an educational director, consists of both day and night schools, in which the common branches, languages and technical subjects are taught, and also health clinics teaching the functions and care of the body. Several class rooms in the building are used for this work.

The department of physical exercise and improvement, in charge of a physical director, is an important feature in the program of the association, and the essential relation of proper development of the physical requirements of young men to their mental and moral life is strongly emphasized. Music, games and other recreations are provided, and the general plan pursued by the association seeks to bring the entire routine of life of young men and boys into proper relation with their physical, mental and spiritual needs.

The membership of the association consists of active members who must be members of some protestant evangelical church, and who alone have the right to vote, and associate members to whom no religious test is applied, and who, equally with the active members, enjoy the other privileges of the association. There are about 1,700 members and the annual membership fee is $10. Revenues are made up of the membership fees, the income from the 117 rooms occupied by members, the cafeteria, barber shop and tailor shop, together with the small fees charged for games and for certain services for which members are required to pay. The total falls about $1,000 a month short of the amount necessary to pay the running expenses, and that deficit is made up by voluntary con-

tributions of liberally disposed persons.

The Constitution and statutes of this state permit exemption from taxation only in case the building was, during the year for which it was assessed, "used exclusively * * * for schools, religious * * * and charitable purposes." Rev. St. 1913, sec. 6301. The contention of the appellee is that it is a religious and charitable institution, and that the building in question, being used for the promotion of its general purposes, is, in a legal sense, used for religious and charitable purposes, although parts of the building are used for purposes which, if dissociated from and considered apart from their utility in carrying out the general plan, are not strictly either charitable or religious; such uses being merely incidental and not destructive of the exempt character of the property.

The use of the property is, under our law, the criterion by which to determine whether it is or is not exempt from taxation. It is therefore essential to determine, in the first place, whether the association, not in its aims and purposes alone, but in what it actually does to carry them out, is religious or charitable, before it can be decided that any of the uses to which the building was put partake of those characteristics. This court said in *Young Men's Christian Ass'n v. Douglas County,* 60 Neb. 642, 52 L. R. A. 123: "It is to be conceded at the outset, as it is admitted by the demurrer to the petition, * * * that the object and purposes of the appellant corporation are such as to exempt the property, used exclusively by it for the purposes of its organization, from taxation under the laws of the state." No such concession can be made in the state of the record before us, and we shall therefore proceed to inquire whether the appellee may properly be described as a religious or charitable organization.

Under facts with reference to the objects and activities of the Young Men's Christian Association there under consideration not differing essentially from the corresponding facts in the instant case, it was held in *Little v.*

City of Newburyport, 210 Mass. 414, Ann. Cas. 1912D, 425, that the association, though not giving charity in its narrowest sense, was in its essence a benevolent or charitable institution, within the meaning of those words in the statute. In *Commonwealth v. Young Men's Christian Ass'n,* 116 Ky. 711, 105 Am. St. Rep. 234, it was concluded that a similar organization was an institution of "purely public charity" under the statute of Kentucky. That decision was reaffirmed in *Corbin Y. M. C. A. v. Commonwealth,* 181 Ky. 384. A similar organization devoted to the welfare of young women was held to be a purely public charity in *Philadelphia v. Women's Christian Ass'n,* 125 Pa. St. 572.

The supreme court of Louisiana, on the other hand, held in *State v. Board of Assessors,* 52 La. Ann. 223, that a Young Men's Christian Association could not claim exemption of its building from taxation on the ground that, because its work tended to improve and elevate young men, the building was actually used for charitable purposes. And in New Jersey, also, it was held in *Trustees Y. M. C. A. v. City of Paterson,* 61 N. J. Law, 420, that statutes exempting private property must be given the narrowest interpretation of which they are reasonably capable; that charitable purposes are eleemosynary purposes, in the sense of aid to the needy, and that, because the members of a Young Men's Christian Association are not recipients of charity but pay a price deemed adequate for what they get, its building was not used exclusively for charitable purposes.

The theory that the rule requiring strict construction of a tax exemption statute demands that the narrowest possible meaning should be given to words descriptive of the objects of it would establish too severe a standard. Rather ought it to be the rule that such words as "charitable" should be given a fair and reasonable interpretation, neither too broad nor too narrow, in ascertaining the true intent as to the objects of exemption, and then that the statute should be strictly applied and enforced in

order not unduly to extend its scope. The rule does not call for a strained construction, adverse to the real intention, but the judicial interpretation of such a statute should always be reasonable. 37 Cyc. 894.

Not only in cases dealing with Young Men's Christian Associations, such as are hereinbefore cited, but in numerous cases dealing with tax exemptions claimed by other institutions in which some analogy is to be found, the courts have defined "charity" to be something more than mere alms-giving or the relief of poverty and distress, and have given it a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive the benefits. *Franklin Square House v. City of Boston,* 188 Mass. 409; *Episcopal Academy v. Philadelphia,* 150 Pa. St. 565; *Brewer v. American Missionary Ass'n,* 124 Ga. 490; *City of Waycross v. Waycross Savings & Trust Co.,* 146 Ga. 68; *Congregational Sunday School v. Board of Review,* 290 Ill. 108.

The record in the instant case shows, it is true, that it is the policy and custom of the association to require its members to pay a moderate charge for some of the privileges, facilities and amusements that they enjoy, while some of them are free. The net financial result, however, is that the whole institution is run at a loss, which in the year preceding the trial below amounted to nearly $13,000, and which must be made up by popular subscription. Reason and authority are opposed to the proposition that an institution otherwise charitable will be deprived of that character by the mere fact that charges for facilities and services are made to individual members, which not only do not result in profit, but which fail, in the aggregate, even to make the institution self-sustaining, and the appellant's contention to that effect must be denied.

It follows from the foregoing discussion and review of the judicial opinions bearing upon that question that the appellee is to be regarded as a charitable organization,

both in its professed purposes and by virtue of its actual performances in the practical work that it does for the general benefit of society in the elevation and betterment of young men and boys. The use to which it puts its building in carrying out its work must, therefore, be characterized, in its general aspect, as charitable, and the building in question is used for charitable purposes, except in so far as some part thereof may be used for purposes foreign to or inconsistent with its dominant purpose.

This brings us to the argument of the appellant that the cafeteria, tailor shop and barber shop maintained in the building are merely business ventures carried on, for profit, for the accommodation of members and others who avail themselves thereof, and are too remotely connected with the general purposes of the association to be treated as uses for charitable purposes of the building or of the parts thereof occupied by them.

The cafeteria is operated under an agreement by which the necessary floor space is leased to outside parties, who pay 10 per cent. of the gross receipts as rental. The lessees supply the fixtures, with the option reserved to the appellee to purchase them at any time, and thereupon the lease shall terminate. The revenue to the appellee from the cafeteria averages about $700 a month. The tailor shop rents for $15 a month; the barber is engaged by the month, and the appellee derives about $25 a month net revenue from the barber shop. The cafeteria serves the members and those of the general public who choose to come.

The appellee's argument with reference to these facilities is that they are necessary to the complete carrying out of its plan to make it attractive to young men and to the public generally to come to the building and thereby strengthen and extend the influence of the association. Not only for the members, but for their near relatives and friends it is a valuable auxiliary to the work to get groups of men together at meal-time, which is the best

and in some cases the only practicable opportunity to arouse their interest in the work of the association, and the revenue from the eating establishment is a great help in keeping up the general expenses. The tailor and barber service is necessary for the accommodation of the roomers in the building.

The question of the maintenance of a restaurant or eating place in connection with buildings of this kind for which exemption from taxation was claimed has been considered by the courts in several cases. In *Philadelphia v. Women's Christian Ass'n, supra,* in which there was a restaurant in the building, it was held that the building was exempt, notwithstanding the fact that the revenues of the association were in part derived from payments for board by those for whose temporal, moral and religious welfare the association exists; not being intended as a source of profit, and being in fact insufficient to defray expenses, the annual deficit being made up from voluntary contributions. And in *Corbin Y. M. C. A. v. Commonwealth, supra,* it was held that the operation of a restaurant in the building, from which a revenue was derived from members and others, but without profit, was consistent with the charitable purposes of the association. But in *Young Men's Christian Ass'n v. Keene,* 70 N. H. 223, in which part of the building was rented for a restaurant, with the primary object of obtaining revenue to assist in carrying on the work and the incidental object of drawing people to the vicinity of the building in order to interest them in the work, it was decided that the association was not entitled to exemption for that portion of the building occupied by the restaurant.

The conclusion arrived at in the Kentucky case just referred to was based, in part at least, upon the peculiar language of the Constitution of that state, which exempts "institutions of purely public charity." The opinion quotes from a previous decision of the same court to the effect that, since the "institution" is exempted without any qualifying words showing that the exemption is re-

stricted to property used by or connected with the institution, the exemption applies to the corporate entity, including all its property. In the *Women's Christian Ass'n* case, also, the Pennsylvania Constitution exempts the property of all institutions "maintained by public and private charity." There is an obvious distinction between such provisions and the provision of our statute confining the exemption to property used exclusively for charitable purposes. The New Hampshire statute upon which is based the decision in *Young Men's Christian Ass'n v. Keene, supra,* holding that portion of the building used for a restaurant to be taxable, exempts the property "to the extent that it is used for the purposes of the association," thus laying emphasis upon the use, as does our statute.

In *Young Men's Christian Ass'n v. Douglas County, supra,* in which the first floor of the building was rented for business purposes, the rent being applied to the work of the association, the rented portion was held taxable. In the case at bar certain floor space was leased and the rental went into the general fund of the appellee for the promotion of its purposes. That the object of having the cafeteria there was to derive revenue from its use by the public, together with the appellee's membership, was frankly conceded in the testimony. It was undeniably, to a certain extent, a commercial enterprise, carried on in competition with other similar business that is taxable. The fact that the money derived therefrom was used for the general purposes of the association, or that it was incidentally desirable in the promotion of those purposes, does not alter the fact that it was a use of a portion of the building differing essentially in character from the primary uses and purposes to which the building and the association itself were devoted. *Young Men's Christian Ass'n v. Douglas County, supra; Young Men's Christian Ass'n v. Keene, supra.* That portion of the building occupied by the cafeteria was therefore not exempt from taxation. The evidence with reference to the barber shop

and tailor shop is that they are accessories required in the building in view of the number of lodgers there, that the amount of space they occupy is insignificant, and that their maintenance is justified in carrying out the general purposes of the association.

There arises the final question, whether it is feasible to segregate the space occupied by the cafeteria from the rest of the building for the purposes of taxation and, if so, by what method. In *Young Men's Christian Ass'n v. Douglas County, supra,* it is said: "It is not necessary that the property should be such as to permit of its separation into distinct and definite parcels or tracts of land." In *Library Ass'n v. Pelton,* 36 Ohio St. 253, in which certain rooms on each floor of a building were rented out, and were therefore not exempt, it was held: "The fact that the building is so constructed, that the parts leased or otherwise used with a view to profit cannot be separated from the residue by definite lines, is no obstacle to a valuation of such parts for purposes of taxation, having due reference to the taxable value of the entire property." To the same effect is *Board of Home Missions v. Philadelphia,* 266 Pa. St. 405. No reason appears why the taxing authorities cannot arrive at a just valuation of that portion of the building which is taxable, in its relation to the entire property, and assess the property in that amount.

The judgment of the court below should be reversed and the cause remanded, with instructions to ascertain the taxable value of the property in accordance with this opinion, and to certify the same to the proper officer according to law.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to ascertain the taxable value of the property in accordance with this opinion, and to certify the same to the proper officer according to law, and this opinion is adopted by and made the opinion of the court.

FLANSBURG, J., not sitting. REVERSED.

ALICE L. MOORE, ADMINISTRATRIX, APPELLEE, V. OMAHA WAREHOUSE COMPANY, APPELLANT.

FILED APRIL 20, 1921. No. 21454.

Judgment: CONCLUSIVENESS: TORT-FEASORS. The personal representative of a deceased employee of an interstate carrier, whose death was caused by the concurring negligence of the carrier and another, is not precluded by a judgment recovered by such representative against the carrier, for the benefit of the widow, under the federal employers' liability act, from maintaining a later action, for the benefit of the mother of the decedent, under sections 1428 and 1429, Rev. St. 1913, against the other joint tort-feasor, where the mother has neither right of action nor interest in the recovery under the federal law. The personal representative, as plaintiff in the respective actions, is a mere trustee for the parties beneficially interested, and, since each action is in fact based upon a different right and ground of recovery, the rule that a judgment against one joint tort-feasor will release the other does not apply.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Raymond M. Crossman, for appellant.

Jefferis, Tunison & Wilson, contra.

DORSEY, C.

Tim F. Moore was a switchman in the employ of the Union Pacific Railroad Company, and died as the result of being crushed between a railway freight car and the platform or loading dock of the Omaha Warehouse Company while engaged in the line of his duty in placing cars there. His widow, as administratrix, brought suit against the railroad company under the federal employers' liability act, the basis of the action being that the company was negligent in maintaining its side-track in too close proximity to the warehouse platform. The administratrix recovered judgment for $7,440, which was paid into court and satisfied. The federal act under which the action was brought provides that, in case of the death of a railway employee while he is employed by such carrier in

interstate commerce, the carrier shall be liable in damages to his personal representative for the benefit of the surviving widow and children. Moore left a widow, but no children.

Afterwards, the widow, as administratrix, commenced the action before us on this appeal against the appellant, Omaha Warehouse Company, under sections 1428 and 1429, Rev. St. 1913, creating liability for death caused by the wrongful act, neglect or default of any person or corporation, and providing that the action be brought in the name of the personal representative for the benefit of the widow and next of kin of the deceased. The next of kin of the deceased in the instant case was his mother. The administratrix alleged in the petition that her intestate met his death under the circumstances hereinbefore related, and that the appellant was liable therefor because it maintained its platform too close to the railroad track upon which the cars were being spotted. Among other defenses, none of which need be noticed because no error relating to them is assigned here, the appellant set up in its answer the facts with reference to the action previously brought against the railroad company and the recovery and satisfaction of the judgment, and alleged that the appellant had been thereby discharged and released from all liability.

The trial court overruled the appellant's motion for a directed verdict and submitted the case to the jury under instructions to the effect that the widow of the deceased was precluded by the action and judgment against the railroad company "from claiming any interest in any sum which may be recovered by her as administratrix in this case, and that you shall only consider whether or not Lucy Moore, the mother of Tim F. Moore, deceased, has sustained any damages in the way of pecuniary loss on account of the death of Tim F. Moore, if you shall find from the evidence that the defendant, Omaha Warehouse Company, was guilty of negligence that was the proximate cause of the accident that resulted in the death of

said Tim F. Moore, deceased." The jury returned a verdict for $2,500, upon which judgment was entered, and this appeal is prosecuted therefrom.

Counsel agree that all questions are eliminated upon this appeal except those which arise in connection with the appellant's plea that there can be but one satisfaction for a single injury; that the railroad company and the warehouse company were joint tort-feasors; that the right of action under both the federal act and the state statute was vested in the personal representative of the deceased, and that the judgment in favor of the personal representative against one of the joint tort-feasors discharged and released the other, and should be held to be a complete bar to recovery in the instant case. The appellee, on the other hand, asserts that the administratrix in bringing these actions was nothing more than a statutory trustee; in the action under the federal law, trustee for the widow, she being the only person entitled to the benefits thereof; in the action under the state death statute, trustee for the mother, who, in view of the prior recovery for the wife's benefit under the federal act, was the only person entitled to damages under the state statute; that the mother had no cause of action against the railroad company, was not represented by the administratrix in that action, and is not bound by any act of the administratrix therein.

If Moore had survived the accident and sued the railroad company for damages resulting from his injuries, the right of action being in him and for his own benefit alone, his recovery against the railroad company would have included all the damage suffered by him, and he could have maintained no later action against the warehouse company, although its negligence concurred with the railroad company's in causing his death. *Irwin v. Jetter Brewing Co.*, 101 Neb. 409. Such was the situation in *Middaugh v. Des Moines Ice & Cold Storage Co.*, 184 Ia. 969, cited and relied upon by the appellant, in which a lineman in the employ of a railroad company

was injured by a truck belonging to the ice company running into him at a railway crossing. He sued the railroad company for negligence of its watchman, and entered into a settlement for a certain sum, in consideration of which he released the railroad company. Afterwards, he sued the ice company, and it interposed the defense that, being a joint tort-feasor, it was also released, and the court held that the prior settlement was a bar to the action because it included his entire damages.

In case of death from the injury, as in the instant case, the federal law, to be sure, gives the right of action to the personal representative, but confers the benefits thereof upon the widow and children, not upon the estate of the deceased. The basis of recovery is not what the injured party could have recovered if he had survived, but is limited to the actual pecuniary loss suffered by reason of the death by the individuals designated in the act. *Gulf, C. & S. F. R. Co. v. McGinnis,* 228 U. S. 173; *Taylor v. Taylor,* 232 U. S. 363. So, in her action against the railroad company, the administratrix could recover only what pecuniary loss she, as widow, had sustained. The recovery was in no sense assets of the estate to be distributed in accordance with the state laws relative to intestacy, but was the exclusive property of the beneficiary under the federal law. *Taylor v. Taylor, supra.*

Referring now to the death statute of this state under which the pending action was brought, we find that an analogous situation is presented. There, too, the right of action is given to the personal representatives, but for the benefit of certain designated persons, namely, the widow and next of kin, in this case the mother of the deceased. In like manner as under the federal statute, the recovery under the state statute is not for such damages as the injured party suffered and might have been compensated for had he survived, but only for the actual pecuniary loss to the specified beneficiaries. *Chicago, B. & Q. R. Co. v. Oyster,* 58 Neb. 1. It seems clear to us that the two actions must be regarded as based upon

different rights and distinct elements of recovery, and that, although in each instance the case was prosecuted by the personal representative as the nominal plaintiff, she acted therein, as the appellee contends, merely as statutory trustee for the respective parties beneficially interested.

In *Spokane & I. E. R. Co. v. Whitley*, 237 U. S. 487, L. R. A. 1915F, 736, the death occurred in Idaho, and the right of action was governed by the death statute of that state, which provides that the action might be maintained by the heirs or personal representatives. The heirs of the deceased were his widow and mother. The widow, as administratrix, brought suit and obtained judgment against the railroad company in the state of Washington, basing her action upon the Idaho statute. The mother was not a party to that action. Afterwards, the mother brought suit in her own behalf against the railroad company in Idaho, and the latter pleaded the Washington judgment in bar of the action. The mother recovered judgment, and the Idaho supreme court, on appeal, held that the administratrix was not to be regarded as representing the mother in the Washington action, and that she was not bound by the judgment therein. This was affirmed by the supreme court of the United States in the cited case, in which it was said in the opinion, by Justice Hughes, that under the Idaho statute the personal representative was not authorized to bind the heirs without their sanction, and that there was no basis for the presumption that the mother was represented in the Washington suit, or was bound by the judgment therein.

In the *Whitley* case, just referred to, the two actions involved were both founded upon the same statute, and that statute permitted either the personal representative or the heirs to maintain the action. But in Idaho, the same as in Nebraska, it is held, as stated by Justice Hughes: "The recovery authorized is not for the benefit of the 'estate' of the decedent; the proceeds of the recovery are not assets of the estate. Where the personal representa-

tive is entitled to sue, it is only as trustee for described persons,—the 'heirs' of the decedent." In the Nebraska death statute the right of action is given to the personal representative, but it is explicitly provided that it shall be for the exclusive benefit of the widow and next of kin. Notwithstanding the different wording of the two statutes, the status of the personal representative in the action is the same in both states.

Since it is held by the highest judicial authority that the personal representative in the *Whitley* case, although authorized by the Idaho statute to sue on behalf of the "heirs," could not bind the mother, as an heir, in the Washington action, because she was not a party to that action and her rights were not considered therein, it follows, we think, with still more cogency and force that the administratrix in the instant case cannot be deemed to have represented the mother of the decedent in the action against the railroad company under the federal act, by the terms of which the mother was given no right of action and was entitled to no part of the benefits. In our opinion, therefore, the action against the railroad company, being in effect an action for the benefit of the widow, was not binding upon the mother and was no bar to an action for her benefit under the state statute, although the administratrix was the nominal plaintiff in both actions.

The fact that the railroad company and the warehouse company may have been joint tort-feasors could have no bearing, unless the prior action and judgment under the federal act involved the same rights as the later action against the warehouse company, and that is to be determined by what was actually considered and adjudicated in the two actions, not by the mere fact that the actions were brought by the same nominal plaintiff.

No other controverted questions being presented, we recommend that the judgment appealed from be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and

this opinion is adopted by and made the opinion of the court.

AFFIRMED.

LULU A. MARQUIS, APPELLEE, V. LEWIS C. MARQUIS, APPELLANT.

FILED MAY 6, 1921. No. 21231.

Divorce: DECREE: MODIFICATION. Where, on appeal from a decree awarding a divorce from bed and board only, the pleadings and the findings of fact of the district court are sufficient to sustain a decree of divorce from the bonds of matrimony, this court may modify the decree so as to award an absolute divorce.

APPEAL from the district court for Scotts Bluff county: RALPH W. HOBART, JUDGE. *Affirmed as modified.*

Morrow & Morrow and *Burkett, Wilson, Brown & Wilson,* for appellant.

H. Leslie Smith, contra.

LETTON, J.

This was a suit for divorce brought by the plaintiff charging extreme cruelty on the part of the defendant. A cross-petition was filed by the defendant praying for a divorce on the ground of adultery. The court found that the charge of adultery had not been established by a preponderance of the evidence, and found facts which sustained the charge of extreme cruelty on the part of the defendant. A divorce *a vinculo* was denied and plaintiff was given a divorce from bed and board. Alimony was allowed her in the sum of $17,000, and it was ordered that $30 a month be paid for the maintenance of each of the three children whose custody was committed to the plaintiff. The custody of two other children was awarded defendant. Defendant appeals.

It would serve no useful purpose to relate the testimony in the case. The district court found, in substance,

that the charges made in the cross-petition as to adultery were not sustained, though plaintiff had been guilty of indiscreet conduct, found certain specific acts to have been committed by defendant which in law constitute extreme cruelty, and further found that "it is for the best interests of plaintiff and defendant that they should not have an absolute divorce." While we might have taken a different view of the testimony, the advantage that the opportunity of seeing the witnesses and hearing them testify gave the trial court is such that we believe we would not be justified in setting aside the findings of fact. The findings justify a divorce from the bonds of matrimony, and, when we consider all the facts in the case, we are of the opinion that the divorce should be absolute.

Coming now to the question of property rights, we are of the opinion that the allowance made was excessive, when it is considered that under the decree rendered the wife retained all her marital rights in the real estate of the husband. Plaintiff assisted to some extent in the accumulation of the property, though the extraordinary rise in the value of real estate was the main cause of the increase in the value of defendant's estate. An allowance of $20,000 as permanent alimony is made, payable in instalments of $5,000 at intervals of six months from the date of this decree, with interest at 6 per cent. per annum until paid. The order of the district court as to the custody, control and education of the three children awarded plaintiff, and the amount awarded for their support and maintenance, is affirmed, but the decree is modified to award the care of the child Viola to plaintiff, who has had her in her care and custody since the date of the decree, and an allowance of $30 a month for her maintenance from that date until she is 21 years of age is also awarded plaintiff. Additional suit money in the amount of $250 and additional attorney's fees in the sum of $400 are allowed.

The decree of the district court is modified to provide for an absolute divorce, and for allowances as stated.

AFFIRMED AS MODIFIED.

CARSTEN H. SIECK, APPELLEE, V. WALTER J. PERRY ET AL., APPELLANTS.

FILED MAY 6, 1921. No. 21470.

Appeal: HARMLESS ERROR. A judgment will not be reversed for the giving of an erroneous instruction, when it appears from the whole record that the party complaining has not been prejudiced thereby.

APPEAL from the district court for Douglas county: JAMES T. BEGLEY, JUDGE. *Affirmed on condition.*

M. O. Cunningham, for appellants.

A. E. Langdon, J. O. Detweiler and *B. N. Robertson, contra.*

LETTON, J.

Appeal from a judgment against defendants Perry for rental value of land. The facts are that plaintiff, Sieck, leased from the Union Pacific Railroad Company a part of its right of way on both sides of the "Lane Cut-Off" tracks, containing about eight acres. Afterwards defendant Perry, who owned about 130 acres of land through which both the old main line and the "Cut-Off" ran, leased the same for a cash rent of $700 to defendant Grabow. This lease excepted the strip of land leased by the Union Pacific to plaintiff, but in a later provision of this lease is the statement, "This lease also includes the crop and all the privileges of the Union Pacific Railroad right of way." Grabow took possession of the strip leased to Sieck, claiming under his lease from Perry. Grabow testifies that he plowed the strip, although Sieck told him Perry had no right to it; that he spoke to Perry about this, and Perry said to farm it, and if Sieck came to throw him off. This testimony is corroborated by another witness who heard the conversation. Sieck testifies that, when he went to see Perry about Grabow's taking possession, Perry told him he had a lease to it, and would farm it that year. All

of this testimony is denied by Perry. He also testified that in June he saw Grabow cultivating this strip and told him he had no right there; that Grabow said that Sieck had not done anything with it, and he made up his mind he would farm it. Perry admits that Sieck had called him on the telephone two or three times about the matter and had come to see him, but says he told him he was not interested, and "cut him off."

The court instructed the jury that, under the pleadings and evidence in the case, the plaintiff was entitled to recover from one or both of the defendants the reasonable cash rental value of the premises on March 1, 1917. This instruction was justified by the evidence. Complaint is made of instruction No. 6. The court evidently was of the opinion that an affirmative defense was pleaded. The answer of the appellant consists essentially of a general denial. The later allegations merely amplify this by pleading facts, but do not set up an affirmative defense. The burden of proof was upon the plaintiff to establish his contention. Instruction No. 6 removed this burden and was erroneous. The overwhelming weight of testimony, however, is with the plaintiff, and we are convinced that the giving of this instruction did not prejudicially affect the defendants.

It is also complained that the verdict is excessive. There was no proof that the land had ever rented for a share of the crop. The testimony as to the rental value varied from $3.50 to $8 an acre, except that Sieck testified it was worth $25 an acre. His lease from the railroad company was at the rate of $3 an acre.

Taking all the evidence into consideration, we believe the recovery is excessive, and that a recovery of $64 with interest from March 1, 1917, is all that the evidence will sustain. Unless plaintiff files a remittitur for all in excess of this amount, the judgment is reversed. If such remittitur is filed within 20 days, it will stand affirmed.

AFFIRMED ON CONDITION.

SECURITY STATE BANK OF EDDYVILLE, APPELLEE, V. AETNA INSURANCE COMPANY, APPELLANT.

FILED MAY 6, 1921. No. 21420.

1. **Insurance:** POLICY: BREACH OF CONDITION: STATUTE. Under the statutes of Nebraska, the violation of a condition in a fire insurance policy by the mortgaging of insured chattels does not invalidate the insurance, unless the breach of contract contributes to the loss. Rev. St. 1913, sec. 3187.
2. ———: ATTORNEY'S FEE. Under the statutes of Nebraska, as amended in 1919, the court has no authority to tax an attorney's fee in favor of plaintiff upon rendering judgment in his favor in a suit on a fire insurance policy covering personal property only. Laws 1919, ch. 103, sec. 2, and ch. 105, sec. 1, subd. 5.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed in part and reversed in part.*

Montgomery, Hall & Young, for appellant.

John A. Miller and *J. M. Fitzgerald, contra.*

ROSE, J.

This is an action to recover $1,600 for fire insurance on personal property in a garage conducted at Eddyville in the name of Leech Brothers, the insured. The policy was issued October 3, 1917, and there was a total loss by fire March 5, 1918. After the fire, the policy was assigned to plaintiff. The answer contained the plea that the insured property, without the consent of defendant, in violation of the policy, was transferred to plaintiff by a bill of sale November 23, 1917, and that the insurance was thus invalidated. In a reply to the answer plaintiff alleged that the bill of sale was in effect a chattel mortgage which in no way contributed to the loss. The case was tried before the district court without a jury, and the issues of fact, upon sufficient admissible evidence, were all settled in favor of plaintiff. Defendant has appealed from a judgment against it for the full amount of plain-

tiff's claim.

In the absence of proof that the giving of the chattel mortgage contributed to the loss, did that violation of the policy invalidate the insurance? The answer depends on the following provisions of statute:

"WARRANTY NOT TO AVOID POLICY UNLESS DECEPTIVE. No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." Rev. St. 1913, sec. 3187.

These provisions are by construction a part of the policy, but it is argued that, as indicated by the catch-words and the first sentence, the legislation contemplates conditions existing at the time of the application for the insurance and the issuance of the policy, but not subsequent violations. The argument is refuted by the literal terms of the act itself. The catch-words, even if a part of the enactment, do not limit specific provisions in plain language. The legislation must be considered as a whole. To the enactment in the first sentence on the subjects of misrepresentation and warranty in preliminary negotiations, the second sentence adds a provision on the existence of breach of condition in the policy itself. The statute declares that the breach of a condition in the policy shall not avoid it, "nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss." As applied to the policy in suit, the act of the legislature does not permit the forfeiture of the insurance on account of the giving of the chattel mortgage unless that breach of condition contributed to the loss. No other interpretation is per-

missible. There is no evidence that the breach of condition contributed to the loss. It follows that there was no defense to the merits of the case made by plaintiff, and that the judgment in its favor for the loss covered by the policy is not erroneous.

On another phase of the appeal an attorney's fee of $300 taxed by the trial court in favor of plaintiff as costs is assailed as erroneous. Under the statutes in force when the judgment was rendered the attorney's fee was unauthorized. As a part of the remedy in an action on a policy insuring real property, the taxing of an attorney's fee is allowable, but the statute does not extend to insurance on personalty, the kind of property covered by the policy in suit. Rev. St. 1913, secs. 3210, 3211. Prior to 1919 a statute authorized the court to tax an attorney's fee in favor of plaintiff upon rendering judgment in his favor on a policy of "indemnity" insurance, which was construed to include fire insurance. Rev. St. 1913, sec. 3212; *Johnson v. St. Paul Fire & Marine Ins. Co.*, 104 Neb. 831. In 1919, however, the legislature changed the word "indemnity" to "liability" and defined "liability insurance" as insurance "against loss or damage resulting from accident to or injury, fatal or nonfatal, suffered by an employee or other person for which the insured is liable." Laws 1919, ch. 103, sec. 2, and ch. 105, sec. 1, subd. 5. Under the new legislation "liability" insurance does not include fire insurance on personal property. With the law thus changed, attention has not been directed to a statute authorizing the court to tax an attorney's fee as costs upon rendering judgment in favor of plaintiff in an action on a fire insurance policy covering personal property only, nor has such a statute been found.

The judgment for the insurance is affirmed and the allowance of the attorney's fee is reversed, each party to pay its own costs in the supreme court.

AFFIRMED IN PART AND REVERSED IN PART.

BANK OF COLLEGE VIEW, APPELLANT, V. J. F. NELSON ET AL., APPELLEES.

FILED MAY 6, 1921. No. 21453.

Banks and Banking: EXCESSIVE LOAN. As a general rule, courts will not refuse to enforce a bank's contract for the loan of money, or disallow damages for a breach thereof, merely because the amount lent exceeds 20 per cent. of the capital and surplus, notwithstanding a statute penalizing the banker for exceeding that limit.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Fred C. Foster, O. K. Perrin and *S. M. Kier,* for appellant.

Hall, Baird & Williams, contra.

ROSE, J.

Plaintiff is a state bank. It brought this action on two promissory notes, one for $1,390 and the other for $400. Defendants had executed and delivered the notes, which were due and unpaid, and made no defense to them, but pleaded a counterclaim for damages amounting to $17,500 for the breach of a contract obligating plaintiff to lend them approximately $6,500 for the specific purpose of constructing a garage on lots owned by them in College View. The answer to the counterclaim alleged that the contract for the loans was unlawful and void because performance required the violation of a statute prohibiting plaintiff from lending to an individual more than 20 per cent. of its capital and surplus. Rev. St. 1913, sec. 312. The facts pleaded by plaintiff in the answer to the counterclaim were put in issue by a reply. The trial court directed a verdict in favor of plaintiff for the amount due on the notes—$2,056.27. On the counterclaim for damages the jury rendered a verdict in favor of defendants for $2,056.37. Defendants recovered a judgment for

10 cents, the difference between the two items. Plaintiff has appealed.

The issues of fact and the amount of the damages resulting from plaintiff's breach of the contract to make the loans were, upon sufficient admissible evidence, settled by the jury in favor of defendants.

Was the contract void in the sense that plaintiff could violate it without becoming liable for resulting damages? In limiting the amount of an individual loan to 20 per cent. of the capital and surplus and in directing punishment for exceeding that limit, the statute established a rule for the government of the bank. Rev. St. 1913, sec. 312. The penalty for violating the act applies to "any officer, director, or employee" of the bank. An excessive loan does not subject the borrower to a penalty. He does not stand before the statute in the same light as the offending banker. The penalty is a matter between the state and the lender. The general rule is that an excessive borrower cannot prevent the collection of his debt by pleading and proving a violation of the statute. In demanding performance of the bank's contract for an excessive loan, the borrower is not in a worse situation than the banker who is subject to a penalty for violating the law governing the bank in the transaction of its business. The borrower has nothing to do with the business management to which the statutory limitation applies. The maximum amount lendable to an individual varies with the capital and surplus. The facts are not equally available to both contracting parties at all times. The statute does not declare that excessive loans are void. They are generally enforced. In the present case both parties had performed the contract to such an extent that a heavy loss fell on the borrowers through failure of the lender to perform fully all of its obligations. Where the law permits a bank to enforce a contract for an excessive loan, it should not be permitted to escape liability for the damages resulting from its failure to fully perform such a contract. For these and other reasons, the great weight

of modern authority supports the doctrine that courts will not refuse to enforce a bank's contract for the loan of money, or disallow damages for a breach thereof, merely because the amount lent exceeds 20 per cent. of the capital and surplus, notwithstanding a statute penalizing the banker for exceeding that limit. 7 C. J. 712, 713, secs. 445-450; *Blochman Commercial & Savings Bank v. F. G. Investment Co.*, 177 Cal. 762; *Goldstein v. Union Nat. Bank*, 109 Tex. 555; *Schuber v. McDuffee*, 169 Pac. (Okla.) 642. To this rule the courts of Nebraska are committed. *Smith v. First Nat. Bank*, 45 Neb. 444.

With the principal question of law thus determined in favor of defendants, no prejudicial error has been found in the rulings on evidence or in the giving or refusing of instructions.

AFFIRMED.

LEYPOLDT & WICKSTROM, APPELLEE, V. JAMES M. ALDERMAN, APPELLANT.

FILED MAY 6, 1921. No. 21250.

1. **Evidence**: WRITTEN CONTRACT: PAROL EVIDENCE. When parties have reduced their contract to writing, it is elementary that, in the absence of fraud or of mistake, oral evidence is not admissible to vary its terms.
2. **Evidence** examined, and *held* that the judgment of the district court is without reversible error.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

J. A. Douglas and *A. F. Mullen*, for appellant.

Hoagland & Carr, Hotz & Lee and *D. H. Sheehan, contra.*

DEAN, J.

Leypoldt & Wickstrom is a copartnership engaged in the hay business at Hershey. Leypoldt & Pennington is a

copartnership engaged in the same business at North Platte. Mr. Leypoldt is interested in the Hershey and North Platte firms, hence two cases were consolidated and tried in the district court as one case and they will be so considered here. The partnership sued to recover from James M. Alderman, the defendant, $19,231.22 for failure to deliver a quantity of hay alleged by the respective partnerships to have been purchased from him. A jury was waived. Leypoldt & Wickstrom recovered a judgment for $2,379.40, and Leypoldt & Pennington recovered a judgment for $4,079.20. Defendant, Alderman, appealed. The plaintiff partnerships filed a cross-appeal.

Leypoldt & Wickstrom allege that from November 9 until November 11, 1916, they purchased 50 cars of prairie hay from defendant at $7 a ton, to be delivered in three months, as evidenced by an exchange of letters and telegrams, and that such letters and telegrams so exchanged between the parties constitute a contract.

On November 11, 1916, the same parties executed the following instrument: "Newport, Neb., November 16, 1916. This is to confirm sale of one-hundred cars number one upland hay, at $7.00 per net ton track Newport, Nebraska, and fifty cars number two upland hay at $6.00 per net ton, f. o. b. Newport, to Leypoldt & Wickstrom at Hershey, Nebraska, to be shipped to different points as specified by them from time to time. Order to be filled at the rate of from three to four cars per day, loading subject to weather conditions, and car supply. Further acknowledge receipt of Leypoldt & Wickstrom check for $700.00 to apply on the above sale. J. M. Alderman. Leypoldt & Wickstrom, by Carl Wickstrom."

Leypoldt & Wickstrom contend that the letters and telegrams constitute a contract for the purchase of 50 cars in addition to the 150 cars of hay that are mentioned in the instrument of November 11. The court, however, found, and properly so, that the latter, by its terms, included the 50 cars described in the letters and telegrams.

Two additional instruments were entered into between plaintiff, Leypoldt & Pennington, and defendant, Alderman, under date of November 21, 1916. Except as to the price, which was fixed at from $6 to $7.25 a ton, and the amount of hay to be delivered, namely, 175 cars, they are, in all material respects, substantially the same as the one under date of November 11, 1916, that was executed by Leypoldt & Wickstrom and defendant. There seems to be no dispute between the parties respecting the quantity of hay that was delivered.

Defendant in his answer alleged, in substance, that the formal instruments, dated November 16 and 21, are merely memoranda of the transactions between the parties, and prayed that they be reformed to show that fact. He further alleged that there were two or more oral hay contracts and they were made subject to car supply and were not binding as to any hay undelivered after the expiration of three months, and prayed that the alleged oral contracts be decreed "to be the contracts between the parties hereto."

The district court, however, found against defendant on this point and decreed in effect that "the memorandum, copy of which is set out in plaintiff's petition (the formal contracts)," constituted the contracts between the parties, and that defendant was not entitled to a reformation.

Defendant also alleged that the 50 cars referred to in the letters and telegrams were, by the parties, intended to be included in the amount described in the contract of November 16, namely, 150 cars; that the orders were to be filled from current hay; that defendant retained the option to fill other hay orders, and that in no event was the hay to be furnished from stored hay. With respect to the 50 cars of hay, the court properly held that they were included in the written contract of November 16, which incorporated in its terms the prior letters and telegrams. The contract seems to be complete in itself, and it was apparently executed by the parties as such, and, of course, in the absence of fraud or mistake, it cannot be

varied by oral evidence.

There was some evidence on the part of defendant tending to prove that there was a shortage of cars during a part of the shipping period. It appears, however, that hay prices were on the incline, and that defendant, instead of shipping hay to plaintiffs with such cars as were obtainable, shipped to other buyers who paid more than the contract price agreed on between plaintiffs and defendant. It is argued by plaintiffs that the court erred in basing the value on the market prices that prevailed at Newport, the local shipping point. We do not think so. It appears that there is a hay market there, and there is sufficient evidence to sustain the findings of the court on the question of value.

The court found that defendant violated the terms of his several contracts on March 26, 1917, and that plaintiffs were therefore entitled, as damages, to the difference between the contract price and the market price of the different grades of hay respectively on that date. On this point defendant contends that the contracts called for delivery of the hay by instalments, and that the damages, if any, accrued on the failure of the delivery of each instalment. He argued that there was no material rise in hay prices until after March 26, 1917, and that plaintiffs were therefore not entitled to receive at the most more than the difference between the contract price and the market price when the breach occurred. Under the facts, we do not think defendant's argument is tenable. It was not until March 26 that defendant refused to deliver any more hay. It follows that he then and thereby became liable for damages.

The evidence throughout sustains the judgment of the trial court, and it is therefore

AFFIRMED.

DAY, J., not sitting.

DURLAND TRUST COMPANY, APPELLANT, V. RUEBEN S. PAYNE, APPELLEE.

FILED MAY 6, 1921. No. 21264.

Evidence: WRITTEN CONTRACT: PAROL EVIDENCE. When plaintiff sues upon a contract, claiming benefits thereunder, and such contract is one which was made between two other parties, plaintiff not being a party thereto nor in privity with either of such parties, the parties to the contract sued on may show by parol what the real agreement was between them, though such agreement is not in accord with the recitals in the written instrument that purports to be their contract.

APPEAL from the district court for Antelope county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

Mapes & McFarland, for appellant.

Boyd & Murphy, contra.

DEAN, J.

Plaintiff sued to recover on a deficiency judgment that was obtained in a foreclosure of real estate on land formerly owned by defendant. Judgment was rendered against plaintiff, the suit was dismissed, and he appealed.

On July 1, 1909, George Fletcher and wife were the owners of two town lots in Bloomfield, Knox county, whereon an opera house had been built. On that date they obtained a loan of $7,000 from plaintiff. To secure the loan they gave a real estate mortgage on the property in question. Within about a year thereafter, in an exchange of real estate, Fletcher and wife conveyed the property to Rueben S. Payne, the defendant here. Subsequently the property was successively owned by several different persons. In October, 1914, the last interest coupon on the Fletcher mortgage became delinquent, and shortly thereafter an action of foreclosure was commenced. Fletcher was then deceased. It appears too that in the foreclosure case neither the Paynes, nor any of the other prior owners, were made parties defendant.

Subsequently the land was sold under execution to satisfy the mortgage decree and brought $7,500. This sum was applied on the amount found to be due, interest and costs included. For the unpaid remainder of the debt a deficiency judgment approximating $850 was rendered against A. P. Philson and wife, in whom the record title to the property then stood. It was to recover the amount of this deficiency from defendant that this suit was commenced.

Owing to a mistake made by the scrivener, in the numerical description of the property, it became necessary for the Fletchers subsequently to execute and deliver to Payne a second deed. Plaintiff relies upon certain of the recitals in the deeds. One contains this: "This deed is given subject to a mortgage of $7,000.00 to the Durland Trust Company, which mortgage the grantee herein assumes as part of the consideration hereof." This recital is in the other: "This conveyance is made subject to a mortgage now thereon of seven thousand dollars ($7,000.00) with interest at 7% from January 1, 1910, which grantee herein assumes as a part of the purchase price herein."

The evidence shows that, when Fletcher and Payne exchanged their respective properties, it was mutually agreed by them that the recitals in the Fletcher conveyance, upon which plaintiff relies, should not be construed to mean that the vendee should be holden for the mortgage debt or any part of it.

W. S. McAllister is a real estate broker and, so far as the record discloses, he does not profess to be learned in the law. He testified that he effected the exchange of properties in question, and that he advised both Fletcher and Payne that, if they used the word "assumes" in the conveyance, unless it was followed by the words "and agrees to pay," Mr. Payne would not be obligated to pay the mortgage debt or any part of it, and that they followed his advice. He further testified that Payne expressly declared at the time that he would not at all ac-

cept the deed if it provided that he should "assume and agree to pay the mortgage," or if it obligated him to pay it, but that he would accept it, and consummate the exchange of properties, if the word "assumes" was used in the deed, and the words "and agrees to pay" were omitted, it being his expressed understanding and belief and the expressed belief and understanding of Mr. Fletcher, acting as they were under the advice of the witness, that, if the conveyance was so drawn, Payne would not be liable for any part of the mortgage indebtedness. McAllister testified that they so agreed.

Defendant cites and relies on section 7909, Rev. St. 1913, which reads: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

It seems clear that if, under the act, "that sense is to prevail against either party in which he had reason to suppose the other understood it" with respect to the meaning of an agreement, the sense is of course to prevail in which both parties to an agreement understood it. The agreement between Fletcher and Payne, with respect to the meaning that was to be placed upon the conveyance, clearly appears to have been the inducement that caused Payne to enter into the agreement and accept the conveyance. The rights of purchasers without notice are not involved here. No consideration passed from plaintiff to defendant. Whether the debt should be assumed by Payne or whether it should not be assumed by him was, under the facts, solely the concern of Fletcher, of the one part, and of Payne, of the other part. They had perfect right to make the agreement in question. The status of plaintiff's claim, as against any person against whom it had a right of action, was not changed by any act of the defendant, and, as against him, it appears that plaintiff should not be heard to complain.

In 22 C. J. at page 1292, it is said: "The rule excluding parol evidence to vary or contradict a written instru-

ment applies only in controversies between the parties to the instrument and those claiming under them. It has no application in controversies between a party to the instrument on the one hand and a stranger to it on the other, for the stranger not having assented to the contract is not bound by it, and is therefore at liberty when his rights are concerned to show that the written instrument does not express the full or true character of the transaction. And where the stranger to the instrument is thus free to vary or contradict it by parol evidence his adversary, although a party to the instrument, must be equally free to do so. This has been held to be true with respect to writings of all kinds, as for example, deeds; mortgages; leases; bills of sale; contracts of sale; licenses; insurance policies, and contractual receipts."

We do not find reversible error. The judgment is right, and it is

AFFIRMED.

NELLIE WALTON, APPELLEE, *v.* VINCENT CARROLL, APPELLANT.

FILED MAY 6, 1921. No. 21356.

Bastardy: SUFFICIENCY OF EVIDENCE. The record examined, and *held* that the verdict of the jury is supported by the evidence.

APPEAL from the district court for Knox county: ANSON A. WELCH, JUDGE. *Affirmed.*

J. F. Green and *M. F. Harrington*, for appellant.

Fred H. Free, Free & Pickens and *P. H. Peterson, contra.*

DEAN, J.

On July 19, 1918, the prosecutrix, an unmarried woman of 18, was delivered of a bastard child. The jury found that defendant was its father. The court thereupon de-

creed that he should pay $2,000 to the prosecutrix for the child's maintenance, in instalments, namely, $75 on October 18, 1919, and $75 on the 18th of every month thereafter, until the $2,000, and the costs of the suit, were fully paid. Defendant appealed.

Prosecutrix testified, in substance, that her parents' home was on the outskirts of the village of Creighton; that she kept company with defendant for about three months, when, about August 18, 1917, he first had sexual intercourse with her, on a Sunday afternoon, at her parents' home, when they were away; that the next time was about October 18 in the nighttime in the yard of her parents' home; that he had sexual intercourse with her once and sometimes twice a month until about two months before the child was born. Otto Hasenpflug and his wife, who is a sister of the prosecutrix, testified that they saw her and defendant together on the evening of October 18, going into a picture show at Creighton at about 9 o'clock in the evening, after the first show was over. Another testified that he saw them together at about 10 o'clock sometime in October on a Saturday night, and that they were "going west toward town." He was unable to fix the date. The father of the prosecutrix testified that he had a talk with defendant respecting the parentage of the child, and that he asked him " if he had been with the girl, and he said, yes, he had several times;" that he had seen defendant and his daughter together on several occasions, and that defendant was often at his home.

Defendant and the prosecutrix are about the same age. He testified that he took her to a picture show three or four times. He denied that he ever had the relations with her to which she testified. Respecting his whereabouts on October 18, 1917, defendant testified that he was then working on his father's ranch, and that he was there on the evening and the night of that day, and not elsewhere as she testified. He admitted that he had two conversations with Mr. Walton, and that, when he was asked by him if he was the father of the child he told him that he

was not, and that nothing was said to him about marriage.

The prosecutrix introduced a picture in evidence that shows the defendant seated between her and another young girl in defendant's one-seated buggy. She testified that it was taken in November, 1917, or soon after the illicit relations between them began. Defendant argues that the foliage that forms the back ground of the picture shows that it must have been taken earlier in the year. From this he argues that the presence of the foliage contradicts the story of the prosecutrix, and that the court erred in refusing to give an instruction which reads: "Where the evidence of any witness or witnesses, if such there be, conflicts with the actual physical facts and conditions, then it is the duty of the jury to accept as true the physical facts and conditions as against such evidence." We do not think the argument of the defendant is tenable. The prosecutrix may have been mistaken in regard to the time when the picture was taken, but that is merely a collateral issue. The testimony of five or six young boys of 18 was introduced tending to prove that the prosecutrix made statements in a public place to the effect that defendant was not responsible for her condition. This was denied by her. It may be added that on this, as on every material point, the evidence conflicts, but it was all submitted to the jury under proper instructions, and the questions of fact were settled by the verdict. We do not find reversible error.

The judgment of the district court is therefore

AFFIRMED.

ROSE, J., not sitting.

KEITH L. PIERCE ET AL., APPELLEES, V. LEONARD H. ROACH, APPELLANT.

FILED MAY 6, 1921. No. 21355.

1. **Brokers: COMMISSIONS.** A real estate broker employed to procure a purchaser for the sale of land is entitled to his commission

when he has procured a purchaser ready, able, and willing to buy on the terms proposed by the seller.

2. **Evidence** examined, and held sufficient to sustain the judgment.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Ernest M. Slattery, for appellant.

E. D. Crites and *F. A. Crites, contra.*

DAY, J.

The plaintiffs, real estate brokers, bring this action to recover a stipulated sum from the defendant for procuring a purchaser ready, able, and willing to purchase his lands in accordance with the terms proposed by him. By stipulation of the parties a jury was waived and the trial had to the court. There was judgment in favor of the plaintiffs, from which defendant has appealed.

The written contract appointing the plaintiffs as defendant's agents to sell his land, and fixing the commission to be paid, consists of letters passing between the parties. No point is made as to the sufficiency of the contract under our statute or the amount of commission to be paid.

The record consists chiefly of a number of letters and telegrams passing between the parties, many of which have no important bearing on the question, except to show the progress of the negotiations leading up to the sale.

It appears that in September the plaintiffs submitted to the defendant a proposition made by one of its customers, to which on September 16 the defendant replied: "Will accept proposition if purchaser is ready to close now." A few days later the plaintiffs notified the defendant that the purchaser had deposited $1,000 on the contract and requested the abstract sent. Some considerable delay was caused in procuring the abstracts, and some minor changes in the terms of sale were made by mutual consent.

On October 8 the defendant wrote a letter acknowledging the receipt of a telegram bearing on the negotiations, and noted that the terms of his letter of September 25 were accepted by the purchaser. He also stated: "If the abstracts are satisfactory, and I have no doubt they will be, kindly prepare contracts in accordance with my letter of the 25th."

On October 19 the defendant wrote that he was disgusted with the delay, and stated: "I am canceling the entire transaction, so far as I am concerned, and request that you return abstract to me." On the day this letter was written, plaintiffs wrote to the defendant that the papers would reach him in a few days, and, on the day the defendant's letter was received, the plaintiffs did send the papers and the draft, explaining, by telegram, that the delay had been occasioned by sickness of the attorney. Defendant refused to complete the transaction.

It is urged by counsel for the defendant that the transaction was to be closed up at once, and considerable stress is laid upon the defendant's telegram accepting the proposition "if purchaser is ready to close now."

After that telegram was sent, changes were made in the proposal and the terms finally agreed upon on October 8, after which, according to the defendant's letter, the abstracts were to be examined and proper instruments prepared.

After the terms of sale had been finally agreed upon, the parties had a reasonable time within which to examine the abstracts, prepare the necessary papers, and close the transaction. Under all of the circumstances, we are not prepared to say that the delay was unreasonable. The defendant resided in Chicago and the plaintiffs in Hemingford, in this state. In the usual course of mail the defendant's letter of October 8 would not reach the plaintiffs until October 10.

The defendant will not be permitted to arbitrarily cancel the transaction and refuse to carry it out and thus defeat the plaintiffs out of their commission. The rule is

well settled that, when land is placed in the hands of a broker to sell or find a purchaser for it, he is entitled to his commission when he has secured a purchaser ready, able, and willing to purchase upon the terms proposed by the owner.

The evidence is clear that the plaintiffs procured a purchaser satisfying the requirements of the rule above announced. The plaintiffs have fully performed their part of the contract and are entitled to the judgment.

AFFIRMED.

WILLIAM H. OSTENBERG, JR., APPELLANT, V. SCOTTSBLUFF INVESTMENT COMPANY, APPELLEE.

FILED MAY 6, 1921. No. 21786.

1. **Landlord and Tenant:** FORFEITURE: RELIEF IN EQUITY. Equity has power to relieve against a forfeiture of a lease for the nonpayment of rent on the day stipulated, and such power should be exercised when the circumstances are such as to call for the exercise of equitable principles, and where, if withheld, gross injustice will follow, when the failure to pay the rent was not wilful or such culpable neglect as to amount to the same thing.
2. ———: ———: ———. Where, by the terms of a five-year lease, $1,800 is paid in the beginning as a payment to be applied on the last year's rent, with the further provision that $160 should be paid on a day certain each succeeding month thereafter for four years, and $120 for the first month of the fifth year, at which time payment of rent was to cease, it being understood that the monthly instalments of rent, together with the $1,800, would be full payment for the entire period, with the further provision that, in case the lessee breached the covenant of the lease with respect to payment of the rent when due, the lessor could terminate the lease, and in that event the $1,800 cash advanced was to be forfeited to the landlord, *held* that, on a breach of the covenant to pay a monthly instalment when due, equity will relieve against the enforcement of such penalty.
3. ———: ———: REMEDIES. The remedy created by sections 8466, 8467, Rev. St. 1913, does not in any way limit the power of a court of equity.

APPEAL from the district court for Scotts Bluff county: RALPH W. HOBART, JUDGE. *Reversed.*

Morrow & Morrow, for appellant.

Wright, Mothersead & York, contra.

DAY, J.

This is an action in equity to enjoin the defendant from prosecuting an action of forcible entry and detainer instituted by the latter to regain possession of certain demised premises for the nonpayment of rent. A demurrer was filed on the ground that "said petition does not state facts sufficient to constitute a cause of action." The demurrer was sustained, and, plaintiff electing to stand on his petition, the cause was dismissed. From this judgment the plaintiff appeals. The sole question we are to decide is whether a cause of action is stated in the petition.

The petition is quite lengthy, and, as no useful purpose will be subserved by setting it out in terms, we will content ourselves with a brief statement of the substance of such portions as will serve to make clear the precise point in controversy.

It appears that the plaintiff and the defendant are, respectively, the successors of the rights of the original lessee and lessor in the transaction. It further appears that on February 11, 1917, the defendant's grantor, who at that time was the owner of the premises in controversy, by a written lease, demised the premises to the plaintiff's assignor for a period of five years commencing February 11, 1917, and terminating February 10, 1922. The consideration to be paid was $9,600, payable as follows: $1,800 in cash upon the execution of the lease, and the sum of $160 on February 11, 1917, and a like sum on the 11th day of each succeeding month thereafter up to, and including, January 11, 1921, and the sum of $120 on February 11, 1921, at which time the payment of rent was to cease. It was the intention of the parties that the monthly instalments of rent, together with the $1,800 cash payment, would constitute the entire rental for the full

period of the lease. The lease contained a provision that, if the lessee failed, neglected, or refused to fulfil or keep any of the covenants of the lease, the lessor had the right at his option to declare the lease at an end, and in such case the lessee agreed to yield up peaceable possession of the premises, and the sum of $1,800 advanced in payment of the last instalment of rent was to be forfeited to the lessor. It is alleged that since the defendant became the owner of the premises the rent has not at all times been punctually paid, but that the defendant received and accepted the same without objection or protest, and thereby waived the strict performance of the covenants of the lease in that respect. It is also alleged that on July 20, 1920, the plaintiff mailed to the defendant his check for $160 in payment of the rent due and payable on July 11, and again in like manner on August 17 his check for $160 in payment of the rent due and payable on August 11; that plaintiff discovered that the two checks above mentioned had never been cashed, and thereupon spoke to one of the defendant's officers about it, who replied that he would "look into the matter and straighten it up;" that on September 16 the plaintiff again mailed his check to the defendant for $160 in payment of the rent due September 11, 1920. On September 17 the defendant served notice on the plaintiff that it had elected to declare the lease at an end, giving as a reason therefor the failure of the plaintiff to make the payments of the instalments of rent due July 11, August 11, and September 11, and on the same day served a notice on the plaintiff to quit the premises, stating in the notice that, if the plaintiff failed to comply therewith within 3 days, legal proceedings would be commenced to obtain possession of the premises. On September 18 the defendant returned to the plaintiff his check of September 16. On receiving the notice to quit, the plaintiff immediately tendered to the defendant the entire amount of rent in arrears, which the defendant refused to accept. It is further alleged that the defendant has commenced an action of forcible entry and detainer

against the plaintiff; that at no time has defendant ever made demand for the rent or returned or offered to return the $1,800 cash paid in the beginning, or any part thereof; that the plaintiff has spent large sums in furnishing and fitting the premises for conducting therein a moving picture theatre, and that it is impossible to secure another location; that the enforcement of the forfeiture will impose upon the plaintiff great and irreparable injury, for which he has no adequate remedy at law. The plaintiff offers to do equity and prays the intervention of the equity power of the court to prevent a forfeiture of the lease.

From the foregoing allegations of the petition it clearly appears that the defendant predicates his right to forfeit the lease upon the sole ground of the failure of the plaintiff to pay the rent upon the stipulated day. It may well be doubted whether the defendant could be heard to complain that the rent for the months of July and August was not paid. The petition alleges that checks were mailed to the defendant in payment of the rent for these months and presumably they were received by it. If the defendant received these checks and retained them without objection or protest, it would now be estopped to claim that the payment was not made on the day appointed. This objection, however, would not apply to the September rent.

It is a well-settled rule that a court of equity has power to relieve against a forfeiture of the term of a lease for the nonpayment of rent on the day stipulated. This is usually placed upon the ground that the condition of forfeiture is intended as a mere security, and that when the landlord has received his rent, and interest, and costs, he has received all he is entitled to under his contract. The power, however, is not exercised except where the circumstances are such as to call for the exercise of equitable principles, and the relief is not ordinarily granted when the failure to pay the rent is wilful or the result of such culpable neglect as to amount to the same thing.

In 1 Pomeroy, Equity Jurisprudence (4th ed.) sec. 453,

the rule is stated thus: "Where a lease contains a condition that the lessor may reenter and put an end to the lessee's estate, or even that the lease shall be void, upon the lessee's failure to pay the rent at the time specified, it is well settled that a court of equity will relieve the lessee and set aside a forfeiture incurred by his breach of the condition, whether the lessor has or has not entered and dispossessed the tenant. This rule is based upon the notion that such condition and forfeiture are intended merely as a security for the payment of money."

The same principle is announced in 16 R. C. L. 1146, sec. 666; 2 Tiffany, Landlord and Tenant, 1412, sec. 194, subd. 3; *Wylie v. Kirby,* 115 Md. 282; *Sunday Lake Mining Co. v. Wakefield,* 72 Wis. 204; *Shriro v. Paganucci,* 113 Me. 213; *Creamery Dairy Co. v. Electric Park Co.,* 138 S. W. (Tex. Civ. App.) 1106.

The case at bar, in its facts, presents a much stronger case for equitable relief than those where the term of the lease alone is sought to be forfeited for the nonpayment of rent. Here the landlord is not only seeking to terminate the leasehold, but also seeks to appropriate the $1,800 cash which becomes forfeited to him by the terms of the lease. This is clearly a penalty against which equity always grants relief.

In 3 Story, Equity Jurisprudence (14th ed.) sec. 1728, it is said: "Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury."

But it is urged by the defendant that the forfeiture of the lease is a right given, not only by the terms of the lease, but is expressly authorized by sections 8466, 8467,

Rev. St. 1913, wherein it is provided that an action of forcible entry and detainer may be maintained whenever the tenant is holding over his term, and that he would be deemed to be holding over the term "whenever he has failed, neglected, or refused to pay the rent or any part thereof when the same became due," and it is argued that a court of equity will not interfere with one who is pursuing a purely statutory right.

Ordinarily it is true that a court of equity will not interfere with a statutory remedy, and yet one can easily imagine a situation where, even as against a statutory remedy, equity will grant relief. It must also be borne in mind that the statute itself does not forfeit a lease for the nonpayment of rent. The clear purpose of the act was to provide a speedy remedy to the landlord to regain possession of his premises when his tenant was holding over his term, or when the tenant had failed, neglected, or refused to pay the rent. It gives the landlord the right to terminate the tenancy, but does not require him to do so. It was not the intention of the legislature by this act to in any wise limit the power of a court of equity to grant relief when the circumstances were such that it ought to be exercised.

As before stated, the defendant is not only seeking to terminate the leasehold, but also to avail itself of the $1,800 cash deposit which, by the terms of the lease, becomes forfeited to the landlord in case of a breach of the covenants of the lease. This is clearly a penalty against which equity should grant relief.

Upon the plainest principles of justice and equity, it would seem an unconscionable rule which would permit a forfeiture of the lease which carried with it the forfeiture of the $1,800 cash payment, as is sought to be done by the defendant, and the law as a science would be unworthy of the name if it confessed itself powerless to afford relief in such a situation.

On the record presented we are unanimous in the view that the case is one calling for the exercise of equitable

relief. The plaintiff is without an adequate remedy at law to save himself from the penalty of his contract and his appeal to equity is properly made. He should be required to do equity by paying the arrears of rent with interest. In this proceeding each party should bear his own costs.

The judgment of the lower court is reversed and the cause remanded for further proceeding in accordance with this opinion.

REVERSED.

NYE-SCHNEIDER-FOWLER COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILROAD COMPANY, APPELLANT.

FILED MAY 6, 1921. No. 21248.

1. Carriers: LIABILITY. A railroad company is liable for loss of grain shipped over its road, and the proof of loss makes a *prima facie* case against the company, by reason of the presumption that the loss resulted from some cause other than one which would exempt the company from liability; but the company is not liable for the natural shrinkage in weight of grain during shipment, due to its drying and losing a percentage of its moisture content.
2. ———: LOSS OF GRAIN: BURDEN OF PROOF. The burden of proving the extent of loss of grain from the car during shipment is upon the shipper and does not shift to the railroad company.
3. ———: ———: ———. Proof of weights of grain before and after shipment, when shown to have been carefully made and with proper apparatus, is presumptively correct; but, where the railroad company introduces evidence of mistakes, or other evidence tending to impeach the accuracy or reliability of the weights, or of the record of the weights made, the question of the correctness of the weights is for the jury and is a fact which the shipper must prove by a preponderance of the evidence.
4. ———: ———: ———. Where evidence is introduced to show that grain will shrink in weight during shipment, owing to loss of moisture content, it at once appears that the mere discrepancy in weight before and after shipment cannot be relied on alone to prove the actual loss of grain from the car, and the burden, therefore, of proving such shrinkage, or the reasonable limit of such shrinkage, and of making allowance therefor, is upon the shipper.

5. Instructions on the burden of proof in such cases examined, and *held* erroneous.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

Wymer Dressler and C. H. Gorman, for appellant.

Courtright, Sidner, Lee & Jones, contra.

FLANSBURG, J.

Action for damages for loss of grain in shipment over defendant's railroad. The case originally involved 299 causes of action, covering as many separate shipments made, within the state, during the years 1914, 1915, and 1916. The jury found for the plaintiff on 47 causes of action, and from the judgment entered thereon the defendant appeals. As to the other causes of action, the plaintiff does not appeal, and they are now out of the case.

The amount of the individual claims ranged from $1.50 upwards, and in all causes of action, where the amount claimed was less than $12, the jury found for the defendant.

Each of the claims was based on what is known as a "clear record" shipment. The cars at loading point were inspected and coopered by the plaintiff's employees, and likewise inspected by them after unloading at plaintiff's elevators in Fremont. No seals were found broken and no defects were discovered in the cars where leakage could have taken place.

The plaintiff relied upon the discrepancy in weights, as shown by the plaintiff's scales before and after shipment.

Testimony was introduced by the plaintiff, however, to show the capacity for the shrinkage of grain due to loss of moisture content. Some of this testimony was to the effect that there is unquestionably a shrinkage of weight in grain, due to handling and exposure during transit, varying with the moisture content of the grain and the atmospheric conditions to which it is exposed; that, in the

case of corn which has become hot, natural shrinkage is very rapid and may, within a few days, amount to several per cent. of the total weight of the corn; that when a car of corn of high moisture content gets hot it may lose as much as 300 pounds a day; that the percentage of moisture in corn varies from 20 per cent. up to 40 per cent., and in wheat, and other like small grain, from 7 per cent. to 17 per cent.; that wheat containing 15 per cent. of moisture might have a loss of as much as 1 per cent. in a single handling. The defendant, on the other hand, followed this testimony with other evidence along the same line.

Before going further, it is necessary to mention that it was defendant's contention that by its evidence it had shown that plaintiff's weights and book records were not reliable, and a number of mistakes and errors were pointed out. In 12 of the causes of action sued upon, plaintiff's record showed considerable overweight of grain after shipment. In fact, through plaintiff's error, it was shown, the total overweights in those 12 causes of action amounted to 95,000 pounds more than the underweights on the other causes of action. On two causes of action, where overweights were shown, the jury found in favor of the plaintiff, and plaintiff remitted as to those two items. Defendant also introduced some evidence attempting to show that plaintiff's scales were not entirely accurate, and that plaintiff had refused to allow the defendant to test or inspect its scales or have access to its weighing records.

In the light of this evidence, the court placed the burden of proof upon the defendant to fix the amount of shrinkage of grain in the individual shipments and, therefore, to prove the extent of the actual loss of grain from the car, and also the burden of proof to show what discrepancies in weights, if any, were due to the errors of the plaintiff. Clearly, the burden of proof as to reliability of plaintiff's weights and as to the extent of the actual loss of grain from the car should have been borne by the plaintiff. The instruction complained of is as

follows:

"The court instructs the jury that, if the jury believe from a preponderance of the evidence that plaintiff has shown losses in said shipments in excess of ordinary losses incident to railroad transportation, then, plaintiff is entitled to a verdict at your hands, *unless the defendant, assuming the burden, has shown by a preponderance of the evidence that it shipped and delivered all the grain it received,* except ordinary losses incident to shipment, or that plaintiff's said losses, if any, were due to causes beyond defendant's control. *The burden is upon defendant to prove by a preponderance of the evidence what said losses, if any in excess of ordinary losses incident to shipment, really were.* If defendant has shown excessive shrinkage, due to the inherent condition of the grain, discrepancy in weights due to inaccuracies of plaintiff's scales, weighmasters, or errors in bookkeeping, or failure of plaintiff to properly load, unload, and properly conserve said grain, or any other cause beyond defendant's control, then as to such loss or losses so occasioned your verdict should be for the defendant."

On all causes of action, upon which the jury found in favor of the plaintiff, the full amount of the claim was allowed and no deduction made for shrinkage. The defendant claims prejudice by reason of the court's instruction.

It is the settled rule that, where a shipper shows a loss of the goods shipped, a *prima facie* case is made against the railroad company, by reason of the presumption that the loss resulted from some cause other than one which would exempt the company from liability (*Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151), but before that presumption attaches the burden is on the shipper to show that a loss has occurred.

If the grain has merely decreased in weight during shipment, and none has been lost from the car, the railroad company is not liable, and where from the evidence it appears that grain will shrink, in varying amounts, in

weight during shipment and in handling, owing to the loss of moisture content in the grain, it at once appears that the mere discrepancy in weights before and after shipment cannot alone be relied on to prove the actual and exact loss of grain from the car. In order, then, to ascertain the extent of actual loss of grain from the car, either the shipper or the railroad company must by evidence eliminate the shrinkage. This burden of proving the shrinkage, or of making reasonable allowance for such shrinkage, is upon the shipper, for the shipper must prove by a preponderance of the evidence that grain has been lost from the car and the actual extent of such loss.

It is true that, even in case of clear record shipments, a discrepancy in weights before and after shipment, when the accuracy of the weighing is not discredited, and when the discrepancies of weights are unexplained or cannot be accounted for by shrinkage, may sufficiently raise an issue of fact for the jury as to whether a loss of grain has occurred. *Oil Trough Gin Co. v. Director General of Railroads,* 141 Ark. 133; *Baker v. Dittlinger Roller Mills Co.,* 203 S .W. (Tex. Civ. App.) 798; *Morris v. Minneapolis, St. P. & S. S. M. R. Co.,* 25 N. Dak. 136; *Schott v. Swan,* 21 S. Dak. 639; *Miller v. Northern P. R. Co.,* 18 N. Dak. 19; *Lewis Poultry Co. v. New York C. R. Co.,* 117 Me. 482.

It is not necessary that the weighing process be mathematically exact. In weighing carloads of grain, it is known, and was shown in this case, that some allowance is necessary for what is known as the "human equation." Different persons weighing the same carload of grain will get slightly varying results. Such unavoidable errors do not discredit the weighing process, nor render incompetent the proof of weights so ascertained. It is only necessary that plaintiff prove his case to the satisfaction of the jury by competent evidence, but he is not required to prove to a mathematical certainty the amount of the grain lost. 4 R. C. L. 914, sec. 369.

When, however, evidence is introduced, intended to im-

peach the weighing process or the book record of the weights made, or tending to show that the discrepancy, or a part of such discrepancy, in weights can be accounted for by grain shrinkage, the burden remains upon the plaintiff to overcome that testimony and, by a preponderance of the evidence, maintain its case. Whenever it appears that the difference in weights alone is insufficient to prove the extent of loss of grain from the car, plaintiff must introduce such other proof as will show what the excess of loss of weight would be over shrinkage, in his particular case. Though the plaintiff may, at any stage in the proceedings, have made a *prima facie* case of loss, the mere fact that further evidence is introduced, either by plaintiff or defendant, tending to rebut that case, does not shift the burden of proof to the defendant and compel the defendant to prove, by a preponderance of the evidence, what the extent of the plaintiff's loss was. The proof of that fact must always rest with the plaintiff.

Furthermore, we can see no good reason why the proof of the shrinkage in weight of grain should be made by the carrier. Such shrinkage depends upon the condition of the grain, which is better known and more easily ascertainable by the shipper than by the carrier. The shipper, and not the railroad company, in this case, weighed all the grain and made the tests as to the discrepancy in weight. The matter of difference in weights is here peculiarly within the knowledge of the shipper. When shrinkage of grain may account for a loss of weight, we cannot see why the shipper, when making his tests of weight, in order to make his case should not also be required to make his tests so complete as to be able to eliminate loss of weight from shrinkage, if any, from his totals. That loss is not exclusively within the knowledge of the railroad company as is the loss of grain by leakage from the car, or damage done to goods while in the custody of the railroad company during shipment.

In the case of *Cardwell v. Union P. R. Co.*, 90 Kan. 707, it was held that the courts will take judicial notice of the

natural shrinkage of grain in transit and that no proof is required of that fact.

In the case here, positive evidence was introduced that shrinkage would take place in varying amounts, and when that was shown the burden was upon the plaintiff to show the extent of that shrinkage, or make due allowance for it in its claims, in order to prove what the extent of its actual loss of grain was.

We are aware of the decisions in *National Elevator Co. v. Great N. R. Co.*, 137 Minn. 217, and *Shellabarger Elevator Co. v. Illinois C. R. Co.*, 212 Ill. App. 1. In the *National Elevator* case, *supra,* a bill of lading, showing the number of pounds of wheat received by the carrier, was issued, and the wheat was weighed at destination by the state weighmaster. No evidence on the question of shrinkage was introduced, and the only question was as to the accuracy of weights. The statutes in that state, governing bills of lading and certificates of weights by a state weighmaster, differentiate that case from the one before us. The *Shellabarger* case, *supra,* was based largely upon a rule in that state that, in order to recover for loss of goods in shipment, the shipper is required to introduce only "slight evidence" that a loss has occurred, and the burden is then shifted to the common carrier to prove delivery. The rule in this state is that the shipper must, by a preponderance of the evidence, prove the loss.

Upon the question of the burden of proof, the court gave the further instruction:

"The burden of proof is upon any one in litigation to establish, by a preponderance of the evidence, in maintaining his cause of action or defense, such several allegations as he asserts, that are material to such one's success in the action, unless such allegations are admitted by the opposing side. Any one under such burden not supporting such contentions, by a preponderance of the evidence, has them concluded against him. When the evidence is evenly balanced, or preponderates in favor of the other party, or any point, then such one under such burden as

to such point cannot prevail."

The giving of this instruction was misleading and was erroneous. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151.

In the former instruction, complained of, the court also directed that the defendant would not be liable for "ordinary losses incident to transportation." What was meant by ordinary losses is not explained. The statement is inaccurate, unless intended to be confined to shrinkage or damage due to the inherent nature of the matter shipped, for the railroad is, except when especially exempted, liable for all ordinary losses incident to shipment.

For the reasons given, the judgment of the lower court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., not sitting.

FLOYD POHLENZ ET AL., APPELLEES AND CROSS-APPELLANTS, V. MATTHOIAS PANKO, APPELLANT AND CROSS-APPELLEE.

FILED MAY 6, 1921. No. 21294.

1. **Executors and Administrators: SALE OF LAND: VALIDITY: BOND.** When an administrator is given license in the district court to sell land for the payment of debts, and the court orders him to give bond to account for the proceeds of the sale (under section 1453, Rev. St. 1913) after the sale is confirmed, from which no appeal is taken, and the property is in the hands of a good-faith purchaser, an objection that the sale bond was insufficient, because the penalty of the bond appears to have been left blank, will not invalidate the sale, where the bond may be reformed in equity and a remedy had thereon.

2. ———: ———: NOTICE: JURISDICTION. Where a notice of sale, given by the administrator, was published in a weekly paper for one day of each of the three weeks next preceding the sale, under section 1461, Rev. St. 1913, requiring publication "for three weeks successively next before such sale," even though the first publica-

tion was not made a full three weeks prior to the sale and is not, therefore, in strict compliance with the statute, the irregularity will not defeat the jurisdiction of the court.

3. ———: ———: COLLATERAL ATTACK. Such defective notice of sale, where no prejudice is shown to have resulted, will not be sufficient ground to set the sale aside on collateral attack by the heirs in an action brought within the five-year statute of limitations. Rev. St. 1913, secs. 1485, 1486.

4. ———: ———: BOND: JURISDICTION. The bond required by section 1453, Rev. St. 1913, to be given by an administrator before a sale is made, is not jurisdictional, since the matter of requiring such bond before sale is left to the judicial determination of the court, and is only to be given when the court concludes that the sale will bring more than sufficient to pay debts.

5. ———: ———: ALLOWANCE OF CLAIMS. Where claims are filed in an administration proceeding in the county court, the fact that the county court has failed to enter a formal order allowing claims is not fatal to a proceeding in the district court for license to sell lands to pay debts of the estate.

6. ———: SALE OF HOMESTEAD: VALIDITY. When the district court in such a proceeding grants a license to sell property which is a homestead, the sale will not be declared void after a confirmation, from which there has been no appeal, when it appears that the property was of greater value than $2,000, if the record shows no claim of homestead, or objection of any kind on that ground, was made in the proceeding, though the court may have committed error in not segregating the homestead and in not ordering $2,000 preserved to the owners, in lieu of the homestead.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed and dismissed.*

Sorensen & Bollen, for appellant.

Hazlett, Jack & Laughlin, contra.

FLANSBURG, J.

Action brought by the heirs of George Pohlenz to quiet title in them to certain land as against the defendant, whose title depends upon an administrator's deed.

In 1895, George Pohlenz died. The administrator of his estate in 1896 applied to the district court for, and was given, a license to sell the land in question for the purpose of paying the debts of the estate. In pursuance

of that license, the property was sold for the amount of $2,250 on August 15, 1896, and it is through that conveyance that the defendant claims title. The lower court held against the plaintiffs on all objections made against the validity of the administrator's sale, except one—that it was the sale of a homestead—and on that proposition the court found that, in its opinion, the land could, at the time of sale, have been divided and the homestead interest set apart, and that the remainder only of the land in excess of that interest should have been sold. On that ground the court held the deed void as to that portion of the land which the court found might have been set apart in 1896 as a homestead, but held that the sale was valid as to the remainder of the land, and made an apportionment of the land between the plaintiffs and the defendant accordingly.

Two of the heirs, plaintiffs here, became of age within five years prior to the commencement of this suit, and the special five-year statute of limitations (Rev. St. 1913, secs. 1485, 1486) does not, as to them, apply.

By section 1487, Rev. St. 1913, it is provided that administrator's sales shall not be set aside for irregularities in the proceedings, where it appears that (1) the administrator was licensed by a district court having jurisdiction; (2) that he gave bond, approved by the judge, in case bond was required; (3) that he took oath; (4) that he gave statutory notice of the time and place of sale; (5) that sale was made according to notice and confirmed, and that the property is held by a good-faith purchaser.

It is insisted by the plaintiffs that the notice of sale and the bond to account for the proceeds of the sale were not strictly in accordance with the statute, and that, at least as to the two plaintiffs against whom the five-year statute of limitations has not run, the sale should, for those reasons, be held void.

The statute (Rev. St. 1913, sec. 1487), however, does not direct that a sale shall be set aside whenever it shall appear that any one of the five conditions enumerated has

not been complied with. It provides only that, whenever it does affirmatively appear that those conditions have been met, then no irregularity in the proceeding shall be sufficient to invalidate the sale.

Though the statute is open to the inference that a sale may be set aside for irregularities, in a case where it appears that any of the five conditions of the statute have not been met, the statute is not mandatory that a sale shall be set aside for such technical omission alone, and, where the particular defect or omission is one of those which are not jurisdictional, it seems to us a sale should not be set aside unless the defect in or omission to comply with one of the five conditions affects injuriously the substantial rights of the parties interested.

The notice of sale which the plaintiffs attack, in this case, was given under section 1461, Rev. St. 1913, which requires that "notice of the time and place (of sale) * * * shall be published in a newspaper, * * * for three weeks successively next before such sale." One publication was made in a weekly paper on July 30, 1896, one, a week following, and one, a week following that. Sale was had according to the notice one day after the last publication, August 15, 1896. Three weeks, therefore, did not expire between the first publication and the date of sale.

Under our decisions, a statute providing that publication be made "for" three weeks is interpreted to mean that the notice shall consume a full three weeks' period of time before it is complete, and, though publication on one day, respectively, of each of the three weeks in a regular issue of a weekly paper is sufficient publication, still, it is held, three weeks must elapse after the first publication before the notice will be deemed to be complete. *State v. Cherry County,* 58 Neb. 734; *State v. Weston,* 67 Neb. 385.

On the other hand, where a statute requires publication in a newspaper "three weeks" and the word "for" is omitted, it is held that a regular publication in a weekly paper on one day of each of the three weeks is sufficient,

and that notice is complete upon distribution of the last paper, though three full weeks have not elapsed since the first publication. *Alexander v. Alexander,* 26 Neb. 68; *Davis v. Huston,* 15 Neb. 28; *Claypool v. Robb,* 90 Neb. 193; *In re Estate of Johnson,* 99 Neb. 275; *State v. Hanson,* 80 Neb. 724.

The distinction is strictly technical, but, applying the rule established, the publication of notice in this case is not in strict accord with the provisions of the statute.

Unless the notice of sale is jurisdictional, we are unable to see how any prejudice could have resulted by a failure to postpone the sale for a week after the last publication. By a postponement of the sale for one week, no further notice would have been given, no additional issues of the newspaper would have been distributed, and in no manner does it appear that the sale would have been affected in any particular. Such an irregularity would, in collateral attack, not be sufficient to invalidate the sale. *Matheson's Heirs v. Hearin,* 29 Ala. 210; *Saltonstall v. Riley,* 28 Ala. 164; *Moffitt v. Moffitt,* 69 Ill. 641; *Bland v. Muncaster,* 24 Miss. 62; *Haight v. Hayes,* 3 Neb. (Unof.) 587; 18 Cyc. 808.

With regard to judicial sales generally, it is stated in 24 Cyc. 21: "The fact that proper notice of a judicial sale has not been given is always a sufficient ground for refusing to confirm or setting aside the sale; but according to the weight of authority it is a mere irregularity which renders the sale voidable only and not void." See, also, *Bresee v. Preston,* 91 Neb. 174.

It seems clear to us that the notice is not jurisdictional. The court acquired jurisdiction by the administrator's application to sell and the giving of the statutory notice thereon to the parties interested. The administrator was licensed and took oath. Where a notice of sale is given and the sale is fairly conducted, so that no prejudice results, a mere technical failure to strictly follow the letter of the law does not defeat the jurisdiction of the court. A failure to give the strict statutory notice

should be objected to on confirmation, and the objection protected by appeal.

In the case of *Moffitt v. Moffitt, supra,* in which it was held that a failure to give a statutory notice did not invalidate the sale, the court said (p. 649): "Whilst all are aware that the law should not be loosely administered in transferring title by sales of this character, still there must be a reasonable protection extended to the purchaser. If the statute is so construed that every slight deviation from its requirements shall defeat the title derived from the sale, then no one will ever pay a fair price for lands thus sold. That would be to sacrifice the lands of infants, and leave none to compete at such sales, as none but sharpers and speculators would run the risk of a title thus derived. * * * To hold that every departure from the statute should vitiate the sale, would be, we have no doubt, vastly more destructive of the interests of minors than all the abuses likely to occur under the construction the court has adopted."

It is the contention of the plaintiffs that the sale was void, for the reason that the administrator did not give a proper and sufficient bond before the sale was made, as is required by section 1453, Rev. St. 1913. This section of the statute provides that, when more land is sold "than is necessary for the payment of debts," the administrator shall before sale give a bond to the judge of the district court, guaranteeing that he will account for the proceeds of the sale. In the proceeding for license to sell, the court ordered the administrator to give a sale bond in the amount of $3,000. A bond with sureties was filed, in response to the order of the court, in the usual form and complete in all respects, except that the amount in the penalty clause of the bond was left blank. This the plaintiffs claim was no bond at all, was entirely void, and the same as if no bond had been given. Plaintiffs contend that the administrator did, therefore, not give a bond, approved by the court, and that such a bond had been, by the court, required.

Though the bond filed is, on its face, defective, it does not follow that it is not a bond. It was approved in its defective form and served the purpose of a bond in the case. The fact that the amount of the penalty was not inserted does not make it utterly void. It was drawn up and signed as an obligation, in response to an order that a $3,000 bond be given, and, though incomplete, that does not necessarily prevent a remedy on it. In some cases, where the penalty of a bond has been omitted, as it was here, some of the courts have held that, even in an action at law, parol testimony could be resorted to in order to show what the full agreement was, and, the full agreement being so proved, recovery would be allowed in that same action. *McManus v. Harrigan,* 85 N. Y. Supp. 220; *Dodge v. St. John,* 96 N. Y. 260; *Tischler v. Fishman,* 68 N. Y. Supp. 787; *Treasurer of State Lunatic Asylum v. Douglas,* 77 Mo. 647; *Burnett v. Wright,* 135 N. Y. 543.

It is unnecessary for us, in this case, to decide whether or not the remedy on such a bond may be available in an action at law, or whether it would be necessary to bring a suit in equity for a reformation of the instrument. In either event, it is quite apparent that the mere omission of the penalty from the bond, with no other evidence to show that the defect cannot be supplied, is not such an irregularity that it can be said that no bond has been given.

When the facts warrant it—and that such facts do exist in this case is not denied—the right in equity to perform, and to allow a recovery on the bond as reformed, is clear. *State v. Administrator of Frank,* 51 Mo. 98; *Nourse v. Weitz,* 120 Ia. 708; *Neininger v. State,* 50 Ohio St. 394; *Russell v. Russell,* 156 Ia. 674; 34 Cyc. 927.

Furthermore, the question of whether or not the land to be sold will bring more than is necessary to pay the debts is a question, in each instance, for judicial determination, and must be determined before the sale is made. The statute is not mandatory that a bond shall be

given in every instance, as in the case of guardian's sales (Rev. St. 1913, sec. 1690), and the case of *Bachelor v. Korb,* 58 Neb. 122, is not controlling nor applicable here. In the case of sales by administrators, though the court may err in judgment in its determination as to whether the land to be sold will bring more money than sufficient to pay debts, and may err on the question, therefore, of the necessity of giving sale bond, and may erroneously fail to require a bond, such error of judgment does not, of course, go to the jurisdiction of the court. Since the statute leaves the matter of giving bond, at least when the question of its necessity is uncertain, to the judicial determination of the court, it cannot be said that the giving of the bond in any case is, by statute, jurisdictional, for the same requirements of the statute cannot be said to be jurisdictional in one case and not jurisdictional in the other. In the case of *McClay v. Foxworthy,* 18 Neb. 295, though the court held, in an appeal on objections to confirmation, that the failure to give a bond in that case was erroneous, it did not hold that such failure was jurisdictional. Under similar statutes in other states, the failure to give such a bond, though the failure may have been erroneous, has been held not to be a jurisdictional defect. *Frothingham v. Petty,* 197 Ill. 418; *Perkins v. Fairfield,* 11 Mass. 227; *Wyman v. Campbell,* 6 Port. (Ala.) 219, 31 Am. Dec. 677; *Norman v. Olney,* 64 Mich. 553; 18 Cyc. 759.

It is our opinion, therefore, that plaintiffs have not shown that the defect in the bond has, in this instance, invalidated the sale.

Again, it is insisted that no formal order allowing claims was ever entered in the county court in the administration proceeding. The administrator's report shows that $2,987.99 was paid out on claims and costs of administration. The county judge testified that it was customary to make an entry on the claim docket that claims were allowed, but that in this instance there was no room to make such an entry, as the entry of claims

covered the entire space on the docket. That this failure to make a formal entry allowing claims is not fatal to the proceeding in the district court for a license to sell has been decided in this as well as other jurisdictions. *Haight v. Hayes,* 3 Neb. (Unof.) 587; *Stow v. Kimball,* 28 Ill. 93.

The more serious question in this case is whether the sale must be held void by reason of the fact that the property was a homestead. Testimony was introduced to show the value and condition of the premises at the time of the death of the decedent in 1895, and the trial court, in this case, on that showing made a finding that the property could, in 1896, at the time of sale, have been divided and the homestead segregated without great diminution in value, but that no such division or admeasurement of the property was made. The trial court, therefore, now orders that such portion of the property, as should then have been set aside as a homestead, be now set aside, and decrees that the administrator's deed is void as to so much of the property as represents the homestead interest, but valid as to the remainder.

The statutes governing execution sales of homesteads (Rev. St. 1913, secs. 3080-3088) provide that the debtor, where his property is levied upon, may notify the sheriff of his homestead claim, and, upon the giving of such notice, the creditor must thereupon proceed to have appraisers appointed and the homestead interest admeasured and, if separable, set apart for the debtor. If the property is not capable of division, it may, in its entirety, then be sold; but from the proceeds of the sale an amount, in lieu of the homestead interest, must be preserved to the debtor.

These provisions of the statute plainly contemplate that the debtor shall make definite claim of exemption, and his failure, when opportunity is afforded, to give such notice prescribed by statute, even though it may not constitute a waiver of the homestead right—a doubtful question, under our decisions (*Rector v. Rotton,* 3 Neb. 171; *Van Doren v. Wiedeman,* 68 Neb. 243; 21 Cyc. 624)—would, at least where the property is of more value than $2,000, relieve

the creditor from requiring an appraisal and admeasurement of the homestead interest as a condition precedent to the sale.

When the debtor, on the other hand, gives the statutory notice of his claim, an appraisal and admeasurement of the homestead interest, when such interest is of greater value than $2,000, is a prerequisite to a valid sale. *Chamberlain Banking House v. Zutavern*, 59 Neb. 623; *Quigley v McEvony*, 41 Neb. 73; *France v. Hohnbaum*, 73 Neb. 70.

These statutes, then, if applicable to administrator's sales, have not been followed by those holding a homestead interest in the land, and the requirements for appraisal and admeasurement of the homestead have not been invoked. All persons interested in the land were, necessarily, made parties and notified of the proceeding in the district court for the license to sell. In that proceeding, the homestead interests must necessarily be determined, and any of such parties interested in the property were at that time afforded a hearing, to the end of determining those questions.

In the case of *Wardell v. Wardell*, 71 Neb. 774, it is held that the district court has jurisdiction to sell the homestead when it is of greater value than $2,000, though the statutory provisions, above mentioned, having to do with execution sales, have not been complied with. In such a case, the questions to be determined by the court are whether the homestead property is of more value than $2,000, and whether it may be segregated from the remainder of the property without material injury. That the property in this case was of greater value than $2,000 is not questioned, since at the sale it brought $2,250. The question of whether the property was divisible without material injury was a matter for judicial determination. It is presumed that the court exercised its best judgment on that question. The evidence upon which the court acted, if any, is entirely outside the record, which comes to us. It may have been that the court made a grievous error in its decision, but such an error does not go to the

jurisdiction of the court to act. The court had power to sell the property, and, where the record is silent, presumptions favor the validity of the sale. We do not believe such a sale is, on that ground, subject to collateral attack. *Reinhardt v. Seaman,* 208 Ill. 448; *Bradley v. Drone,* 187 Ill. 175; *Sigmond v. Bebber,* 104 Ia. 431; *Doran v. Kennedy,* 122 Minn. 1, affirmed in 237 U. S. 362; *Watkins Land Mortgage Co. v. Mullen,* 62 Kan. 1. In the latter case the court said: "Generally speaking, when a court is invested with power, upon evidence, to determine a state of facts and declare the law applicable thereto, its decision, no matter how erroneous, is conclusive."

With regard to the court's disposition of the proceeds of the sale, that was a matter which the purchaser would not be bound to follow. The sale having been confirmed and no appeal taken, those who had held homestead interests in the land were relegated in their rights to their proper shares in the proceeds of the sale which they were, under the law, entitled to hold in lieu of homestead.

It is our opinion that the objections made are not sufficient to show that the sale is void, and, therefore, that the plaintiffs in this action have at this time no interest in the land. Their action to quiet title as against the defendant is, therefore, dismissed.

REVERSED AND DISMISSED.

ALBERT BOWEN ET AL., APPELLEES, V. M. A. SELBY: PLEASANT W. BROWN ET AL., APPELLANTS.

FILED MAY 6, 1921. No. 21776.

1. **Landlord and Tenant:** MORTGAGE OF LEASEHOLD: RIGHTS OF MORTGAGEE. A mortgagee of a leasehold interest in land takes his mortgage charged with notice of all the covenants and conditions of the lease and the provisions for forfeiture, in case of nonpayment of rent.
2. ———: ———: ———. The mortgage interest is only coextensive with the leasehold interest, and the mortgage interest falls with a termination of the lease.

3. ———: ———: FORFEITURE OF LEASE. Where the lease provides for forfeiture for nonpayment of rent, the default in payment of rent is as much the default of the mortgagee as that of the tenant, and where the landlord, during the period of default which had continued for nine months, elects to forfeit and does so, and retakes possession, *held*, that the lease was terminated and the mortgage interest, so far as it concerned the remainder of the term, was destroyed.

APPEAL from the district court for Dundy county: HARRY S. DUNGAN, JUDGE. *Reversed and dismissed.*

James & Danley, for appellants.

L. E. Anderson, J. H. Broady and *Charles T. Jenkins, contra.*

FLANSBURG, J.

Action by plaintiffs to foreclose a mortgage on a lease. The lower court decreed foreclosure, and from this decree the defendants appeal.

Defendants are the owners of certain ranch and pasture land, and executed a written lease thereon to one Selby for a term, beginning March 1, 1917, and ending February 28, 1922. Rent of $500 a year was payable on the 1st day of January of each year thereafter during the period of the lease. The rent payable on January 1, 1919, was not paid when due. Under the statute (Rev. St. 1913, sec. 8467), Selby then became a tenant holding over his term. The written lease, furthermore, contained a stipulation that, in the event Selby should fail to pay his rent when due, the defendants, lessors, might "at any time (at their) election either distrain for said rent due, or declare this lease at an end and recover possession as if the same was held by forcible detainer; the said * * * (Selby) hereby waiving any notice of such election or any demand for the possession of the said premises."

While thus in default, Selby executed the mortgage to plaintiffs covering his leasehold interest in the land. This mortgage was made and delivered to the plaintiffs on June 28, 1919. The defendants testified that on February

27, 1919, they had given written notice to Selby, declaring that, by reason of his failure to pay rent, they declared the lease forfeited. Selby, however, was not immediately ousted from the premises, and the plaintiffs claim that the testimony of the defendants, with regard to the giving of such written notice, is discredited, and it may have been that the trial court so found. However that may be, it appears that the defendants, in September, 1919, forced Selby off the land by reason of his default, and took possession. This they undoubtedly had the legal right to do, the payment of rent being still in default. At this time the defendants purchased from Selby certain stock and personal property that he had on the place, and, in that transaction, the rent due defendants no doubt must have been accounted for and Selby credited with payment.

The lower court held that, by the settlement and the credit of the payment of rent, the forfeiture of the lease was necessarily waived by the defendants, and that the lease, thus reinstated, inured to the benefit of the mortgagee. There is nothing in the record, however, to show that the forfeiture of the lease was waived. On the other hand, the proof to the contrary is clear. Nor does it appear that the defendants were at that time on any ground estopped from insisting upon a forfeiture as against Selby. Though the defendants may, in their settlement, in which they purchased the personal property of Selby, have credited him, and deducted from the amount of their settlement, the $500 rent due, and which at that time had been in default for nine months, still it appears that the defendants were at that time demanding possession of the premises and a forfeiture of the term, and that the rent paid in no manner covered any period of time under the lease which had not, at that time, already elapsed.

That the owners had a right to insist upon a forfeiture, and at the same time collect for the rent which was owing them for past years under the lease, has been decided in *O'Connor v. Timmermann,* 85 Neb. 422, where, under

similar circumstances, this court said (p. 424): "It is further contended that the acceptance of payment of rent after September 1, 1906, constituted a waiver of forfeiture. This cannot be so. The unpaid rent constituted a debt owing from the tenant to the landlord, and the acceptance of money owing upon this debt, in the absence of any agreement or conditions whereby the landlord agreed to waive the forfeiture and reinstate the tenancy, could not affect his right to recover possession."

When the plaintiffs acquired their mortgage on the leasehold interest of Selby, they did so, charged with notice of the covenants of the lease, and the provisions for forfeiture in case of the nonpayment of rent. *Maxwell v. Urban,* 22 Tex. Civ. App. 565; *Barroilhet v. Battelle,* 7 Cal. 450; *Boltinghouse v. Arnold,* 174 N. W. (Ia.) 563; 24 Cyc. 982, 987.

It was their duty, as much as that of Selby, to see that those covenants were complied with and that the lease be saved from forfeiture. Yet they never communicated with the owner, and, during the entire period of default, made no effort to discover the default, nor to require that past-due rent be paid. The mortgagee of the leasehold interest takes his mortgage subject to all the covenants and conditions of the lease, and the mortgage is only coextensive with the term of the lease. The mortgage interest falls with a termination of the leasehold interest. 24 Cyc. 987.

In a case very similar to the case at bar, *Abrahams v. Tappe,* 60 Md. 317, the court held that, where, under like provisions in a lease, the landlord elects to forfeit the lease for the nonpayment of rent, the mortgage interest terminates. The court said (p. 322): "When Caroline Tappe became the assignee of the leasehold interest by virtue of its conveyance to her in the deed of mortgage, she took it subject to all the conditions and covenants of the lease to George Feller. Her failure to pay the rent and to keep the taxes paid up, was equally a default in her as in the original lessee. It was, as we have seen, ex-

pressly stipulated in the lease, that if the rent should be suffered to fall in arrear for one year, the lessor or his assigns might reenter upon the premises and hold the same as if the lease had never been made.

"The rent having been allowed to remain unpaid for more than one year, and Mrs. Abrahams having by reason of that default, and in the assertion of her rights as landlord, secured an actual and peaceable repossession of the premises, which in fact she found deserted, the lease became absolutely forfeited, and the mortgage, so far as it affected the premises, fell with it."

It is our opinion, therefore, that the repossession by defendants of the property, under the provisions of the lease, allowing them to forfeit and take possession by reason of the default in payment of rent, terminated the mortgage interest of the plaintiffs and left them with no interest to foreclose.

The decree of foreclosure is therefore set aside and the case reversed and dismissed.

REVERSED AND DISMISSED.

STATE, EX REL. ADAM J. BLAIR, APPELLEE, V. A. A. BISCHOF, COUNTY JUDGE, APPELLANT.

FILED MAY 6, 1921. No. 21840.

Mandamus: CLAIM AGAINST ESTATE: APPEAL: SUSPENSION OF PAYMENT. It is within the judicial discretion of the county court (Rev. St. 1913, secs. 1399, 1400), in an administration proceeding, to suspend the payment of a disputed claim during the pendency of an appeal from an order allowing the claim, taken from the district court to the supreme court, though no supersedeas bond is given, and such discretion cannot be arbitrarily interfered with by mandamus.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed and dismissed.*

Paul Jessen, L. F. Jackson and *D. W. Livingston,* for appellant.

W. F. Moran, contra.

FLANSBURG, J.

Mandamus issued from the district court for Otoe county, directing the county judge of Otoe county to require the administrator of an estate, then being administered in the county court, to pay a creditor's claim.

The claim had been presented in the county court and allowed. From the order of allowance the administrator refused to appeal, and an appeal was taken to the district court by the heirs. In the district court the claim, in the amount of $13,000, was again allowed and judgment entered in that amount. The district court refused to fix the amount of a supersedeas for an appeal to the supreme court. A supersedeas bond was nevertheless filed. This the district court refused to recognize, holding that it was insufficient under the statute, and certified its judgment of $13,000, on the claim, to the county court. The county judge thereupon issued a citation upon the administrator to show cause why the claim should not be paid. At that hearing the heirs intervened and made showing that an appeal had been taken from the district court to the supreme court. The county judge then suspended payment to await the final outcome of the case on that appeal.

On application of the claimant, the district court issued a peremptory writ of mandamus, requiring the county judge to immediately pay the claim. This order the district court refused to supersede. Application was made by respondent for 10 days' time in which to apply to the supreme court for a supersedeas, but this was also denied. Respondent immediately, on the same day, applied to the supreme court for a suspension of execution and time to make a showing for a supersedeas, and this application was by this court allowed. Respondent, however, in the meantime, complied with the writ of mandamus, doing so a short time previous to receiving notice of this court's action. The claim was thereupon, under order of the county court, paid to the claimant by the administrator.

It is unnecessary to determine in this case the suffi-

ciency of the bond, filed by the heirs in the district court, to supersede the judgment, pending the appeal from the decision of that court. It is our opinion that the writ of mandamus, directing the county judge to order the claim paid, was, in any event, unwarranted, and an undue interference with the jurisdiction and judicial functions which are, by law, delegated to him. The district court may enter its judgment on an appealed claim and notify the county court of its decision, but cannot control nor direct the county court in the administration of the estate, nor distribution of the assets in any of those steps in the proceeding where the county court is vested with a judicial discretion.

By section 1399, Rev. St. 1913, with regard to the payment of claims in the county court, it is provided that, "if an appeal shall have been taken, and shall remain undetermined, the court may suspend the decree for the payment of debts," until the final outcome of the matter on appeal.

It is the function of the county court to protect the rights of the parties interested in the estate. Even though no supersedeas is given, the county court is not required by statute to immediately order the payment of a claim, but, pending appeal, may, in its discretion, suspend payment. This provision is for the obvious purpose of protecting the estate. Should a claim be paid pending appeal, where supersedeas is not given, and then the claim, in the final outcome of the case, be denied, and should the claimant, to whom the money had been paid, prove insolvent or be beyond the jurisdiction of the court, restoration of those proceeds to the estate might be rendered impossible. See *In re Estate of Jones*, 83 Neb. 841. The matter of suspending payment during appeal is a matter resting in the sound discretion of the county court, and hence cannot be arbitrarily interfered with by mandamus. *State v. Laflin*, 40 Neb. 441; *State v. Churchill*, 37 Neb. 702; *State v. Grimes*, 96 Neb. 719.

The judgment granting the writ of mandamus is, there-

fore, reversed and the action dismissed.

REVERSED AND DISMISSED.

IN RE ESTATE OF JOHN STROLBERG.
AUGUST STROLBERG, EXECUTOR, APPELLANT, V. EMMA STROLBERG ET AL., APPELLEES.

FILED MAY 6, 1921. No. 21416.

1. Wills: LEGACIES: PAYMENT: RESORT TO REALTY. Whether the real estate may be resorted to for the payment of legacies when the personal property of the estate is insufficient is a question of intention, which may appear either expressly or by implication from the language and dispositions of the will, read in the light of the circumstances existing when it was made.
2. ———: ———: ———: ———. Where there are pecuniary legacies in a will, followed by a general residuary disposition of the whole estate, both real and personal, the real estate included in the residue will, as a general rule, be chargeable with the legacies, unless such construction is restrained or avoided by the other provisions of the will.
3. ———: ———: ———: ———. A direction in the will that legacies be paid out of the personal estate, unaccompanied by language indicating a deliberate intent that the real estate should not be resorted to in case of deficiency of personal property, will not prevent the legacies from being charged upon the residuary real estate.
4. ———: ———: ———: ———. The fact that the word "residue" is not followed or qualified by such words as "after the payment of legacies," or that no power of sale to pay legacies is given, will not affect the operation of the rule making them a charge upon the real estate by virtue of the residuary provisions of the will.
5. ———: ———: ———: EVIDENCE. Evidence of the testator's financial condition and habits of investment is admissible to show that he did not at the time he made the will have, or contemplate having when the will should become operative, sufficient personal property to discharge the legacies, and that, therefore, it was not his intention that his personal estate alone should be responsible for their payment.
6. ———: CONSTRUCTION. Effect should be given to all the provisions of a will, if, in the light of the surrounding circumstances,

it can be done consistently with the recognized rules of construction as to the testator's intent.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

C. P. Anderbery, for appellant.

W. D. Oldham, contra.

DORSEY, C.

The sole question involved in this appeal is whether or not certain bequests in the last will and testament of John Strolberg, deceased, are chargeable upon his real estate upon deficiency of personal estate with which to pay them. The executor filed his petition for license to sell the real estate for that purpose. The widow, and a minor child and devisee by his guardian *ad litem,* filed objections on the ground that the real estate was not liable; the trial court dismissed the petition, and the executor appeals.

The will consists of numerous articles, first of which is a direction to pay debts out of the personal estate. Each of the next seven articles of the will contains a bequest to a different branch or foundation of the Swedish Lutheran Church. These bequests, aggregating $2,500, are in the following form, differing only as to name and amount: "I give, devise and bequeath to the Augustana College and Theological Seminary, Rock Island, Illinois, the sum of two hundred and fifty dollars ($250.00)." Next after the foregoing bequests is the following paragraph: "All the foregoing bequests being special in their nature as above set out and made to the various benevolent and charitable institutions shall be paid out of my personal estate and the executive board or the proper officers of the same who are competent to receive such bequests by my executor who shall take their receipts for the same in full settlement of the various devises so made."

Succeeding articles of the will set forth that the testator

had already provided for four of his sons, and that he wished to leave the sum of $500 to each of two children of his son Edward, the payment of which he charged as a lien upon 80 acres of land in Kearney county, which he devised in fee to his son John Walter Strolberg, subject to the use of the land by his widow until his said son should attain the age of 21. To his widow he devised and bequeathed certain specific articles of personal property and the life estate in lots in the city of Holdrege constituting his homestead, and also the use, rents and profits of the 80 acres devised to John Walter, together with the use of certain other described city property in Kearney, from all of which real estate she was to receive the income until his said son should attain his majority. The residuary provisions of the will were as follows: In case both his widow and his son John Walter should live until the latter became 21, he devised the residue of his property, both real and personal, not devised in the will, one-fourth to his widow and the remaining three-fourths, in equal shares, to his sons August, Frank, Emil and John Walter. In case either his widow or his son John Walter should die before the latter became 21, he devised the residue aforesaid one-fourth to the survivor of them and one-fourth each to his sons August, Frank and Emil. If either or both of the children of his son Edward should die before his son John Walter became 21, then the legacy of $500 should lapse as to each such deceased grandchild and should cease to be a lien upon the land devised to John Walter. His son August was nominated executor.

The will was duly probated and the executor qualified. The money and personal property of the estate, amounting to about $1,000, sufficed to pay the debts and expenses of administration, but was not enough to discharge the seven bequests to the various church organizations.

The principles that govern this case are, in substance, that legacies, as a general rule, are payable primarily out of the personal estate of the testator, and that real estate will not be charged with their payment unless the inten-

tion to do so is expressly declared or clearly inferable from the dispositions of the will; that the chief criterion is the intention of the testator, which may appear either expressly or by implication from the language and dispositions of the will; that such intention cannot be inferred solely from or shown solely by evidence of circumstances altogether extraneous to the will, nor is such evidence admissible on the question of intent where there is no ambiguity in the will; but where legacies are not expressly charged upon the land and the intention of the testator is not clear, the court may and should, for the purpose of ascertaining the intention, read the will in the light of the circumstances existing when it was made.

The principal facts relied upon as disclosing that intent are, first, the language of the residuary clause in which he devised "all the rest and residue of my property, both personal and real, not hereinbefore devised" to certain persons upon certain contingencies. Counsel for the appellant argue that, as "residue" means that which is left over after the previous dispositions of the will have been carried out, the testator must have meant that his real estate as well as personal property should be looked to for the payment of the legacies; second, that, as shown by testimony introduced by the appellant, the testator never had so large a sum as would be required to pay these legacies for any considerable time; that he was in the habit of keeping his money, as it came in, closely invested, it being customary with him to purchase small rental properties in the city of Kearney. Three of these properties he had acquired before August, 1911, when the will was made, and he purchased five others after that time at prices ranging from $320 to $700. Counsel deduce from this that, in view of his settled habit of investing in these small properties instead of allowing his money to accumulate, he could not have intended to limit the payment of legacies to money or personal property, of which he did

not keep sufficient on hand, but had in mind that these investments should be resorted to and therefore placed them in the residuary provisions of the will.

The testator made but one specific devise of real estate —the 80 acres to his son John Walters, subject to the life use thereof by the widow, and subject also to the specific legacies to his grandchildren. No specific devise of real estate in fee was made to the widow. He gave her only the income until John Walter became of age. All the real estate other than John Walter's 80 acres was part of the residue, so far as the fee is concerned. This consisted of the Holdrege and Kearney city property, the income from which was devised to the widow, and there was no other property included in the residue, because the personal property was either specifically bequeathed to the widow or consumed in paying debts and expenses of administration.

A rule to which sanction has been given by this court is that, when pecuniary legacies are given in the will and there is a gift of the residue, both real and personal, the residue being blended in one mass, the presumption arises that the testator intended to charge the entire residuary estate with the payment of the legacies, for the reason that, in such case, the residue can only mean what remains after satisfying the previous gifts. *Klug v. Seegabarth,* 98 Neb. 272; *Lewis v. Darling,* 16 How. (U. S.) 1; *Coon v. Coon,* 187 Ind. 478; *Reynolds v. Reynolds,* 27 R. I. 520; *Bird v. Stout,* 40 W. Va. 43; *Lacey v. Collins,* 134 Ia. 583; *Paterson General Hospital Ass'n v. Blauvelt,* 72 N. J. Eq. 725; *Turner v. Gibb,* 48 N. J. Eq. 526.

Appellees contend, however, that any presumption which might ordinarily arise from the language of the residuary clause that the testator intended to charge the legacies upon real estate is rebutted by the express provision in the will stating that the bequests in controversy were special in their nature and directing that they be paid out of the personal estate. Counsel argues that the testator thereby gave conclusive evidence of his intention

that the personal property should be the only source of payment. As we view that provision of the will, the testator, in saying that the legacies were special in their nature and that the executor should pay them out of the personalty, meant to point out the manner in which he desired those particular bequests to be treated, as distinguished from the two legacies to his grandchildren, which were the only other pecuniary legacies in the will and which were not to be paid until his son John Walter became 21, the legacies remaining in the meantime charged upon the land devised to his said son. The thought intended to be conveyed by this language was that the legacies to the charitable and religious institutions were to be paid in the process of administration, in contrast with the other legacies, payment of which was to be delayed until a definite future time.

Assuming that such was the testator's meaning, what effect must be given to the direction that the legacies be paid out of his personal estate? Is it to be taken as a positive affirmation of the testator's intent that the personal property should alone be chargeable? Such intent, according to the rule, is presumed in the case of every pecuniary legacy, unless it appears that resort to the real estate in case of deficiency of personal assets was intended. It is equally the rule, as we have seen, that if there is a devise of the residue, both real and personal, in one mass, after pecuniary bequests, it is ordinarily sufficient proof of intent to charge the realty. Is that proof of intent overcome and rendered nugatory in the case before us by the express direction that the legacies be paid out of the personal property? In our view, that was simply a statement of what the law would have implied if that direction had been omitted from the will. The law makes the personal property the fund for the payment of legacies in the absence of any direction. But there was nothing in the language directing that the legacies be paid out of the personal property which would indicate a deliberate intent to debar the legatees from resorting to

the real estate in default of personal property, if the language of the residuary clause gives them that right. The will nowhere says that the personal estate was to be the only or exclusive fund for the payment of legacies or that the land should in no event be liable. We therefore conclude that the direction to pay the legacies in question out of the personal property will not of itself overcome the force of the residuary clause and prevent it from operating to charge the legacies upon the real estate covered thereby if, tested by the rule hereinbefore stated, it otherwise would have that effect.

Counsel for the appellees contend, however, that the residuary clause should not be interpreted as showing an intent to charge the real estate, because it is lacking in such qualifying words as "after the payment of legacies," following the word "residue," to indicate that legacies were to be deducted, and that there was no power of sale to the executor, which would have been a further indication of the testator's intent to make the real estate liable. In none of the cases cited in support of the rule above referred to was it deemed necessary that the word "residue" should be qualified, as contended by counsel, or that there should be an express power of sale, in order to make the residuary clause effective to charge real estate included therein with the payment of legacies. The rule is one of implication arising from the blending of the real and personal estate in the residuum and from the fact that the word "residue," if real estate is expressly made a component part thereof, means that part of the real estate, not specifically devised in the preceding portions of the will, remaining after the prior dispositions of the will have been satisfied. This rule is unaffected by the fact that there are no precise words referring to the payment of legacies in the residuary clause or that no express power of sale is given.

As strengthening the presumption arising from the rule just discussed, the appellant relies also upon the testimony relating to the financial condition of the testator

when the will was made and to his habit of making small investments in city rental property as a further manifestation that he must, of necessity, have intended that the legacies should be paid out of the proceeds of the real estate included in the residuary clause. This testimony indicates that it was at least very unlikely that he had as much as $2,500 in money or personal property when the will was made. If he did not have enough on hand to pay the legacies, that fact is regarded by some courts as of almost, if not quite, controlling importance in determining whether the testator intended that the personal property should constitute the exclusive fund for their payment. In *McGoldrick v. Bodkin*, 125 N. Y. Supp. 101, this rule is announced: "It is to be presumed that a will was drawn honestly and in good faith, and that when testator provided a legacy he intended that it should be paid; such presumption not being absolute, but coming into play only when the circumstances surrounding the making of the will give fair cause for its rise." And it is said in the opinion: "Hence the courts have always considered as of almost controlling importance on the question of the testator's intent the fact whether or not when he made his will his personal estate was sufficient to pay in full or in part the legacies therein expressed; for, as was frequently argued, if, when he made the will and specified the legacies, he knew that he had not sufficient personal property to pay them, he should be deemed to have intended to subject his residuary real estate to the burden of payment, or otherwise he must be deemed to have made his will a mere trick upon the legatees." These views find support in the following, among many other cases: *Williams v. Williams*, 189 Ill. 500; *Jaudon v. Ducker*, 27 S. Car. 295; *Reid v. Corrigan*, 143 Ill. 402; *American Cannel Coal Co. v. Clemens*, 132 Ind. 163.

Effect should be given to all of the provisions of the will if, in the light of the surrounding circumstances, it can be done consistently with the recognized rules of construction as to the testator's intent. *Coon v. Coon*, 187

Ind. 478; *Reid v. Corrigan, supra.*

It is our conclusion that the extrinsic evidence, taken in connection with the language of the residuary clause, established the testator's intent to charge the payment of legacies upon the real estate included in the residue, and we therefore recommend that the judgment appealed from be reversed and the cause remanded.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, and this opinion is adopted by and made the opinion of the court.

REVERSED.

OSCAR PETERSON, APPELLANT, V. MONROE INDEPENDENT TELEPHONE COMPANY, APPELLEE.

FILED MAY 6, 1921. NO. 21483.

1. **Telegraphs and Telephones:** DUTIES OF TELEPHONE COMPANY. Telephone companies are under the duty of furnishing to their subscribers reasonably prompt and efficient service in giving them connections with other subscribers, and they are liable for any pecuniary loss directly traceable to a breach of such duty as the proximate cause.
2. ———: NEGLIGENCE: PETITION: SUFFICIENCY. In an action to recover for the loss of horses alleged to have died for want of medical treatment prevented by the negligent failure of a telephone company to connect the plaintiff with a veterinary surgeon, the averment in the petition that the horses, if afforded such treatment, could with reasonable probability have been saved, is not so uncertain and conjectural as to make the petition demurrable, but the question is one of fact.

APPEAL from the district court for Boone county: A. M. POST, JUDGE. *Reversed.*

Vail & Flory, for appellant.

Garlow & Long and *V. E. Garten, contra.*

DORSEY, C.

The question upon this appeal is whether or not the petition of the plaintiff states a cause of action for negligent failure of the defendant to furnish telephone service. A general demurrer to the petition was sustained, and from the judgment of the trial court dismissing his action the plaintiff appeals.

The preliminary averments of the petition are that the principal business in which the defendant was engaged was to maintain telephone lines and wires throughout Boone county, Nebraska, and contiguous territory and to connect patrons at one station with parties at another station, so that patrons could talk and transmit messages; that it held out to its patrons, including the plaintiff, that it would conduct its business with reasonable care, diligence and dispatch and would make proper connections along its line, so that plaintiff could talk and transmit telephonic messages correctly and with convenient speed; that, relying thereon, the plaintiff, for a valuable consideration, contracted with the defendant to connect, and the defendant did connect, his residence with its telephone system; that about 8 o'clock in the morning of October 29, 1918, the plaintiff discovered that two of his horses had been accidentally poisoned; and that the plaintiff's residence was about 11 miles from Albion and about 10 miles from Newman Grove.

The negligence charged against the defendant consisted in the alleged failure of its operators to connect the plaintiff with veterinarians at Albion in spite of the plaintiff's repeated efforts. It was further set forth in the petition that the horses were so sick that he could not leave them; that Dr. Bulla could not leave his residence and advised calling the Albion veterinarians; that one of the latter was in his office for over four hours while plaintiff was seeking to reach him by telephone and would immediately have answered the call if he had received it; that because of the defendant's negligence the plaintiff was unable to obtain proper medical aid for the horses until about 12 hours after he put in the call; that in all reasonable

probability the horses could have been saved with prompt medical attention, and that they died for lack of such attention; and that the defendant had notice through its operator of the reason and urgency of the call.

We quote from the argument in the brief of counsel for the defendant: "The cause of the loss was, according to the pleading, the poison taken by the horses, with which there is no possible connection with defendant. The proximate and primary cause of their death, if the allegations of plaintiff's petition be true, was poison. If the poisoning of the horses happened without the concurring fault of defendant, plaintiff cannot recover. * * * The fatal cause which ended the life of the horses was working long before the alleged attempt was made to secure the Albion doctors, who were not under the control of defendant. The chain between the act of poisoning and the antidote to be administered and the certainty of saving them has too many broken links to hold a connection between the cause and effect. The death and damage are too uncertain, speculative and remote from the act of poison to ever justify a recovery."

Telephone companies are under the duty of furnishing to their subscribers reasonably prompt and efficient service in the way of giving them connections with other subscribers, and they are liable for any pecuniary loss directly traceable to a breach of such duty as the proximate cause thereof.

The theory of the plaintiff's petition is that the negligence of the defendant prevented him from securing medical aid for the horses from the only source available to him under the circumstances, and that there was a reasonable probability that such aid would have resulted in saving their lives. The attitude of the trial court in sustaining the demurrer was that the allegation of reasonable probability is so uncertain that the court is required to say, as a matter of law, that the petition was based merely on a remote and speculative contingency, not susceptible of exact proof, and that therefore the case should be dis-

missed on the pleading, without inquiry into the facts.

In no case in which death or permanently injurious effects are alleged to have resulted from lack of or delay in medical attention could it be known with absolute certainty whether the proper and timely application of medical skill would have led to a different result. As stated in *Glawson v. Southern Bell Telephone & Telegraph Co.*, 9 Ga. App. 450: "There are some diseases and human ills which so readily respond to the treatment of a physician, according to the general experience of mankind, as to make it merely an ordinary inference, such as we are daily accustomed to indulge and to act upon, to say that if the treatment were applied the malady would be relieved. On the other hand, there are many diseases the results of which are so uncertain, even when the best treatment is had, as to make the chances of recovery always a matter of doubt."

The case just quoted from was an action by a husband to recover for his wife's death alleged to have resulted from the negligence of the defendant telephone company in failing to connect him with a physician, and was based upon the proposition that, if the message had reached the doctor within a reasonable time, the death of the wife would probably have been prevented. In that case, as in the case before us, the trial court sustained a demurrer to the petition, but that ruling was reversed upon appeal on the ground that, although it was in the nature of things problematical whether medical aid would have saved the wife, it was a question of fact for the jury. In that connection it was said in the opinion: "Juries are frequently called upon to settle the probability of things, and to determine, according to human experience, whether this or that result likely did ensue or will ensue from this or that somewhat problematical cause. For instance, it is a common thing for a court to submit to a jury the question as to whether an injury will prove permanent, and to allow them to assess the damages with reference to their finding as to this question—a question often problematical to a

high degree. * * * Yet the effect of insistence of counsel is that we ought to hold, as a matter of judicial cognizance, that the cause of the woman's death was speculative, and that the petition alleges a matter incapable of proof by ordinary methods. It may be that, when the dead woman's condition just prior to her death is described, those who are informed upon the subject can testify to the jury as to the course of human experience as to these matters, and as to what drugs and appliances the physician had by which the hemorrhage could have been stopped; and if it appears that it was not merely possible that the woman's life would have been saved, but that, with practical certainty, it would have been saved, the jury, without exercising any extraordinary function, may be able to say that the failure to get the physician was the direct, natural, controlling, and proximate cause of her death."

In *Central Union Telephone Co. v. Swoveland,* 14 Ind. App. 341, 368, it was held that the value of the horse cannot be considered as an element of damages in an action by its owner for negligence of a telephone company in failing to sooner place him in communication with a veterinary surgeon, as the question whether the horse would have been saved was entirely a matter of speculation. But the force of this decision as an abstract statement of law is qualified by the following language in the opinion: "We do not wish to be understood as holding that cases may not arise in which under similar circumstances it would be proper to submit the question as to whether the death of the animal may be traced to the negligence of the company, but we do not think there was any proper evidence in this case upon which the jury could base a verdict for damages by reason of the death of the horse."

The following rule is stated in *Duncan v. Western Union Telegraph Co.,* 58 N. W. 75 (87 Wis. 173): "A mistake in the transmission of a telegram requesting the services of a veterinary surgeon cannot be deemed the

proximate cause of the death of a horse belonging to the sender of the telegram, where the evidence is merely conjectural as to whether the life of the horse might have been saved had a veterinary come at once, pursuant to a correct transmission." In this case also it was a question of the sufficiency of the evidence, and the decision does not seem to be based upon the theory that the fact that the horse might, with reasonable certainty, have been saved was incapable of proof.

In *Hendershott v. Western Union Telegraph Co.*, 106 Ia. 529, the court held: "In the nature of things, reasonable probability as to the cause of the death of the horse is the most that can be proven in a case like this; and, if the evidence discloses facts which show such reasonable probability as convinces the jurors as to the cause of death, they may surely act upon it, though, as they were told, they must not indulge in conjecture, speculation, or guesswork. Absolute certainty is not required to entitle a party to recover, but only a preponderance of the evidence."

It is our conclusion that, under the allegations of the petition in this case, the causal connection between the negligence of the defendant and the loss of the horses is not so remote and conjectural as to justify the court in sustaining a demurrer to the petition for that reason; but that it is a question of fact to be submitted to the jury, unless it shall conclusively appear from the evidence that the alleged negligence was not the proximate cause.

We recommend that the judgment of the court below be reversed and the cause remanded.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, and this opinion is adopted by and made the opinion of the court.

REVERSED.

CARRIE HAGELIN, APPELLEE, V. COMMONWEALTH LIFE INSURANCE COMPANY, APPELLANT.

FILED MAY 16, 1921. No. 21524.

Insurance: FORFEITURE. Where there is no specific provision in a policy of life insurance for forfeiture, either whole or partial, on a breach of a condition by the assured, the court will not write one in; nor can the insurer afterwards impose new conditions creating a forfeiture without the consent of the assured, and without a new consideration.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

Fawcett & Mockett, for appellant.

Stewart, Perry & Stewart, contra.

LETTON, J.

Paul A. Hagelin, the assured, was a son of plaintiff, the beneficiary named in a life insurance policy issued to him by defendant. He died November 2, 1918, from a wound received in battle in the World war. The defendant admits the issuance of the policy, but denies that the assured at all times fully complied with its conditions. It pleads that one of the provisions of the policy is: "This policy is unrestricted as to travel, residence or occupation of the insured. In case of death of the insured by self-destruction, sane or insane, within one year from date of issue, a sum equal to the premiums actually paid hereon, and no more, shall be paid, but if at any time he engage in military or naval service in time of war (the militia not in active service excepted), he shall secure the company's written consent and pay the extra premium therefor." And it alleges that the assured, without receiving the company's written consent, went beyond seas, and, while engaged in military service, was killed, and that this forfeited the policy except as to the return of premiums paid. The answer also pleads some matters of evidence which will be mentioned hereafter. Liability is denied on account of the failure to procure the written consent of

the company and failing to pay the extra premium. The reply is a general denial, with affirmative defenses not necessary to set forth, as the case is not controlled by them.

When the assured was drafted he wrote the following letter to defendant:

"April 25th, 1918.

"Commonwealth Life Insurance Co., Omaha, Nebr.

"Gentlemen: I am now drafted into the service of the U. S. starting April 26, 1918. Will you kindly advise me at your early convenience whether my insurance will hold good in view of the present emergency. Will it be possible to collect the full amount of the policy in case of a casualty during the term of military service either in this country or abroad. Or does the policy merely lapse with an option of taking it up again after the war is over. Please advise me fully as I am anxious to know before I make any further payments on the premiums soon coming due. I am, very truly yours,

"Paul A. Hagelin."

Defendant answered:

"April 27th, 1918.

"Mr. Paul Hagelin, Box 122, Wahoo, Nebraska.

"Dear Sir: In reply to your letter of the 25th, wish to state that all of our policies carry a war clause and the policy holder has a choice of two options. If you wish the face of your policy to be paid to the beneficiary, should you die or be killed while in service, it will be necessary for you to request a permit from the company and pay an extra premium, which at the present time is $37.50 per $1,000.

"However, as you undoubtedly know, the government is paying insurance on all of the soldiers and sailors, and we have advised all of our policy-holders to take as much government insurance as possible and pay the regular premium on their policies. Should they then die or be killed while in service, the surrender value of the policy will be returned. In keeping the policy in force this way,

should you return crippled, sick, or in such condition that you could not again pass the physical examination, you will have an old line policy, as we do not require re-examination.

"If there are any other questions that you would like to ask in regard to your policy, we will be pleased to again hear from you. Yours very truly,

"J. E. Euhling, Secretary."

Defendant received no answer to this letter. The premium due in June was paid by a brother of the assured. In October defendant received the following letter from Eleanor Hagelin, a sister of the assured:

"October 10, 1918

"Commonwealth Life Ins. Co., Omaha, Nebraska.

"Dear Sir: Please notify me hereafter, when my brother's policy, Paul A. Hagelin, Touhy, Nebr., policy No. 445, is due and how much and how good the policy is after he has gone to war and how much more, if any, you have to pay to collect the face value. I am going to try to keep up his policy until he returns. Please write me all the particulars. Respectfully yours,

"Eleanor Hagelin, 1644 O Street, Lincoln, Nebr."

Defendant replied as follows:

"Oct. 14, 1918.

"Eleanor Hagelin, 1644 O Street, Lincoln, Nebraska.

"Dear Madam: I have your letter of the 10th inst., and note what you have to say in regard to your brother's policy, and that you desire to pay the premium. I would suggest that you just pay the regular premium on this policy, and should your brother die or be killed while in the service, all premiums paid the company would be returned to the beneficiary. Should he return sick, crippled or in such condition that he could never again pass the physical examination, he would still have an old line policy for we do not require a re-examination when he returned from the service. We will make note that the notices will be sent you and I trust that you will advise your brother to take as much government insurance as he

can take. Yours very truly,

"J. E. Euhling, Secretary."

Miss Hagelin, on November 12, paid $16.88, the quarterly instalment of the premium for the current year. Assured was wounded, and died in November, 1918, but his relatives had no definite knowledge of this until in January, 1919. Soon after defendant was informed of the fact, but refused to pay more than the amount of premiums received, amounting to $512.78, which sum it now offers to pay.

Defendant introduced in evidence portions of several letters from the assured to his sister complaining that the defendant raised the rates of insurance because he was in the service, and indicating that he would be unable to keep up the premiums on that account, but these cannot affect the contract between the assured and defendant.

In addition to the provision quoted in the answer and above set forth, the policy contained the following provision: "This policy is incontestable after one year from date of issue, except for the nonpayment of premiums, or violation of the terms of this policy as to military or naval services in time of war." The appellant pleads and insists that engaging in such service in time of war "*ipso facto* worked a forfeiture of said policy or contract of insurance and relieved the defendant from any and all liability under said policy thereafter, for death of said Paul A. Hagelin while so engaged in said military service." This is a mere conclusion, and is not based upon anything in the policy. There is no provision therein that, in the event the insured engages in military or naval service in time of war and fails to secure the written consent of the company and pay an extra premium, the contract shall be void, or the insurance forfeited, or that the company will return only the premium paid. Neither is there any provision that a violation of its terms in this respect will constitute a defense to an action thereon, or that the defendant does not assume such a liability. The only forfeiture provision we find is as follows: "If any premium

is not paid when due this policy shall be *ipso facto* null and void, and all premiums forfeited to the company, except as herein provided." This does not cover the proposed partial forfeiture.

The contention is made that, since the assured was informed of the construction placed upon the policy by the company and thereafter the premiums were paid for him, such construction was ratified and adopted by him, and that the construction placed upon the contract by the parties will control in its interpretation by the court. The mere fact that the premiums were paid in accordance with the terms of the policy, after this construction was communicated to the assured, does not establish consent to this construction by him. He was at liberty to pay the premiums as they fell due and abide by his own idea as to the meaning of the contract, or by the construction that a court might place upon it. Furthermore, in this case the policy was written in 1911, and contains the contract made, and the insurance company had no power seven years afterwards to inject conditions or qualifications into it, unless these conditions were assented to by the assured, and the burden is upon it to establish this. Doubtless a new contract might have been made, but none was ever made so far as shown by the record.

There is no provision in the policy specifying the amount of additional premium to be paid for war risks, and the assured never agreed to pay any specific amount therefor, or to comply with any rule establishing a rate for such insurance. Where there is no specific provision in a policy for forfeiture, either whole or partial, on the breach of a condition, the court will not write one in, nor can the insurer do so without the consent of the insured and without a new consideration.

The cases cited by defendant do not apply to the provisions of such a policy as this.

AFFIRMED.

CHARLES E. FOWLER ET AL., APPELLANTS, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLEE.

FILED MAY 16, 1921. No. 21811.

1. **Insurance**: BENEFICIAL ASSOCIATIONS: CONSTRUCTION OF LAWS. Where the supreme legislative body of a fraternal benefit association has given a reasonable construction of an ambiguous provision of its laws, the court will adopt that construction.
2. ———: ———: INCREASE OF RATES. The "loading" of the rate of assessment of the members of such an association by the percentage method, instead of by the *per capita* method, is within the discretion of the association.
3. ———: ———: ———. A "loading" of the net rate to the extent of 15 per cent. for the purpose of paying expenses and to provide a fund as a factor of safety to guard against increased mortality from epidemics, or other unforeseen causes, is not excessive or discriminatory.
4. ———: ———: AMENDMENT OF BY-LAWS. The provision of the amended by-laws permitting a member physically disabled to surrender his certificate and to receive certain specified benefits does not violate section 3296, Rev. St. 1913, does not constitute "endowment insurance," and is not illegal.
5. ———: ———: LIEN ON BENEFITS. A method of readjustment of the affairs of such an association whereby a lien is placed upon the amount promised to be paid on the certificate is not invalid for that reason alone.
6. ———: ———: ASSESSMENTS: CHANGE OF PLAN. Sanctity does not attach to a mistake in mathematics, and it is not unlawful to change the method of operation of such an association from an inadequate assessment basis or plan to one based upon mathematical principles, even though the change involves the adoption of the "level premium" plan.
7. ———: ———: ———: ———. In such a readjustment it is proper to consider the likelihood that "adverse selection" will occur by reason of younger members of the association withdrawing to obtain cheaper insurance, and older members retaining their membership.
8. ———: ———: ———: ———. When it is considered that assessments may be omitted by the Sovereign Commander, if warranted by the condition of the funds, and that the association may readjust its rates at each biennial meeting of the Sovereign

Camp, a representative body, it will not be presumed that excessive or extortionate rates will in future be exacted from the members, and a court of equity will not declare the plan of readjustment adopted by the supreme legislative body void, unless it is clearly established by the evidence that it is illegal.

APPEAL from the district court for Otoe county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

D. W. Livingston, Wilkerson & Barnett, Wilfley, Williams, McIntyre, Hensley & Nelson, for appellants.

William F. Moran, W. B. Price, Nelson C. Pratt, F. H. Gaines and *D. E. Bradshaw, contra.*

LETTON, J.

Plaintiffs are members and certificate holders of the defendant, which is a fraternal beneficiary association incorporated under the laws of the state of Nebraska. The purpose of the action is to have the court declare that certain provisions of the constitution and by-laws of the order in force in 1917 are still in full force and effect, and that the constitution and by-laws claimed to have been adopted by the Sovereign Camp of the defendant at its session in Chicago in July, 1919, be declared unlawfully adopted; that sections 60 and 61 of said constitution and by-laws be declared unreasonable and discriminatory between members and classes of members, *ultra vires,* and void; and that defendant be perpetually enjoined from enforcing or attempting to enforce the provisions of said sections, or from collecting rates on any different basis than that provided in the laws of 1917; that it be enjoined from declaring or enforcing any lien upon the benefit certificates of its members, and from dissipating or disbursing its emergency funds by apportioning its accumulated funds among the members or permitting them to withdraw any portion of the same. From a decree refusing the relief prayed, the plaintiffs appeal.

At the outset of the argument it was conceded by the appellants that under the decision of this court in *Funk v. Stevens,* 102 Neb. 681, a fraternal beneficiary association

whose members had agreed in advance to any changes in the by-laws and constitution thereafter made has power to amend the same so as to increase the rates to be paid by its members, if the increase was reasonably necessary for the preservation of the order, or the successful carrying on of the purposes and objects of the association. It is also conceded that if the changes made by the amendments of the constitution or by-laws are unreasonable or confiscatory, and operate unjustly and wrongfully to deprive a member of the benefits of the insurance contract, or place undue and unreasonable burdens on one class of members from which others are exempt, such changes in the by-laws or constitution are beyond the power of the association to make without the consent of the persons affected and will be held void.

These principles being established, the questions left for determination are mainly questions of fact.

Appellants insist that the 1919 constitution and by-laws were not legally adopted, for the reason that section 164 of the constitution and by-laws then in effect provides that the same shall not be altered, "(a) unless the alterations or amendments are proposed in writing through Head Camps, and such proposals are received by the Sovereign Clerk at least 15 days prior to the next regular meeting of the Sovereign Camp, or recommendations by the Sovereign officers or members of the committee on legislation, which may be proposed at the session of the committee;" that such committee shall meet "(b) at least five days prior to the time of meeting of the Sovereign Camp to consider such proposed alterations and amendments. Such committee shall transmit them, together with its recommendations thereon in writing, and all other alterations and amendments which it may deem to be for the interest of this society, to the next regular meeting of the Sovereign Camp on the first day of its session. (c) The committee shall have its report printed in sufficient numbers to furnish a copy thereof to each officer and delegate of the Sovereign Camp on the first day of its

session. (d) No other alterations or amendments to the constitution and laws shall be submitted to or considered by the Sovereign Camp, except by a two-thirds vote of all the members at a regular meeting thereof, unless presented in the manner hereinbefore provided. And the constitution and laws of the Sovereign Camp shall not be altered or amended except by a two-thirds vote of all the members constituting the same at a regular meeting thereof, except as hereinbefore provided in this constitution and laws."

It is contended that the provision that a copy of the proposed amendments shall be placed in the hands of each delegate on the first day of the convention is mandatory and jurisdictional, and that this provision was not complied with, could not be waived, and hence the whole proceedings in this regard are void.

The evidence shows that the printed reports of the committee were distributed on the morning of the fifth day of the convention. The report was at once taken up by a committee of the whole house, which considered the same during the day. On the afternoon of the sixth day a roll-call was had on the adoption of the amendments to sections 60 and 61, which were carried by more than a two-thirds vote. Consideration of the other amendments proceeded daily until the eighth day of the session, when a resolution was offered that the constitution, laws, by-laws and rules, which had been considered section by section, should be adopted as the constitution and by-laws from and after December 31, 1919. A roll-call was had and the presiding officer announced that 212 votes had been cast for the adoption, that 12 Sovereigns were absent, and that the laws were unanimously adopted.

Since the amendments were not presented, nor the reports printed and distributed on the first day of the session, they evidently must fall under the class of "other alterations" provided for in subdivision "d."

The provision that "no other alteration or amendments" shall be submitted or considered, except by a two-thirds

vote, "unless presented in the manner hereinbefore provided," seems to be confusing and self-contradictory. The Sovereign Camp construed this language to mean that such "other" amendments might be submitted and adopted by a two-thirds vote of all its members. This seems to be a reasonable construction of an ambiguous provision by the supreme legislative body of the association, which the court will follow, the more so as there seems to have been nothing surreptitious, fraudulent or unfair in the proceedings leading up to the adoption.

It is alleged that the plaintiffs and interveners were paying the rates of assessments provided by the constitution, laws and by-laws enacted by the Sovereign Camp in 1917, which are now in force, and it is asserted that the changes in the rates and plan alleged to have been adopted in July, 1919, are void:

"(a) Because the rates of contribution therein imposed upon plaintiffs and other members are not fair, reasonable or just, in that they are higher than is reasonably necessary for defendant to pay its promised benefits and the legitimate expenses of doing business.

"(b) Because there is the rates of contribution therein imposed upon plaintiffs and other members, there is discrimination against older members and the existing members of defendant.

"(c) Because said sections and the plan of apportionment referred to there, change the fundamental plan of defendant from assessment or mutual benefit insurance to legal reserve or old line insurance.

"(d) Because the provision of said sections for the withdrawal of accumulated funds by members constitutes endowment insurance which as to defendant is *ultra vires*.

"(e) Because the provision contained in sections for charging liens against the certificates of members is illegal."

The evidence shows that the defendant now has outstanding certificates of the face value of more than $1,173,000,000, and that there is a large deficiency be-

tween the assets and the present worth of the future contributions, and the present value of promised benefits. It is undisputed that the percentage of solvency on December 30, 1919, was about 58 per cent., and that an increase of rates is necessary if the defendant shall be able to pay its promised benefits.

While, in substance, conceding that a change of rates is necessary, the plan adopted is attacked and what is said to be a better and more equitable plan is suggested by appellants.

Desiring to make the association 100 per cent. solvent, the officers of the association called to their assistance Mr. Abb. Landis, an experienced actuary, as to whom it is stipulated by the parties: "That he has been employed by many fraternal societies and life insurance companies to make the valuation of their business, and that he has made such valuations, and that he has been employed by many fraternal beneficiary societies to construct for them mortality tables and to prepare tables of rates and plans of adjustment, and that he is competent to prepare a mortality table and rates, based thereon." And it is further stipulated that the defendant furnished Mr. Landis true records of its transactions for more than 20 years covering more than 100,000 lives, from which he prepared its mortality table, and also commutation and other tables. Mr. Landis, in conjunction with Mr. Macken, the actuary for defendant, and Sovereign Commander Fraser, after much investigation and deliberation, prepared and submitted to the Sovereign Camp of the order the amendments here attacked.

Mr. Landis testifies that experience has shown that a step rate of annually increased rates is not a practical plan of insurance, for the reason that as the members become old it becomes prohibitory, and it was desired to have a level rate plan and at the same time an adequate plan. It was concluded that the best plan would be to get a rate according to the risk assumed by the society determined by attained age—"the plan therefore was to

make rates that would be adequate and apply them to attained ages, and then reduce them by whatever advance might become available from the mortuary funds of the society." He also testifies: From calculations made it was found that under the proposed rates the funds would be exhausted at age 38. The plan finally adopted was to make the rate adequate and then give the older members the benefit of the accumulations in the mortuary fund by using the same to reduce their rates after age 38. The greatest reduction was given to the members who had been in the society the longest time. Old age had a part in the apportionment, and duration of membership had part in it. This plan did not have anything to do with the "loading," because this is a managerial matter, and not an actuarial matter. The death rate fluctuates, and it was necessary to provide for a little surplus to take care of epidemics, or years of excessive mortality, and a shock is always caused by rerating so as to materially increase the rates.

Are the new rates discriminatory and unfair with respect to the older members? In a properly adjusted table of rates the natural premium, which is the premium which must be annually increased to meet increasing mortality, is a mathematical equivalent of the level premium. In the organization of nearly all fraternal associations they overlooked this indisputable fact, but by the force of circumstances they have been compelled to realize it. The evidence shows that, under the specified rates, each member carries his own insurance up to the age of 38 years. That is to say, while he pays more than the cost of his insurance in the early years, the payment for that entire term equals the loss from the average mortality. In order to relieve the older members of the society from paying the full cost of their insurance at their attained age on January 1, 1920, the plan apportions the accumulation in the emergency fund, amounting to about $30,000,000, among the members then over the age of 38 years, for rate-making purposes; the theory being that, since the

older members had paid this money, or the greater part of it, into the society and accumulated this fund, it ought to be redistributed to them by applying the same in reduction of the actual cost to each of them of carrying their insurance during their later lives. Mr. Landis testifies that this was done in as equitable a manner as could be devised. In this he is corroborated by three other actuaries. We think this evidence preponderates, though the plan was of necessity an approximation only, and could not apply with absolute equality in each instance. So far as the net rate is concerned the evidence seems to justify such an apportionment. But it is said the gross rates are excessive and discriminate against the older members by reason of the fact that the net or "actuarial" rate is "loaded" to an unreasonable extent for expenses; that the new laws provide for the payment of expenses, not by a *per capita* tax, but by a percentage of the gross receipts, and that by this plan the loading is increased to such a degree for the older members that it practically forces them out of the society.

The evidence shows that all, or nearly all, level premium companies derive the money to meet current expenses in this manner, and that a number of fraternal societies use the percentage method, or a combination of the percentage and *per capita* methods, which perhaps comes nearest to doing exact justice to the older members. It is also in evidence that such societies when rerated are increasingly changing from the *per capita* or "constant" to the percentage, or to a combined method. At the low and inadequate rates collected when such associations had their beginning, a *per capita* tax was necessary, since 15 per cent. to 25 per cent. of the net premiums would be insufficient to pay the expenses of the association, but as mortality increased this plan was found by experience to be unfair and inadequate. The "loading" is for the purpose of covering expenses and contingencies. It is customary in many companies to consider the first year as a one-year term policy, and to use the difference between the net premium

for one year of term insurance and the actual premium collected to provide for the extra expenses necessitated by placing the insurance contract in force. The expenses incurred at, and incidental to, the inception of the contract are much greater for the same period of time than the ordinary expense of carrying the contract. At the maturity of the contract by death, other expenses are necessarily incurred, such as investigation of the facts, determination of the real beneficiaries, contest of fraudulent claims, etc., which usually necessitate a greater outlay during the last year of the term than during any year but the first. As the age of the members increases the mortality increases, so that the expense is larger in proportion during the latter years of the membership. The "loading" is not increased each year, but when a man is young it is considered that the expense of carrying the risk will be distributed over a long series of years, and since the rate is low the amount produced by the percentage is small each year, but a great deal in the aggregate; while if a man enter at age 50, or later in life, the expense must be paid for in a shorter time. While the percentage remains the same, the net premium having increased, the amount he pays at one time is larger, but it may produce no greater sum in the aggregate than that collected from the younger men.

The mortality table of the society is shown to be low in comparison with the American Experience and other standard tables, and it would appear to be too low when the experience of the years of the epidemic of influenza and the world war is considered. The evidence convinces us that, while the experience of the society as set forth in this table must be considered, sound actuarial policy would not accept this as absolutely correct, and it is the part of wisdom to add a factor of safety to any rate based upon this table. Epidemics are not usually foreseen, but it is necessary to assume they will come and to provide against them.

The practice of this society for 17 years has been to

take a percentage of the gross receipts for expenses. No change of the principle was made in that respect. Four actuaries have testified that the percentage method is fair and equitable, and that, since the Mobile bill and the New York Fraternal Congress bill have been put into effect, a great change has taken place in the method of business of fraternal societies in most states of the Union. Plaintiffs have not established that such a method of providing for the expenses of the association, and for an additional factor of safety with respect to mortality, is unreasonable or discriminative, or that the "loading" is so excessive that it is unfair. If experience demonstrates that the amount collected for these purposes is in excess of that which is necessary, the members themselves have the means and the power to adjust rates to mortuary requirements through their representative governing body, which meets biennially. Also the Sovereign Commander may omit any assessment if the finances of the Sovereign Camp justify such action, and proper conduct on the part of the officers of the society must be presumed until the contrary is shown.

The point that the changes made allow endowment insurance, which, it is said, is not permitted by the statutes of this state, is not well taken. The withdrawals permitted are not *ultra vires,* as claimed. Section 3296, Rev. St. 1913, provides that such a society "may make provision for the payment of benefits in case of sickness, temporary or permanent physical disability, either as a result of disease, accident or old age: *Provided,* the period of life at which payment of physical disability benefits *on account of age* commences shall not be under seventy years." There is nothing here to prevent a member who becomes permanently and totally disabled prior to his attaining the age of 60, as permitted by the new laws, from surrendering his certificate and receiving in settlement one-half of the face amount of his certificate, less indebtedness due to the society, as a permanent total disability benefit, and there is no provision in the amendment which

gives to a member who is not disabled the right to withdraw and receive any amount as the surrender value of his certificate, or as a payment in the nature of an endowment. The proposed change in the by-laws does not conflict with the statutes, and this objection is without merit.

It is complained that the laws of 1919 impose a lien upon the certificates of older members without authority, and that such method of adjustment is illegal and void. A large number of cases are cited to sustain this position, but a critical examination of these shows that they are inconsistent with the law of this state as laid down in *Funk v. Stevens,* 102 Neb. 681, and *Case v. Supreme Tribe of Ben Hur,* p. 220, *post,* and are also inconsistent with the concessions made by appellants set forth in paragraph 2 of this opinion.

By the laws of 1917, upon which plaintiffs stand, a somewhat similar provision is made which in effect constitutes a lien upon the certificate.

In *Shepperd v. Bankers Union of the World,* 77 Neb. 85, the court said: "In the case under consideration the society said to its old members: We will not require you to pay the additional assessment from month to month as in the case of new members, but will charge you up with the additional amount and deduct it from the face of your certificate at the date of death." This was held not to be illegal. *Wright v. Minnesota Mutual Life Ins. Co.,* 193 U. S. 657; *Polk v. Mutual Reserve Fund Life Ass'n,* 207 U. S. 310. Furthermore, the liens provided for are only to be imposed with the consent of the member. If he would rather pay the actual cost of carrying his insurance at his attained age on January 1, 1920, he may do so. The changes are not invalid because of this provision.

It is argued that the new plan constituted a change from fraternal or assessment insurance to level premium, or what is known as "old line" insurance, and is therefore void, and that the proposed increase is higher than necessary. Originally the plan of insurance adopted by fra-

ternal beneficiary societies was impracticable and unscientific, and time demonstrated that, in order to fulfil the agreements of such a society, its plan of operation must of necessity be based upon mathematical principles. Sanctity does not attach to a mistake in mathematics. The originators of the plan and those who participated in it were both innocently mistaken, and the society has the right to change it to accord with sound principles. The evidence shows that certain old line companies and a number of fraternal benefit associations have higher rates than these attacked, and that the rates of a number of fraternal companies are lower. Appellants say these facts are of no importance, since that which controls is the needs, experience and condition of the defendant. This is true, but the officers of the defendant are justified in taking advantage of the experience of other societies engaged in a like enterprise, and they are entitled to consider every factor and element of the insurance business as disclosed by the experience of all engaged therein. It is a business of contingencies and probabilities, and experience is the most potent factor to consider in placing it upon a plane of safety.

That the society may exist for several years without a change of rates does not prove that the new rates are excessive. It is shown that a substantial increase of rates in a fraternal society often results in "adverse selection," the younger men leaving it and procuring insurance in a competitive association having lower rates, and the older members, many of whom are unable to procure other insurance, perforce remaining. The ratio of mortality becomes consequently greater and the mortuary payments and expenses are increased. The result of the 1919 change had to be anticipated and provided for, and not until the force of the shock is spent can it be determined with any degree of accuracy whether these rates are excessive. If they produce an excess of funds, the assessments will be reduced in number, or the rates or liens reduced, because it must be presumed that an insurer who is also the in-

sured will not impose upon itself or upon its members undue hardships, and that the governing body will in future be as anxious to relieve its membership from unnecessary burdens as it has been to provide means to fulfil its insurance obligations.

Some of the cases supporting the principles announced are: *Reynolds v. Supreme Council, Royal Arcanum,* 192 Mass 150, 7 L. R. A. n. s. 1154, and note; *Supreme Council, Royal Arcanum, v. Green,* 237 U. S. 531; *Supreme Lodge, Knights of Pythias, v. Mims,* 241 U. S. 574; *Supreme Lodge, Knights of Pythias, v. Smyth,* 245 U. S. 594; *Smith v. Mutual Reserve Fund Life Ass'n,* 140 Ill. App. 409; concurring opinion, Dawson, J., in *Williams v. American Ins. Union,* 107 Kan. 214; *Clarkson v. Supreme Lodge, Knights of Pythias,* 99 S. Car. 134; *Wineland v. Knights of Maccabees,* 148 Mich. 608; *DeGraw v. Supreme Court, I. O. F.,* 182 Mich. 366; *Hall v. Western Travelers Accident Ass'n,* 69 Neb. 601; *Sawyer v. Sovereign Camp, W. O. W.,* 105 Neb. 395.

The judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK OF LEXINGTON, APPELLANT, V. ROY D. ANDERSON ET AL., APPELLEES: ELEANOR J. BAKER, INTERVENER, APPELLANT.

FILED MAY 16, 1921. No. 21219.

1. Process: RETURN: IMPEACHMENT. After judgment, the sheriff's return of service of summons can only be impeached in a collateral proceeding by clear and convincing evidence.
2. ———: ———: ———: PROOF. Where a sheriff, whose return recites that he served a summons on defendant by leaving a copy at his usual place of residence, testifies to the specific acts on which the return was based, the validity of the service is determined by a preponderance of the evidence, but such preponderance requires proofs of a clear and convincing nature.
3. ———: ———: ———: SUFFICIENCY OF EVIDENCE. Evidence outlined in the opinion *held* to require a finding that the sheriff did

not leave a copy of the summons at the defendants' place of residence, as recited in the return, and that the defendants did not have actual knowledge of the suit.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

Hoagland & Hoagland and *E. E. Carr,* for appellants.

Halligan, Beatty & Halligan, W. T. Wilcox, and *Beeler & Crosby, contra.*

ROSE, J.

This is a suit in equity to redeem a quarter section of land in Lincoln county from a sheriff's sale in a suit to foreclose a mortgage. When Samuel A. Thomas and wife owned the land September 22, 1914, they mortgaged it to H. Bruce Kriger to secure the payment of a note for $1,000 bearing interest at the rate of 10 per cent. per annum until paid. With the land thus incumbered they deeded it to Eleanor J. Baker February 11, 1915, and she and her husband, Dr. B. Baker, deeded it to the First National Bank of Lexington February 24, 1915, under an agreement obligating the bank to reconvey the land to its grantors upon payment of debts which their deed had been given to secure. The deeds from the Thomases to Eleanor J. Baker and from the Bakers to the bank were not recorded. Silas Burcham used the land as a tenant. An instalment of interest due to Kriger being unpaid October 10, 1916, he then commenced a suit to foreclose his mortgage, making the Thomases and the Bakers the only defendants. There was personal service of summons on the Thomases and the return of the sheriff recited that he served it on the Bakers by leaving a certified copy for each at their usual place of residence. Upon the default of defendants a decree of foreclosure was rendered December 20, 1916, the amount then due on the mortgage being $1,261.10. The land was appraised February 21, 1917, at $3,040, and sold by the sheriff to the Union Realty & Investment Company April 16, 1917, for $2,030.

The sale was confirmed and the sheriff's deed was executed May 15, 1917. The purchaser at the sheriff's sale sold the land to Roy D. Anderson September 1, 1917, for $3,800, received $1,000 in cash and took a mortgage for $2,800. Anderson went into possession immediately and made valuable improvements.

The First National Bank of Lexington, being the holder of the legal title under a conditional obligation to reconvey the land to the Bakers, and not having been made a party to the foreclosure proceeding, commenced the present suit December 7, 1917, to redeem the mortgaged land from the sheriff's sale and to cancel the subsequent conveyance and the subsequent mortgage given to secure the remainder of the purchase price. Eleanor J. Baker, being entitled to a reconveyance from the bank upon payment of the debts which her deed to the bank was given to secure, intervened as a defendant in the suit to redeem the land and prayed for the relief sought by the bank. Upon a trial of the issues raised by the pleadings, the actions by both the bank and the intervener were dismissed and the title to the land was quieted in Anderson, the grantee of the purchaser at the sheriff's sale. The bank and the intervener have appealed.

The bank was not a party to the foreclosure and contends that it is not bound by that proceeding. The intervener pleads that she and her husband, though named as defendants in the foreclosure suit, were not served with summons therein; that they had no notice or knowledge of the pendency of the foreclosure suit, and that they are entitled to redeem their land. How these pleas should be determined under the evidence is the controlling question presented by the appeal. In this inquiry in the appellate court the statute requires an independent conclusion upon consideration of all of the evidence, "without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Rev. St. 1913, sec. 8198.

As already stated, the return of the sheriff recites that

he served the summons upon the Bakers by leaving a certified copy for each at their usual place of residence. The burden was on them to impeach that return. That could only be done by clear and convincing proof. In performing his official duty the sheriff acted under an oath of office and under the penalties of an official bond. There is a presumption that he performed his duty. The enforcement of contracts, the integrity of judicial proceedings, and the disturbing of titles are impressive factors in the impeachment of a sheriff's return after judgment. At the same time courts, in a foreclosure proceeding, cannot strip landowners of title without notice to them. A sheriff's return is not beyond judicial scrutiny.

In the present case the sheriff testified as a witness to the specific acts on which his return is based. The validity of the service, therefore, under recent rulings, is determined by a preponderance of the evidence. *Janous v. Columbus State Bank,* 101 Neb. 393; *Racine-Sattley Co. v. Popken,* 102 Neb. 635. Such a preponderance, however, requires proofs of a clear and convincing nature.

Tested by the standards mentioned, did the sheriff serve the summons on the Bakers? He testified that he left a copy for each at one of the rooms in the Ritner Hotel, at North Platte, October 21, 1916. He had no personal knowledge that they resided there. He had been directed by Kriger's attorney to make service at that place. Neither of the Bakers was at the Ritner Hotel when the sheriff called. He was asked why he left the copies there, and answered: "There were two ladies there and one was Mrs. Smith, and she told me the room he (Dr. B. Baker) occupied there at that time and that he was not at the hotel." The "Mrs. Smith" to whom reference is thus made testified, in substance, that she was manager of the Ritner Hotel; that soon after the middle of September, 1916, Dr. Baker settled his bill and took his things away; that Mrs. Ritner had moved his things out of the room which he had occupied, and that he had said he would leave; that he stated he was going to the McCabe Hotel;

that a drayman took his things away from the Ritner Hotel; that thereafter he did not stop at the Ritner Hotel; that witness found a paper under the door of the room formerly occupied by him, but he was not there at the time and his effects had been moved away. Both the proprietor and the clerk of the McCabe Hotel testified that Dr. Baker came there September 15 or 16, 1916, and made reservation for a room. One witness said that Dr. Baker expressed his purpose to make his home there, and stated that he would be absent most of the time for a few weeks. At that time his trunk, his wife's sewing machine and a cabinet, which had been at the Ritner Hotel, were delivered at the McCabe Hotel, where they were stored in the basement.

Dr. Baker testified, in substance, that he was not residing at the Ritner Hotel when the summons was left there; that he had previously left and did not return; that he had changed his residence to the McCabe Hotel; that he did not receive the summons; that he did not know it had been left at the Ritner Hotel; that he never knew of the pendency of the foreclosure suit until the fall of 1917; that he first learned of it when he called on the tenant for rent.

There is uncontradicted evidence that the Bakers formerly lived at Lexington, but changed their residence to North Platte; that thereafter Dr. Baker was engaged in the insurance business; that he spent most of his time traveling and was not regularly in his room at the Ritner Hotel or at the McCabe Hotel during the year 1916.

For the purposes of this inquiry the testimony of Mrs. Baker may be summarized as follows: Her home in Lexington was sold in February, 1915, and thereafter she remained at the home of her mother in Denver until December, 1915, when she went to the residence of her husband at the Ritner Hotel. She stayed there until her mother had a stroke of apoplexy April 5, 1916. The next day she went to Denver; returned to North Platte in May for her trunk; remained one night; went back to Denver

and stayed until November 20 or 21, 1916. She then came back to North Platte; was there a few days, and again went to Denver and stayed with her mother until July, 1918. She had no notice of the foreclosure suit and first learned of the difficulties about her land in 1918.

The land was mortgaged for $1,000 only. It was appraised before the sheriff's sale at $3,040. It was sold by the sheriff for $2,030, and a few months later by the purchaser for $3,800. It is not likely that owners of land of such value would knowingly and willingly permit it to be sacrificed for the satisfaction of so small an indebtedness.

While, in some minor particulars, the proofs tending to impeach the sheriff's return are contradicted, there is little reason to doubt that the Ritner Hotel was not the residence of the Bakers when the sheriff left copies of the summons there, or to doubt that they did not have notice of the foreclosure in time to protect their rights. It is certain that the residence of the Bakers was once at the Ritner Hotel, but any presumption of its continuance there fell as soon as the substantial evidence of a change was adduced.

There is proof tending to contradict the testimony that Dr. Baker had paid his bill in full when he left the Ritner Hotel, but, when considered with the record as a whole, it does not disprove the case made by the intervener on the invalidity of the sheriff's return.

There is also proof tending to show that Dr. Baker once registered at the Ritner Hotel after he removed his trunk and other property therefrom, but this is contradicted by direct and positive testimony. In any event, considering such proof as verity, the proper inference, in the light of all of the circumstances, is that he was then merely a transient guest as distinguished from a resident.

An attorney for Kriger testified to facts tending to prove that Dr. Baker learned of the foreclosure suit while it was pending, but the latter denied such knowledge. In any event Mrs. Baker, who owns the equity of redemption,

testified that she did not know of the difficulties about her land until 1918. This is uncontradicted and actual knowledge is not imputable to her.

From evidence that fully meets the requirements of the law in cases of this kind, the conclusion is that the summons was not served on the Bakers, and that they did not have actual knowledge of the foreclosure in time to protect in that litigation their interests in the land in controversy. It follows that the Bakers and the bank are entitled to redeem, and to have the decree of foreclosure, the sheriff's sale, the sale to Anderson, and the latter's mortgage canceled, upon equitable terms. Anderson should be required to account for the rents and profits during his tenure, and further evidence may be taken to determine the amount for which he is accountable. Otherwise the final decree should be based on the record as it now stands. The district court should exact of the Bakers and the bank the equitable terms proposed by the following offer in their brief in the supreme court:

"These appellants are willing to do equity, and are willing to allow the defendant Anderson for his improvements, and require him to account for the rents and profits of the premises, and have the same applied thereon and require whatever balance there may be due to be paid into court by these appellants. The mortgage to the Union Realty & Investment Company should be canceled. Anderson should be reimbursed for the moneys which he has advanced to Patterson, with interest thereon, and Patterson should have the balance that is due him which he paid on the sale, with interest."

For the purposes of redemption on the equitable terms outlined herein, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

MARTIN VANDEWEG, JR., APPELLEE, V. GUS A. OLSON, DEFENDANT: FIRST STATE BANK OF HICKMAN, APPELLANT.

FILED MAY 16, 1921. No. 21382.

Appeal: CONFLICTING EVIDENCE. When the evidence conflicts respecting the existence of material facts, and such evidence is fairly submitted to the jury under proper instructions, the verdict will not be set aside.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Hainer, Craft & Lane, for appellant.

L. T. Fleetwood and *Sterling F. Mutz, contra.*

DEAN, J.

This action was brought to recover the value of a quantity of sheep and hogs, alleged by plaintiff to be due him, from defendants Gus A. Olson and the First State Bank of Hickman. Defendant Olson having absconded, his default was entered. When plaintiff rested, defendant moved for an instructed verdict. The motion was overruled. When the taking of testimony was concluded, defendant renewed its motion, which was again overruled. Upon submission of the evidence the jury returned a verdict against defendants for $511.14. The defendant bank alone appealed.

Olson bought live stock at Hickman, for shipment to Omaha and other markets. On September 17, 1918, he gave two checks to plaintiff, drawn on the defendant bank, for the sheep and hogs that were bought from him. Plaintiff cashed the checks at a bank in a neighboring town. Payment was subsequently refused by the Hickman bank and plaintiff was compelled to reimburse the bank where the checks were cashed.

Plaintiff in substance charges liability of the bank on the alleged ground that Gus A. Olson, while buying stock at Hickman, "was acting for and on behalf of the First

State Bank of Hickman;" that the bank was the real party in interest; that the stock was shipped in its name, and that it received the consideration therefor; and, finally, that defendant's association in the business was such that plaintiff was unable to allege "its exact nature."

It seems that Mr. Olson came from Campbell and located at Hickman. On this point Mr. Heckman, cashier of the bank, testified: "Q. You suggested to him that they needed a stock buyer there at Hickman, did you? A. It was suggested to him; that is the reason he came to Hickman. Q. He came to Hickman to talk it over with you. Did you meet him in Hickman or Campbell? A. In Hickman. * * * Q. Was he a man of property, I mean, in this county? A. No, sir. Q. Or any other property so far as you know? A. Not that I am certain of."

The facts upon which plaintiff relies, as tending to prove that there was some agreement between the defendants for handling stock together, or that the bank was an undisclosed principal in the enterprise, are substantially these: From May 8 to September 18, 1918, Olson shipped 22 carloads of live stock from Hickman. Two of the cars in May, 1918, were shipped in the name of May & Olson and 20 cars were subsequently shipped in the name of the bank, plaintiff's stock being consigned in the shipment of September 18. It appears that Olson was practically insolvent; that he wrote checks for stock purchased, when he had no money on deposit, that were paid by the bank, and apparently without any arrangement for liquidation; that Olson's checks given for stock aggregated at times from $2,000 to $3,000, and at one time they aggregated $3,959.89, when he had no money on deposit. It was admitted that, at such times, it was the bank's money that was being used to pay for the stock that Olson bought. It was also shown that no interest was charged against Olson by the bank for the money so used in the purchase of stock.

Plaintiff testified that he talked with Heckman after the checks were dishonored, and that in the conversation

Heckman volunteered the information that there was a "sheep check" and a "hog check," although there was nothing on the checks to indicate what they were given for; that he asked Heckman how he knew what the checks were given for, and that Heckman told him that he talked with Olson before he went away; that the last thing Olson said to him before he left was this: "You tell the boys not to worry about them checks," he says, "they will get every dollar of it back;" that Heckman in the presence of his father and brother admitted that he knew the stock in question was shipped in the name of the bank. The plaintiff's evidence on this point was subsequently corroborated by his father and his brother.

Mr. Heckman denied knowledge that the shipment of the car, in which plaintiff's stock was shipped with other stock, and for which the checks in question were given, was in the bank's name, but subsequently he made this statement. He testified: "Q. How many cars did you know had been shipped in the name of the First State Bank? A. I knew that there had been cars shipped sometime, possibly six months before that." It was shown that, after Olson left Hickman, the cashier and Olson went to Omaha and there met a brother of Olson. Respecting the object of the Omaha trip the cashier testified: "The purpose was to get security on this $1,500. Well, his brother absolutely refused at first. * * * He finally signed the note with G. A. Olson for $750. * * * At the same time I got a bill of sale from G. A. Olson for the yards there, a couple of hogs and crib. * * * Yes, and a $50 Liberty bond, a hog trough and gates and pump." Plaintiff contends that the $750 transaction between the bank and the Olsons is evidence of a division of liability arising from the stock-dealing venture. The cashier testified that the bank held notes of Olson at different times, namely, one for $1,500, and one or two for from $500 to $800.

Mr. Heckman further testified that he made no effort to bring the attention of the county attorney to the fact

that Olson was writing checks on the bank when he had no funds there, because, as he said, "it never entered my mind." From Heckman's evidence it appears that it was not the custom of the bank to honor checks generally for its customers in sums aggregating $3,000 or $4,000 unless they had money in the bank to draw against.

Defendant's explanation of the reason why Olson made the shipments in the name of the bank is that in some former shipments he had failed to pay certain charges that were due the railroad company therefor, and that they were a personal charge against him that would be deducted from the proceeds of subsequent shipments unless they were paid, and that it was to avoid making such payments that he adopted the plan of shipping in the name of the bank. Defendant argues that, in view of the fact that the railroad company did not attempt to collect the delinquent charges from the bank, this "is in itself proof that the railroad at least had no knowledge or suspicion that the bank was in any way interested in Olson's business." In the argument of plaintiff it was suggested that the jury doubtless took note of the fact that the railroad company was not a party to this suit.

From a review of the record, we conclude that, notwithstanding the conflict in the evidence, there is sufficient to support the verdict. We therefore decline to set it aside unless, indeed, it has come to pass that, with respect to controverted questions of fact, the jury has ceased to function in Nebraska.

The judgment is

AFFIRMED.

ROSE and FLANSBURG, JJ., not sitting.

ORVILLE E. BUCKLEY, APPELLEE, V. ADVANCE RUMELY THRESHER COMPANY, APPELLANT.

FILED MAY 16, 1921. No. 21589.

1. **Sales: DELIVERY: BREACH OF WARRANTY.** When a machine does not fulfil the terms of the vendor's warranty and, over the

vendee's protest, is left by the agent with the vendee's prospective purchaser, such action on the agent's part does not constitute a delivery. It follows that the vendee is not obliged to return the machine in order that he may maintain an action for damages.

2. ———: ———: NOTICE. A contract for the sale of a machine provided that notice of defects therein should be given by the vendee by registered mail addressed to the vendor at its head office. *Held* that, when it clearly appears that the machine has not been delivered, the provision for notice is not obligatory.

3. ———: WARRANTY: PROOF. When an implied warranty and an express warranty relate to the same or a closely related subject, proof of the implied warranty will be excluded.

4. ———: ———: BREACH. Where the vendor undertakes a practical demonstration of a machine to prove its workability, even though the contract of sale does not provide therefor, and the machine, when given a trial, fails to comply with an express warranty under which it was sold, the vendee is not bound by the contract.

5. **Corporations**: PROCESS: SERVICE. *Held*, that the service of process herein upon the auditor of public accounts was a sufficient compliance with section 725, Rev. St. 1913, to confer jurisdiction over a foreign corporation doing business in Nebraska.

APPEAL from the district court for Thurston county: GUY T. GRAVES, JUDGE. *Affirmed.*

Howard Saxton and *Good & Good,* for appellant.

R. E. Evans and *Sidney T. Frum, contra.*

DEAN, J.

Plaintiff is a dealer in agricultural implements. He sued to recover the purchase price of a tractor gang plow, alleging misrepresentation and breach of warranty. A jury was waived. Plaintiff recovered a judgment for $1,286.25, which included the purchase price, interest and freight. Defendant appealed.

Though there is some conflict in the evidence the following material facts seem fairly to be established. The tractor plow was purchased by plaintiff through G. Mattison, one of defendant's agents, pursuant to the terms of a written contract executed September 8, 1917. A warranty is indorsed on the contract, of which it is a part,

which reads: "Said machinery is warranted to be well made and of good material, and with proper use capable of doing as good work as any other machine of the same kind, size and rated capacity, working under like conditions."

It appears that the tractor plow was shipped to Winnebago station, and was consigned by defendant to "order of Advance Rumely Co." Upon arrival at Winnebago, H. Mooney, an agent and tractor plow expert in defendant's employ, collected the purchase price and freight from plaintiff before the machine was tested. Subsequently it was unloaded from the car and prepared by him for a trial, and by him driven about two miles distant to the farm of C. C. Frum, plaintiff's prospective buyer. On September 16, 17, and 18, Mooney attempted to operate the plow, but it clearly appears that it failed to do the work for which it was intended and which it was warranted to do. When the field demonstration was closed plaintiff informed Mooney that the plow did not meet the warranty, and that, in view of his failure to make it work, he refused to accept it and demanded a return of his money. On September 25, 1917, and at subsequent intervals, plaintiff, by letter addressed to the Lincoln agency, repeated his complaint and again demanded repayment of the purchase price and freight. It also appears that Frum told Mooney to take the plow away from his farm because, as he says, he informed him that it was worthless. It seems though that, over Frum's protest, as he testified, "Mooney took the tractor around north of the corn-crib and left it." Apparently it has remained there ever since, though there is some evidence on the part of one of defendant's employees that, upon subsequent examination of the tractor, it appeared to him that it had been used to furnish power, apparently for some sort of a belt machine. On this point, however, the evidence conflicts.

It was shown that other tractor plows of substantially the same size and rated capacity, when working under sub-

stantially the same conditions as to soil and the like, did good work. One witness, who appears to be a practical tractor plowman, testified that the soil where defendant demonstrated its tractor plow was in normal condition, and that other plows of substantially the same sort "would pull three plows all over the Fisher land and do good plowing, under exactly the same conditions as existed at the time when the Rumely tractor was tried out on that land." To substantially the same effect is the evidence of three or more disinterested witnesses who were apparently conversant with the subject and qualified to testify. They testified that they had seen two or more tractor plows of different companies, but of the same general size and capacity as the tractor plow in question, doing good work under substantially the same conditions. On this point it may be said there is sufficient evidence to support the court's finding, which was, in effect, that the tractor plow in suit was not "capable of doing as good work as any other machine of the same kind, size and rated capacity, working under like conditions."

Defendant argues that because plaintiff did not return the tractor plow he cannot therefore recover for a breach of the warranty. It seems clear that the facts do not warrant the conclusion that, in legal effect, there was a delivery or an acceptance. Plaintiff was not obligated, under the facts, to accept the plow. It was consigned to defendant's order and, for all of the time material to the issues here, it was in the possession of defendant by its agent who attempted, but failed, to make it work, and subsequently left it at the farm where the demonstration was had. Apparently it remained there subject to defendant's order and under its control. In view of the facts it is obvious that no obligation rested on plaintiff to return it to the company.

Defendant relies upon this recital in the warranty clause of the contract: "Purchaser shall not be entitled to rely upon any breach of above warranty * * * unless: (a) Notice of the defect or breach, particularly de-

scribing the same and specifying the time of discovery thereof, is given by registered letter addressed to vendor at its head office, posted within four days after such discovery." Plaintiff argues that he was not obligated to notify defendant of the defects of which its operating agent then on the ground was already advised. In support of his argument he cites *Advance Thresher Co. v. Vinckel,* 84 Neb. 429; *Ditto v. International Harvester Co.,* 105 Neb. 544; *Fairbanks, Morse & Co. v. Nelson,* 217 Fed. 218. The majority of the court, however, conclude that the question of notice, that is argued at great length by the parties, is not, under the facts, involved herein. It follows that, in view of our conclusion on this point, we do not find it necessary to decide the question respecting notice.

Plaintiff contends that certain inducements were offered to him that caused him to execute the written contract, and that such inducements constitute an implied warranty. We conclude that the express warranty excludes the implied warranty, for which he contends, because it had to do with practically the same subject. Defendant cites 35 Cyc. 392, wherein the general rule is well stated: "An express warranty will exclude an implied warranty on the same or a closely related subject. Thus an express warranty of quality will exclude an implied warranty of fitness for the purpose intended."

It is contended by defendant that, when "Buckley paid the freight and made settlement * * * before the tractor was unloaded, * * * title at once passed to him." In its brief it is also said: "The court will search in vain in the contract for any provision which obligates us to demonstrate this tractor. * * * It is true that as a matter of courtesy the defendant company sends an expert to the place of delivery and teaches the new owner how to use the tractor."

It is a harsh rule for which defendant contends. The lesson that was communicated to the prospective purchaser was more than a courtesy. It was a business en-

terprise undertaken with a view to the sale of a tractor plow. The fact that the machine was unloaded and freight paid and settlement made, as contended by defendant, did not, under the facts, release defendant from its contractual obligation to deliver that which it agreed to deliver. The warranty plainly contemplates a workable tractor plow. The warranty was not fulfilled. It follows that it would be unconscionable to permit defendant to prevail on either point.

Another feature of the case remains. Service was obtained on defendant by delivery of a summons to the state auditor of public accounts at Lincoln, under section 725, Rev. St. 1913. Defendant appeared specially and argues that the district court did not have jurisdiction of the subject-matter of the action. The language of section 725 is involved and obscure, but the object of that part relating to service of summons seems to be to provide, in effect, that a foreign corporation is "found," within the meaning of section 7619, Rev. St. 1913, in a county "where the cause of action, or some part thereof, arose, or in counties where the contract, or portion thereof entered into by such corporation has been violated or is to be performed." Service on the appointed agent or on the auditor of public accounts is sufficient. The general rule as to venue is not changed. The provisions of the act are salutary. We know of no reason why a foreign corporation that is permitted to do business in Nebraska should not be holden to answer in any county in the state where its contract has been violated or where its provisions are to be performed.

The evidence supports the judgment. It is therefore

AFFIRMED.

ROSE, J., not sitting.

MINNIE E. CASE ET AL., APPELLEES, V. SUPREME TRIBE OF BEN HUR, APPELLANT.

FILED MAY 16, 1921. No. 20756.

1. **Insurance:** BENEFICIAL ASSOCIATIONS: INCREASE OF RATES. When an insured in a fraternal benefit association agrees to be bound by future changes of the by-laws, the association may make amendments increasing the rates and changing the plan of assessments for the general good of the order, so long as such changes do not work an injustice between the individual members, are not discriminatory, and are reasonable.
2. ———: ———: ———. In the absence of averment or proof to the contrary, it will be presumed that an increase of rates or change of plan of assessments to increase revenues was reasonable as to the amount of the increase in the charges, when it appears that the amended regulation was duly enacted.
3. ———: ———: ———. Though the increase of assessments, adopted by a fraternal association, should be so high as to make it unprofitable and prohibitive to older members, that fact, standing alone, would not make the rate unreasonable, if the assessment is no more than experience has shown is necessary to properly meet the cost of covering such individual with insurance at his attained age.
4. ———: ———: CLASSIFICATION OF MEMBERS: DISCRIMINATION. Where such an association, by amendment of its by-laws, divides its members into two classes, placing all members belonging to the association prior to a certain date in one class, and all who have joined or should join after that date in another class, and provides that each class shall raise its own funds and pay its own losses, and that the former class is to continue without the aid of growth and the addition of young blood, and makes it necessary, where a member of the former class should desire to change and become a member of the latter class, that he surrender what rights he had in the funds of the former class and surrender that security furnished by the mutual promises of members of that class, *held*, that the classification is discriminatory and unreasonable as against the members of the former class, and will not be upheld.
5. ———: ———: AMENDMENT OF BY-LAWS: VALIDITY. Where a benefit certificate provided that, in case insured should reach 70 years of age and be disabled, he should receive disability benefits, and his policy then be considered paid up, an amendment to the

by-laws, made prior to insured's reaching 70 years of age and becoming disabled, which required payment of assessments during the period of such disability, after the age of 70, impairs no vested rights under the policy, and is not to be treated as a reduction in the amount of benefits provided by the policy.

6. ———: ———: CLASSIFICATION OF MEMBERS: WAIVER. Where the insured, on the representation to him by the agent of the association that his policy was paid up and that he would not be required to make any further payments, signed a statement presented to him by the agent, which contained in it a printed clause, agreeing that insured would pay additional assessments during such period of disability, but where no consideration moved from the association to him for such agreement, and there were no elements of estoppel shown and none pleaded, *held*, insured had not waived his right to object to the discriminatory classification of members, and was not bound by such signed statement; it being further shown that the amount he had paid to the association in the past was sufficient to cover all payments due, or to become due, on his policy, in accordance with the association's rules as they existed prior to the establishment of rates upon the discriminatory basis complained of.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

Garlow & Long, for appellant.

Burr & Brown, contra.

FLANSBURG, J.

This is an action on a benefit certificate issued by the Supreme Tribe of Ben Hur, a foreign fraternal beneficiary association. The defendant contends that the policy had become forfeited by default of payment of the assessments. These assessments were levied by virtue of amendments to the by-laws made after the certificate sued on was issued, and plaintiffs claim the amended by-laws were unreasonable, impairing vested rights under the benefit certificate, and were therefore not binding on insured. At the close of the testimony the court directed a verdict for the plaintiffs. Defendant appeals.

The certificate sued on contained the usual provision that the insured would be bound by all the laws, rules

and regulations of the society thereafter enacted. It was in the amount of $500, and was issued to John Case in 1901, when he was 54 years of age. Plaintiffs were named as beneficiaries.

At the time this certificate was issued the by-laws of defendant association provided for the monthly payments of $1 for insurance, the amount of the benefit being rated according to age, so that while members entering between the age of 18 and 25 received benefit certificates in the amount of $1,500 for a monthly payment of $1, members entering at 50 years of age received certificates of $500 only. All members were also required to pay a per capita tax of 75 cents semiannually, together with lodge dues, or what were called "court dues," levied by the subordinate court.

The benefit certificate in question provided that, in the event of the insured becoming physically disabled from old age after reaching 70 years and making proof of such fact, he should receive one-tenth of the face of the policy that year and a like sum each year thereafter until the whole benefit was paid or until the member should die, and it also, however, further provided "that such member shall continue to pay his or her court dues and per capita tax" though the monthly payments for insurance were not required from that time forward.

In May, 1908, the by-laws of this defendant association were amended in the manner of which plaintiffs complain, whereby all holders of benefit certificates issued prior to July 1, 1908, were put in what is called Class A, and all holders of certificates issued after that time were put in Class B. The two classes were kept distinct. Each, it was provided, should raise its own funds and pay its own losses. In case the monthly payments of Class A members, as previously fixed, should be insufficient, additional payments would be required to be paid from time to time. The rates required to be paid by the Class B members were determined by valuation upon the basis of tables of

mortality, and the rate was to be fixed according to the age attained by the member at his entrance.

It was further provided that any Class A member could, at any time up to July 1, 1910, by surrendering his certificate and paying the rates fixed by the age of such member at such time, according to the schedule of rates adopted for Class B members, become a member of Class B without being required to pass medical examination, such examination, however, to be required in case he desired a disability clause in his certificate such as appears in the certificate here involved, and, in that case, it was necessary before a transfer would be allowed that he be found to be in good health and not physically disabled at the time of the transfer. It was further provided by these amended rules that the disability benefit for members in either Class A or Class B would be allowed only upon the condition that, after such disabilities were proved and insured became entitled to the disability benefit, he would still continue, not only to pay the per capita tax and court dues as theretofore provided, but would in addition continue to pay all monthly payments and assessments required. In order to change from Class A to Class B, in other words, it was necessary for the Class A member to surrender his certificate and take a new one at a rate based upon his age at the time of the transfer, as if he were an entirely new applicant for insurance in the association, and, except in the instances as stated, he would not be required to pass a medical examination.

The insured, after these amendments were adopted, remained in Class A and made all payments called for up to September 1, 1916. On July 12, 1916, he became 70 years of age, and on September 12, 1916, he applied for the old-age disability benefit. His application was approved, and he was paid the first instalment of $50. In this application, signed by insured, which was on a printed form furnished by the company, there was a printed statement that insured agreed to continue to pay, in addition to the court dues and the per capita tax, the

monthly insurance payments and assessments during the continuation of such policy and during the period when he was entitled to the disability benefits.

It is claimed by plaintiffs that insured did not know of this statement in the application. The officer of the defendant association, whose duty it was to help make out and receive such applications, testified, and her testimony stands alone on that issue, that she read the application to him and also that she told him it was her understanding that no further payments were required from him thereafter except the per capita tax and dues, and that his policy so far as insurance payments were concerned was fully paid up.

From the time that the association allowed insured the disability benefit in September, 1916, and paid him the $50 instalment, he made no further insurance payments, as provided by the amended by-laws, nor in accordance with the statement made in the application just above referred to. The per capita tax and court dues were tendered by insured, but the defendant refused to accept these and demanded the regular monthly payments and assessments as fixed at that time, and so the matter stood from September, 1916, until the insured died in February, 1917; the association claiming that the insured's policy had lapsed by reason of his failure to pay the regular monthly payments and assessments for insurance from and after the time of the granting of the disability benefits to him.

The questions presented are: (1) Whether the classification under the amended by-laws was unreasonable and discriminatory so as to make invalid the increased assessments levied upon the insured in this case; (2) whether the provision that insured should continue to pay insurance rates, when, by the terms of his certificate, it was to be paid up in case of disability at 70, in effect reduced the benefits and thereby destroyed vested rights under the contract; and (3) whether insured had waived his rights to refuse to pay insurance rates after reaching 70 by signing the agreement to pay such additional assessments

when he signed his application for the disability benefit.

It is the rule in this state that, when an insured agrees to be bound by future changes of the by-laws, a fraternal association may make amendments increasing the rate and changing the plan of assessments for the general good of the order, so long as such changes do not work an injustice between the individual members, are not discriminatory, and are reasonable. Insured, in the case before us, remained in the class of old members who had entered the association prior to 1908. The exact amount of increase in assessments levied against him the record does not disclose. There is no averment nor proof that the assessments made were unreasonable in amount, nor greater than sufficient to the proper operation of this division of the association as a separate entity, raising its own funds and paying its own losses. On the other hand, it does not appear that the rates fixed for the members of the new class were more than was necessary to the operation of that class, nor larger than required to properly raise funds to prepare against and pay death claims as they should accrue. The rates in this class were based upon mortality tables and in accordance with the principle that each member should pay in proportion to the hazard of his own individual risk.

The next question is, therefore, whether the creation of the two divisions of members, each operating independently of the other, did in itself work an unjust discrimination as against the insured. There is no vested right to a continuance of a plan of insurance which experience might demonstrate would result disastrously to the society or its members. *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657; *Polk v. Mutual Reserve Fund Life Ass'n*, 207 U. S. 310. It is also true that, in the absence of averment or proof to the contrary, it will be presumed that an increase of rates or change of plan of assessment to increase revenues was reasonable as to the amount of the increase in the charges, if the amended regulation was duly enacted by the association. *Supreme Council, Cath-*

olic Knights of America, v. Fenwick, 169 Ky. 269; *Demings v. Supreme Lodge, Knights of Pythias,* 131 N. Y. 522; *Supreme Lodge v. Bieler,* 58 Ind. App. 550. It is unnecessary, therefore, to discuss the amount of assessments in this case, since there is no proof of the financial condition of the company and no evidence tending to show that the assessments were more than were reasonably necessary to carry out the objects of the order.

Considering the Class B members as a separate division, the plan devised of requiring each member to pay a rate in conformity to the cost of insurance based on age is a reasonable regulation as among the members in that class. And it would further, as settled by the laws of this state, have been a reasonable regulation to have required all the members of this association at the time when the amended by-laws were enacted to have commenced anew and to have paid assessments based upon mortality tables, the amount of such rate to be determined by the age attained by the respective members at the date of such change in the rule of assessment. *Funk v. Stevens,* 102 Neb. 681; *Thomas v. Knights of Maccabees of the World,* 85 Wash. 665, L. R. A. 1916A, 750; *Hollingsworth v. Supreme Council of Royal Arcanum,* 175 N. Car. 615; *Supreme Lodge, Knights of Pythias, v. Mims,* 241 U. S. 574; *Reynolds v. Supreme Council of Royal Arcanum,* 192 Mass. 150. Though the increase of the assessment provided by a fraternal association should be so high as to make it unprofitable and prohibitive to older members, that fact, standing alone, would not make the rate unreasonable, if the assessment is no more than experience has shown is necessary properly to meet the cost of covering such individual with insurance at his attained age. It may be here, and in fact in most, if not all, such fraternal companies, insurance has been furnished in the past at rates far below cost. The member has lived and had the value of his assessments in the protection given him, and, when it is found that each must pay in exact accord with the risk the company has assumed in carrying him, he can-

not complain. As Judge Holmes said in *Supreme Lodge, Knights of Pythias, v. Mims, supra*: "It is proper to remember that for many years the plaintiff had been insured, and although by what he is not likely to regard as bad fortune his beneficiary has not profited by it, she would have if he had died. As he happily has lived he has to bear the burdens incident to the nature of the enterprise into which he went open eyed."

But when such increase in assessments is made it must progress upon a uniform plan. It must be remembered that the promises of this association are the mutual promises of all the members in it, individually and collectively, to one another. Each member also has the right to see that all new members shall equally assume such mutual obligations. The basis for rates must be just and not discriminative. In this case all members of the order, prior to 1908, are severed from the association and become a distinct entity apart from it. It is manifest that to thus cut off the old members, undesirable risks, into a company by themselves and make them pay their own losses and raise their own funds without the aid of growth and the addition of young blood, since no new members can under the amended by-laws be placed in this division, would result in a separate division of membership; in fact, a distinct company in itself which would have a constantly dwindling membership and a rapidly increasing assessment until the lone survivor would have to pay his own death claim. Such classification and division of members, destroying the mutuality of the promises of the members of the association as a whole and requiring older members to be thrown out upon their resources and alone compelled to proceed without the accession of new members, which destroyed the very working power of the plan under which they were operating, has been held an effectual repudiation of the contract obligation owing them by the society, and has quite universally been held an unreasonable and unjust regulation as to them, and therefore void. *Wilson v. Supreme Conclave, I. O. H.*, 174 N.

Car. 628; *Williams v. Supreme Conclave, I. O. H.*, 172 N. Car. 787; *Strauss v. Mutual Reserve Fund Life Ass'n*, 126 N. Car. 971, 83 Am. St. Rep. 699; *Tusant v. Grand Lodge, A. O. U. W.*, 183 Ia. 489; *Parks v. Supreme Circle, Brotherhood of America*, 83 N. J. Eq. 131; *Benjamin v. Mutual Reserve Fund Life Ass'n*, 146 Cal. 34; *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116.

In the cases just cited, the facts as to classification and assessment were in all instances very similar to, and in some identical with, the method followed in the case at bar. In the *Tusant* case, *supra*, members joining before a certain date were put in Class A, and those joining after in Class B, each operating separately as if a distinct association, raising its own funds and paying its own losses. Class A was assessed on the old plan, by increasing amount of assessment and was allowed no new members, and Class B was assessed upon an insurance risk basis as determined by the age of the member. The court in that case said: "It is sufficient to say that it is of the very essence of mutual insurance and of the efficiency thereof that it shall grow, and that it shall continue to receive new and younger blood. * * * When these men joined the order they joined themselves to a membership, many of whom had already reached their expectancy. These plaintiffs began at once to pay death losses on such. When they paid such losses they had nothing to expect in return from those whose membership had ceased by death. Their only way of compensation was from those who should come after. They relied and had a right to rely for the security of their insurance upon the new blood which was to come."

By this reasoning it is shown how the shutting off of new members into Class A, operating under the old plan, in effect actually destroyed its working ability. Obviously, then, if this class were to be continued under the old plan, the shutting off of new members was in fact an actual destruction of their plan of operation. Defendant's answer to this is, however, that insured had the

option of joining Class B with the new members and taking insurance at his then attained age. But, in order to do that, it was necessary that he part from the class in which he then was and surrender up all rights that he had therein. He was entitled to share in the funds of this class, and was entitled to have that fund, as well as the mutual promises of all the other members of that class, as his security, and these we do not believe he could be required to release without his consent. These, by going into Class B, he would be required to lose. In Class B he would begin again upon his then attained age, losing the right to benefit or credit by reason of funds already accumulated in Class A, and losing the added security that would be given him were he still allowed protection of such fund and mutual promises. In 1908, when the amendment divided the membership and allowed a transfer from Class A to Class B, no provision was made for any transfer of the funds. This, at that time, could only have been effected by a transfer of the entire class, and, of course, power of insured was limited to transferring his own membership only. In 1916, it is true, the by-laws were amended providing for the transfer of a *pro rata* portion of the funds of Class A to the funds of Class B, following the transfer of a member, but this amendment was enacted only a month before the insured reached the age of 70, and so short a time before his proof of disability that he, no doubt, could not have passed the necessary physical examination were he to keep alive the old-age disability clause of his contract, and, furthermore, a transfer of the *pro rata* portion of the fund was not all that plaintiff was entitled to; he was entitled to have that fund in its entirety continue for his security. As we view it, he was entitled to belong to the association as he had joined it and what it had grown to be, protected by the mutual promises of all, and not required to release any part of the funds accumulated under the previous plan of assessment.

It is unnecessary to discuss at length the cases above

cited holding the classification discriminative. In all those cases the classification and method followed was the same as in the case at bar, with this exception, that in some of those cases no right of transfer was allowed by the older members to the new class, and in the others—the cases of *Wilson, Williams, Tusant,* and *Parks*—such transfer was allowed; but in some of those cases at least the rule was stated that in the allowance of such transfer the old members were discriminated against, since they were required to rerate on their then attained ages, and hence surrender rights that they had become entitled to by their long-time membership and contributions to the society. As an abstract principle of law, under our holding in *Funk v. Stevens, supra,* and other cases cited, this last statement of principle is incorrect. But the distinction must be borne in mind that, when all members of the association are required to rerate, instead of causing a division of membership into classes, the beneficial interest of each individual member in the funds and assets of the society remains unaffected. The accumulated funds still remain as his security, and the mutual promises of all its members still afford him protection; while in the transfer of an old member from Class A to Class B he surrenders all interest and rights to security in the funds and promises of all Class A members, and in fact joins a new company as a new member.

It seems to us that in the latter case cited it was those rights, required to be surrendered up, which the courts had principally in mind when they said that to require the old members to enter the class of new members destroyed what rights those members had theretofore attained. This must have been so in the North Carolina cases. In that jurisdiction it has been held in *Hollingsworth v. Supreme Council of Royal Arcanum,* 175 N. Car. 615, following the same principle as enunciated in the holding of our court in *Funk v. Stevens,* 102 Neb. 681, that an amendment of the by-laws requiring all members to rerate according to their attained age on the basis of risk as based on mortality

tables was a reasonable and valid regulation, and the court in that case, referring to the North Carolina cases, above cited, which hold the classification in question discriminatory, said: "There is another ground of distinction between the *Strauss, Williams,* and *Wilson* cases and the other cases cited in them, on the one hand, and our case, on the other. In the former there was, not only a raising to a higher figure of the rates, but there also was classification and discrimination. That is, the old members were put in one class and the new members in another, and the losses (death benefits) in the old class were paid from the funds collected from that class, while the losses in the new class were paid from the funds collected from that class; but in this case it appears that all moneys collected from assessments are mingled or blended in one fund, and losses paid solely out of it. It is, therefore, a single or common fund for the payment of death benefits. In the one case there is classification and discrimination, while in the other there is neither."

It therefore appears to us that the increased and added assessments upon the certificate of insured in this case, being based upon an unjust discrimination, were illegal and unenforceable. Insured, however, paid the increased assessments until in September, 1916, when, being 70 years of age and disabled on that account, he received his first instalment of disability benefit, and he refused from that time on up to the time of his death, a few months later, to pay the insurance assessments, contending that his policy was fully paid up, and, according to its terms and the rate of assessment fixed prior to the amendment complained of, such was the fact.

Plaintiffs contend further that, since the benefit certificate itself did not provide for payment of insurance assessments after disability was proved, an amendment of the by-laws requiring payment of the assessments during such period was in effect a reduction of the benefits and impaired vested rights of insured under the policy. We think this position is untenable. The argument put forth

by plaintiff that an increase of rates reduces benefits has been adopted in some states, but not in ours. It is true that an increase in rates diminishes the marginal return on the policy in the instances here presented, and in fact in every insurance contract. Our court, however, in accord with the generally accepted rule upon that subject, holds that reasonable increases in assessments do not impair vested rights in the nature of a direct reduction of the benefit to be derived from the policy. Had the insured reached the age of 70 and his policy been matured so that his rights thereunder had become vested before the by-laws were amended, a different question would have been presented; but here, in advance of any rights becoming vested, it was determined for what period of time assessments should be made. This alone, we do not believe, would invalidate the assessments, which, it was provided, should become due after the disability rights under the contract accrued.

We come, then, to the question of whether the insured had waived his rights to attack the unwarranted increase in the amount of assessments, or the levy of the additional illegal assessments, here complained of. The payment of the increased assessments up to the time of his applying for disability benefit in September, 1916, would not prevent him from claiming subsequent assessments unlawful; there being no element of estoppel shown and none pleaded nor urged in this action upon that ground. The record is silent upon facts pertaining to that question. It is true the printed application which was signed by insured recited an agreement to pay these illegal assessments from that time forward, but the officer of the company whose duty it was to collect assessments explained to him when he signed the application that the policy was then paid up and no further assessments could be required of him. When the next following insurance payment became due, insured refused to pay it. He did not become in default as to payment of the *per capita* tax and court dues called for in his certificate.

His action in signing the statement in the face of the explanation of the company's agent and his attitude from that time on could not be construed as a waiver of his right to object to these assessments, since it was apparent to all parties that no waiver was intended. No estoppel could be based upon this statement signed by him; the company did not change its position toward him; he had made every payment called for or due at the time this first instalment was delivered to him; neither party disputed his right to collect this $50 payment; such payment could not be made to depend upon a promise by him that he would meet future insurance assessments as they became due; the association, in other words, paid him only what the policy in terms and what the law then bound it to do. The statement could not be considered a contract or agreement to pay a further assessment, since there was no consideration moving to insured from the company to support it. Though it be a fact that insured signed this statement that he would pay a future unenforceable assessment, that certainly would not bind him, unless the company had been misled or changed its position in some way, or unless the insured received some consideration for the promise. Neither of such facts appears in this case.

We therefore are of opinion that plaintiffs in this case are entitled to recover upon the policy, and that the judgment of the lower court should be affirmed.

AFFIRMED.

I. BENTON TAYLOR, APPELLEE, V. J. E. EVANS, APPELLANT.

FILED MAY 16, 1921. No. 21071.

Taxation: TAX LIENS: FORECLOSURE: VOID SALES. In a suit to foreclose separate tax liens upon distinct tracts owned by the same person, the sale of all such tracts together to satisfy the combined amount of the several liens is prohibited by section 6565, Rev. St. 1913, notwithstanding the proviso thereto, permitting the court to apply the proceeds of the sale of one tract to the

payment of the lien upon another tract belonging to the same person. Such sale, being beyond the jurisdiction of the court to order or, by confirmation, to approve, is void and will be set aside in a collateral suit brought for that purpose.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Evans & Evans, for appellant.

Beeler & Crosby, contra.

DORSEY, C.

The appellee, I. Benton Taylor, was the owner of two noncontiguous tracts of land in Lincoln county, namely, all of section 19, and 160 acres in section 24, township 15, range 29. These tracts were separately sold for delinquent taxes and a separate tax sale certificate for each tract was issued by the county treasurer to the purchaser, H. S. Evans. November 4, 1915, Evans commenced a suit to foreclose these tax liens, setting up each of the tax certificates as a separate lien upon the particular tract covered thereby. The appellee, as owner of the land, was made defendant and personally served with process, but made no appearance. In its decree the district court for Lincoln county made separate findings as to the amount due upon each tax certificate separately and established that amount as a lien upon the particular tract. It was ordered that, if the appellee should fail within 30 days to pay the amount of the lien found and adjudged to exist upon section 19, an order of sale should issue to the sheriff directing him to appraise, advertise and sell that tract, and a precisely similar order was made in the decree as to the tract in section 24.

The appellee failing to redeem, the clerk issued an order of sale, in which, instead of keeping the two liens and the two tracts separate and distinct, he combined the amounts due upon both liens and directed the sheriff to sell both tracts for the aggregate sum. That officer accordingly procured an appraisement of both tracts together in a lump sum and sold both tracts together, as if they were

in one body, to H. S. Evans, the plaintiff in the foreclosure action. The appellee filing no objections, the sale was on December 4, 1916, confirmed and a sheriff's deed issued to the purchaser in conformity therewith.

January 26, 1918, the appellee commenced the suit now under consideration upon this appeal, for the cancelation of the deed and all proceedings leading up to it and to be let in to redeem. That relief was granted him in the court below, which adjudged the sale to be void, and the appellant, J. E. Evans, as grantee of the purchaser at the sheriff's sale in question, seeks a reversal of that decree.

In selling both tracts together for the aggregate amount of both liens, the sheriff obeyed the directions of the order of sale, which, however, were exactly contrary to the terms of the decree, whereby it was specifically ordered that each tract be sold separately in satisfaction of the lien specifically established thereon. Section 6565, Rev. St. 1913, with reference to tax lien foreclosures, provides: "No lot or parcel of land shall be sold for taxes due upon any other lot or parcel of land." And the decree was in conformity therewith. The violation by the sheriff of the terms of the decree would undoubtedly have entitled the appellee, as owner of the land, to an order setting aside the sale, if he had filed timely objection before confirmation.

The controlling question here, however, is whether the departure by the sheriff from the provision of the statute above quoted, and from the terms of the decree which was in accord with the statute, was a mere irregularity which would be cured by confirmation, or was the mode of sale adopted by the sheriff one that the court was without jurisdiction either to order in the first instance, or afterwards, by confirmation, to ratify and approve? If it was clearly beyond the limits of the court's jurisdiction, a sale of the two tracts for the combined amount of the liens would be void, and, therefore, subject to collateral attack. The court could not, by confirmation, make valid a pro-

cedure which it could not in the first instance have ordered.

The provision of section 6565, above quoted, prohibits the district court, in a suit in which the holder of separate tax liens upon distinct tracts owned by the same person seeks foreclosure, from ordering the sale of one tract for the lien upon another. Such would be the effect of combining the amounts of both liens in this case and ordering the sale of both tracts to satisfy them. That prohibition is not affected, in our opinion, by the proviso appended to that section, which reads:

"Provided, where the same defendant is the owner of two or more lots or parcels of land, the court may in its decree order that any surplus proceeds of sale of one lot or parcel of land shall be applied to the payment of taxes and costs against any other lot or parcel of land owned by the same defendant."

Not only does the proviso not furnish authority to sell both tracts for the combined amount of the several liens, but it points the way to a method by which, after one tract has been sold for more than enough to satisfy the lien upon it, the sale of the other tract may be obviated by applying the surplus to the payment of the tax lien upon the latter. No such order as is contemplated in the proviso to section 6565 was, in fact, included in the decree under consideration, but it is argued that the proviso recognizes the right of the court to make one tract liable for the tax lien upon the other, and that it was therefore not beyond the court's jurisdiction to approve the sale of both tracts together in discharge of the combined liens. In our opinion, nevertheless, the proviso does not deal with the mode of sale or deprive that part of the section which prohibits the sale of one tract for the lien upon another of any of its force; it deals only with the application of the proceeds of the sale, and is a remedial provision which the landowner may invoke to prevent the needless sale of more than one tract, where

each tract has been properly ordered sold to pay the particular lien upon it.

The express prohibition of the statute against the combined sale of tracts subject to separate liens is in harmony with the principles of common right and equity, under which the remedy of a lienholder, whether of a tax lien or mortgage, is confined to the property held as security. We can see no distinction between a case wherein two or more separate tax liens upon distinct tracts are involved and a case in which two or more separate mortgages upon distinct tracts owned by the same person are sought to be foreclosed. In the latter case it has been held that a sale of the tracts together for a gross sum is unauthorized and void, and will be set aside in a collateral suit. *Hull v. King,* 38 Minn. 349. The lien must be enforced upon the particular property to which, by operation of law or the contract of the parties, it has attached. The fact that the lienholder unites several demands upon distinct tracts in the same suit does not empower the court to enlarge his security by combining all the tracts upon which he has separate liens in one sale in gross. The district court was, in our opinion, without jurisdiction to order or by confirmation to approve a sale so conducted; it was void and therefore open to collateral attack.

The question here considered is, we think, quite different from that which would arise when several tracts are covered by one lien, or when one large tract covered by a lien might more advantageously be subdivided and sold in smaller tracts, and it is a question whether the land should be sold in parcels or in gross. *First Nat. Bank v. Hunt,* 101 Neb. 743. In such a case the lien is actually secured upon all the land in all the tracts, and there is no fundamental inequity in selling all the land to satisfy it. In such instances, it is within the jurisdiction of the court, in the exercise of its sound discretion as to what would be for the best interests of the parties, to direct the sale to be made in either manner, and its order in

that regard would be voidable only upon direct objection and appeal in that suit.

The relief granted by the decree of the district court was right, and we accordingly recommend that it be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

MYRTLE B. SACKETT, APPELLEE, V. MASONIC PROTECTIVE ASSOCIATION, APPELLANT.

FILED MAY 16, 1921. No. 21500.

Insurance: ACCIDENT INSURANCE: VOLUNTARY EXPOSURE TO DANGER. The fact that the insured was killed while voluntarily aiding a peace officer in the fresh pursuit of persons reasonably suspected of having committed a crime, and seeking to escape, will not, as a matter of law, defeat recovery in an action upon a policy of accident insurance under a provision thereof that the insurer shall not be liable in case of "voluntary exposure to unnecessary danger;" but the question whether, in performing his duty as a citizen, the insured incurred needless risk is for the jury.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

R. J. Millard and *Alfred S. Pinkerton,* for appellant.

J. C. Robinson and *F. P. Voter, contra.*

DORSEY, C.

The appellee brought this action to recover upon a policy of accident insurance carried by her deceased husband in the appellant association, which provided that she, as his beneficiary, should be entitled to a certain sum in the event of his death. The defense was that the insured met his death in consequence of "voluntary exposure to unnecessary danger;" there being a provision of the policy relieving the appellant from liability in case of

death so resulting. The appellee recovered a verdict and judgment.

The insured was a physician in the town of Laurel, Nebraska. On June 14, 1918, he was shot and killed while driving the town marshal and three other persons in his automobile in pursuit of burglars. Between 1 and 2 o'clock in the morning the marshal was called by telephone to come down town, and when he arrived in front of a certain store a light was flashed from within and he saw a man there. The marshal fired his revolver and went around the corner of the block to the alley in the rear of the store where two residents of the village were standing. Dr. Sackett was coming toward them and remarked, "There he goes," and then they noticed a man about half a block south of them running east. Dr. Sackett and the marshal pursued the man for a short distance and, after hunting around for him without success, returned to where they had been standing. Dr. Sackett then remarked, "Listen, there is a car there," and in a moment they heard a noise and saw a bright light. Dr. Sackett thereupon said that he would get his car, which was standing about 75 feet away, and the marshal stated that he was going to get some more shells and told Dr. Sackett to go and get his car. The marshal went to a near-by residence and procured a revolver, Dr. Sackett meanwhile going for his car.

He picked up the marshal and they started, with another man in the back seat. They took two other men into the car with them on the way down the street. The car which they were pursuing was about 75 rods away. Dr. Sackett drove rapidly and they were gaining on the car ahead when a shot was fired, and the marshal, who saw the flash, but did not hear the report, said: "Hold on, they are shooting back at us." When Dr. Sackett's car had come up within about 25 rods, the car ahead turned out to the right of the road and stopped. Dr. Sackett did not slacken speed, but caught up with the front car in an instant and stopped a little ahead of it on

the left side of the road; the cars being only three or four feet apart. Dr. Sackett was sitting on the left side of the front seat with the marshal beside him. The occupants of the other car immediately began firing, and the marshal returned the fire. Dr. Sackett was shot and fatally wounded. There was no evidence that he spoke during the ride, or that he noticed the shot fired in their direction from the front car, or heard the marshal say that they were shooting back at them. The only remark made by Dr. Sackett of which there is any evidence was when he exclaimed that he was hurt.

The main point urged for reversal is that the undisputed evidence just detailed makes out a clear case of "voluntary exposure to unnecessary danger," and that the trial court should have so held, as a matter of law, and dismissed the action. Counsel have cited, and we have found, no adjudicated case in which the act of a private citizen in going with an officer in pursuit of criminals has been considered in connection with such a clause in an insurance policy. The elements of the inquiry must be, first, whether, under the facts, Dr. Sackett voluntarily exposed himself to danger, and, second, whether it was an unnecessary danger. To be voluntary, his act in exposing himself to danger must have been intentional and of his own will. This, of course, implies that he was conscious of the peril and purposed to incur it. That he was conscious of the danger could be shown by his acts or words at the time or, in the absence of such direct evidence, by circumstances indicating that the danger was so apparent that a man of ordinary intelligence must necessarily have known of its existence. Evidence is lacking of acts or words on his part such as would specifically show that Dr. Sackett was conscious of the danger. Were the circumstances such as to impute that knowledge to him as a man of ordinary intelligence?

There can be no doubt that when he offered to drive the marshal in his car, and while the preparations were going on, Dr. Sackett knew that the purpose was to overtake

the car ahead, if possible, and to capture the men seeking to escape in it, who were presumably burglars who had broken into the store. There is no evidence that any one in his car, other than the marshal, was armed, but he knew that the marshal deemed it necessary to be armed. As a reasonable man Dr. Sackett must have foreseen the possibility of resistance on the part of the supposed fleeing criminals, that physical force might be required to stop and detain them, and that firearms might be brought in play. The danger, in our opinion, was obvious, and knowledge thereof must be attributed to Dr. Sackett at the time the pursuit was started. Furthermore, the circumstances indicate that he exposed himself voluntarily to the danger. The suggestion that his car be used came from him. While the marshal told him to get it, this was not a command, but an acquiescence in and acceptance of his previous offer. There is nothing to support the inference that he was coerced against his will to take his car and go.

Was it "unnecessary danger" within the true meaning and interpretation of the language relied upon to defeat the policy? That question should be answered in view of what should reasonably be deemed to have been within the contemplation of the parties to the insurance contract. In placing therein a clause defeating liability in case of "voluntary exposure to unnecessary danger," the intent was to establish a reasonable limit and check upon the insured in order to protect the insurer against reckless acts and ventures in which the insured might engage, beyond the sphere of his ordinary avocation and mode of life. Whether any particular hazard to which he exposed himself was necessary is to be determined, however, with reference, not only to his ordinary activities, but also to those unusual situations and emergencies which are likely to confront any person in the performance of his duty as a citizen. The law gives every citizen the right, when crime has been committed in his presence or within his knowledge, to assist in the pursuit and apprehension

of those detected in its commission or under reasonable suspicion of fleeing from justice after perpetrating the unlawful act. *Kennedy v. State,* 107 Ind. 144; *Brooks v. Commonwealth,* 61 Pa. St. 352. And the moral duty to lend aid under such circumstances becomes a legal duty when the citizen is called upon by a peace officer. Rev. St. 1913, sec. 8744.

In the interest of the safety and well-being of society, men should not be deterred from the willing performance of that duty through fear that, in so doing, they will overstep the bounds of prudence and forfeit their rights under insurance contracts. The law regards such contracts as made with reference to the perils incident to the fulfilment by the insured of his obligation to assist in bringing criminals to justice. Such hazards do not come within the definition of "unnecessary danger." The rule is well settled that exposure to danger in the effort to save human life is not "exposure to unnecessary danger" within the meaning of the clause under consideration. *Da Rin v. Casualty Co. of America,* 41 Mont. 175, 27 L. R. A. n. s. 1164. We think there is equally strong ground to hold, by analogy, that the duty of the citizen to act for the preservation of society itself by helping to pursue and take criminals into custody is none the less urgent and controlling. Public policy forbids that contracts should be given a construction tending to discourage that sense of duty which should, in either case, be instinctive with every citizen. For that reason, the risk incurred in the performance of such duty does not, as a matter of law, constitute "exposure to unnecessary danger," but in every case arising under such conditions it will be for the jury to say whether the insured exposed himself so wantonly and recklessly as to have subjected himself to needless risk.

Certain instructions given by the trial court are criticized, but, in view of the conclusion hereinbefore reached, they were not objectionable. There being no error in the record, we recommend that the judgment be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

JOHN W. FRANCIS, ADMINISTRATOR, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JUNE 6, 1921. No. 21485.

Negligence: WHEN QUESTION FOR JURY. Where there is evidence tending to prove both negligence and contributory negligence in an action to recover damages for the causing of death by a wrongful act, the duty of making the comparison under the comparative negligence law is imposed upon the jury, unless the evidence of negligence is legally insufficient to sustain a verdict in favor of plaintiff, or the evidence shows the contributory negligence of the plaintiff is more than slight, or where the defendant's negligence is not gross in comparison with that of plaintiff. Rev. St. 1913, sec. 7892.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

Hainer, Craft & Lane and *H. W. Baird,* for appellant.

W. C. Frampton and *Wilmer B. Comstock, contra.*

MORRISSEY, C. J.

This is an action to recover damages in the sum of $10,000 for alleged negligence resulting in the death of Rebecca Jane Francis, a married woman about 61 years of age. She was struck and killed by a street-car on defendant's track in Lincoln about 10 o'clock p. m. November 29, 1918; her daughter being her companion at the time. The street-car was going east on Holdrege street. The collision occurred at the intersection of the crosswalk on the west side of Twenty-second avenue, while the mother was attempting to cross the street-car track from the north, intending to take passage with her daughter on the approaching street-car at the regular stopping place.

The daughter had safely crossed the street-car track ahead of her mother. The husband, as administrator of the estate of his deceased wife, is plaintiff. Defendant is charged with negligence in the following particulars: The motorman was incompetent and careless. The car was run at a dangerous speed. The car was not equipped with an efficient fender. The motorman failed to keep a proper lookout. In the answer defendant pleaded that the collision was unavoidable on its part, that the accident occurred without any fault or negligence of defendant, and that the collision was caused solely by the negligence of Rebecca Jane Francis. The reply to the answer was a general denial. The jury returned a verdict in favor of plaintiff for $1,000. From the judgment thereon defendant has appealed.

The principal assignment of error is insufficiency of the evidence to sustain the verdict, and this presents the controlling question in the case. Defendant takes the position that the car was brilliantly lighted, that it gave notice of its approach, that it was on schedule time, that it was running at the usual speed, that Mrs. Francis was guilty of negligence in going in front of the approaching car, that defendant was free from negligence, and that the collision was unavoidable on the part of defendant. Is the position thus taken tenable? There is evidence tending to prove the following facts: The daughter, coming from the north on the west side of Twenty-second avenue, crossed the street-car track and saw the street-car approaching at a distance of 150 or 200 feet. She took her place on the south side of the street railway track at the intersection of the cross-walk, the usual place to board the car approaching from the west, that being the signal for it to stop. Her mother followed her, but was 10 or 15 feet behind. The street-car, without slackening speed, while running at the rate of 15 miles an hour, struck her mother when she was between the rails but nearly across the track. She was dragged 80 feet or more and the car ran at least 120 feet before it was stopped. The car was

equipped with sand to prevent the wheels from slipping when the brake was applied, but the sand was not used. When the car was within 50 feet of the place where the collision occurred, the motorman was engaged in conversation with a man in the front vestibule. Immediately after the car stopped the motorman and another man, coming from the direction of the car, walked together toward the scene of the accident. In some particulars the evidence outlined is contradicted, but from it there may be drawn the inferences that the motorman did not keep a proper lookout, and that timely and proper application of the brake with the use of sand would have slackened the speed, would have given the mother time to cross the track, and would have prevented the collision. The evidence of negligence seems to be sufficient to sustain a verdict in favor of plaintiff. There was also testimony tending to prove the other allegations of negligence submitted to the jury. On the part of defendant the proofs tend to show that Rebecca Jane Francis was guilty of contributory negligence, but it cannot be said, as a matter of law, that her contributory negligence was more than slight in comparison with the negligence of the motorman, within the meaning of the comparative negligence law. Rev. St. 1913, sec. 7892. Under the circumstances the duty of making the comparison and of deciding the issues of negligence and of contributory negligence was imposed upon the jury. *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224; *Sodomka v. Cudahy Packing Co.*, 101 Neb. 446; *Robison v. Troy Laundry*, 105 Neb. 267; *Morrison v. Scotts Bluff County*, 104 Neb. 254.

Defendant argues further that an amendment of the petition during the trial and the awarding of damages to the husband and daughter, who, as it is said, had no pecuniary interest in the life of Rebecca Jane Francis, are grounds for reversal. Under the evidence and the established principles of law neither of these points is well taken.

AFFIRMED.

KENESAW MILL & ELEVATOR COMPANY, APPELLANT, V. GEORGE AUFDENKAMP, APPELLEE.

FILED JUNE 6, 1921. No. 21521.

1. **Statute of Frauds:** SALES: PART PERFORMANCE. Where 998 bushels of wheat were stored in an elevator under an agreement that it should be sold to the owner of the elevator at a price and date to be fixed in future by the owner of the wheat, and a parol contract was afterwards made by the owner with the company owning the elevator whereby he sold to it 5,000 bushels of wheat of which the 998 bushels already delivered formed a part, the acceptance of the delivered wheat by the buyer and the surrender and relinquishment by the seller of all direction and control over it constitute such an acceptance of part of the goods sold as to satisfy the provisions of the statute of frauds.
2. **Judgment:** DISREGARD OF VERDICT. "In a case in which a party is entitled to a jury trial, and where the pleadings do not confess the right to a judgment, the court cannot disregard the verdict and enter such judgment as the evidence warrants. If the verdict is not sustained by the evidence, the remedy is by motion for a new trial on that ground." *Manning v. City of Orleans*, 42 Neb. 712.

APPEAL from the district court for Adams county: WILLIAM A. DILWORTH, JUDGE. *Reversed.*

J. E. Willits, for appellant.

Tibbets, Morey & Fuller, contra.

LETTON, J.

This is an action for breach of a contract to deliver wheat. In substance, the petition alleges that the defendant, a farmer living near Kenesaw, on or about October 2, 1916, delivered to the plaintiff, between that time and March 5, 1917, 998 bushels of wheat for storage in its elevator, with an agreement that he was to sell it to the plaintiff, the price to be determined at such time as defendant called for a settlement, and by the market value on the date of settlement; that on March 5 the defendant sold to the plaintiff 5,000 bushels of wheat at $1.80 a

bushel, which included the 998 bushels already delivered under the former agreement, on which the defendant had already received $1,232.25 advance payment; that subsequently at different times a further payment of $500 was made; that defendant failed to deliver the remainder of 4,002 bushels of wheat, and on June 15, 1917, expressly refused to deliver the same when plaintiff demanded delivery; that the reasonable market value of wheat at the time and place of delivery was $2.82 a bushel. Plaintiff prays judgment for the difference between the $1.80, which was the contract price, and $2.82, the market price, with interest.

The answer, among other things, admits the agreement as to the storage of the 998 bushels of wheat, and sale of the same at $1.80 on March 5, 1917. It alleges that on that date the defendant verbally agreed to sell 5,000 bushels more at the same price, in addition to the 998 bushels; that this agreement was not in writing, that no payment had been made thereon, and no portion delivered, and that the contract was therefore void under the statute of frauds. The reply is virtually a general denial. The jury found for plaintiff, and assessed its recovery at $550, with interest from June 15, 1917, to date. Afterwards plaintiff filed a motion for a correct computation of the full amount shown to be due plaintiff upon the general finding contained in the verdict. This motion was overruled. A motion for a new trial was also filed by plaintiff and overruled. Plaintiff appealed and now assigns as error that the court erred in overruling these motions.

At the beginning of the trial the defendant objected to the introduction of any evidence for the reason that the petition did not state facts sufficient to constitute a cause of action. This objection was overruled, but defendant raises the point in this court that a parol agreement that the 998 bushels already in the elevator should be part of the 5,000 bushels could not take the contract out of the statute of frauds, since mere words could not

constitute a delivery, nor were the payments made at the time of the contract.

The sale and acceptance on March 5, 1917, of the 998 bushels already in the elevator is alleged in the petition. This is sufficient to satisfy the statute of frauds, since, when property of this character is already in the purchaser's possession, the only further act necessary to complete the delivery is acceptance. *Gray v. Peterson,* 64 Neb. 671; *Calkins v. Lockwood,* 17 Conn. 154. The petition therefore is not vulnerable to a demurrer *ore tenus.*

There was a direct conflict in the evidence with respect to the conversation which occurred on March 5. Plaintiff's agent testifies that the 998 bushels previously delivered formed part of the 5,000 bushels contracted for on that date, while defendant with equal positiveness testifies that the 5,000 bushels he then offered to sell was in addition to, and did not include, the wheat already delivered. This is the pivotal question in the case and is a question of fact which the jury settled against the defendant by the verdict. It must be taken as established that the sale of the 5,000 bushels was made as alleged by plaintiff.

The remaining question is whether the trial court should have sustained plaintiff's motion, computed the amount claimed to be due under the contract, and rendered judgment for the same. The statute (Rev. St. 1913, sec. 8006) provides that, when trial by jury has been had, judgment must be rendered by the clerk in conformity with the verdict, unless it is special, or the court order the case to be reserved for future argument or consideration. The verdict was rendered January 29, 1918. The court made no order that the case be reserved for future consideration, but no judgment was entered and no further action taken by the court until February 13, 1918, when the motion to correct the computation and the motion for new trial were overruled, and judgment was entered by the court in conformity with the verdict.

A judgment notwithstanding the verdict may be ren-

dered only where the pleadings show that the moving party is entitled thereto. Rev. St. 1913, sec. 8008. Section 7858 provides that the jury shall assess the amount of the recovery, and section 7862 that, if a verdict be defective in form only, the same may, with the assent of the jury before they are discharged, be corrected by the court. These provisions control. "In a case in which a party is entitled to a jury trial, and where the pleadings do not confess the right to a judgment, the court cannot disregard the verdict and enter such judgment as the evidence warrants. If the verdict is not sustained by the evidence, the remedy is by motion for a new trial on that ground." *Manning v. City of Orleans,* 42 Neb. 712. See also, *Wiruth v. Lashmett,* 85 Neb. 286; *Rueber v. Negles,* 147 Ia. 734; *McKeon v. Central Stamping Co.,* 264 Fed. 385; 38 Cyc. 1899, note. The case of *Spence v. Damrow,* 32 Neb. 112, cited by plaintiff, is an equity case tried *de novo* in this court, and is inapplicable here, as are the other cases from this court relied upon in support of the motion. While finding for plaintiff on the main issue, the jury disregarded the express instruction of the court with reference to the measure of damages and returned a verdict for much less than the evidence warranted or required. This was a prejudicial error. Plaintiff is therefore entitled to a new trial.

REVERSED.

G. A. BOYD, APPELLEE, V. HENRY FRANCISCO, APPELLANT.

FILED JUNE 6, 1921. No. 21652.

Municipal Corporations: VIOLATION OF ORDINANCE: JUDGMENT: REVIEW. Where the proceedings in a prosecution for the violation of a village ordinance are conducted properly in all respects except that the police judge mistakenly entitled the case upon his docket as if the complaining witness instead of the state were plaintiff, proceedings to review the judgment in the district court must be conducted in the manner provided by the statute for reviewing such prosecutions.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Affirmed.*

E. D. Kilbourn, for appellant.

O. A. Williams, contra.

LETTON, J.

This case originated in the police court of Royal, Antelope county, and was a complaint under an ordinance of that village charging that Henry Francisco did "operate and conduct for hire * * * and public use, three pool and one billiard table, without having first obtained * * * a license," in his place of business in that village. The defendant was convicted and fined in the sum of $100. The case was taken by petition in error to the district court, and that court dismissed the error proceedings.

Two errors are assigned: First, that the complaint does not state a cause of action; second, that the prosecution was not carried on by the state, but by a private person.

The record shows that the proceedings in police court were carried on regularly in all respects. A sufficient complaint was filed, the accused arrested, and trial had as is usual in such prosecutions. The police judge, however, docketed the proceedings as "G. A. Boyd, plaintiff, v. Henry Francisco, defendant." The record recites: "Evidence was introduced by the state, but no evidence was offered by the defendant. On consideration of the evidence the court finds the defendant guilty as he is charged in the complaint"—and a fine was imposed in proper form. There was no judgment in favor of Boyd, and it is apparent that the state was the real plaintiff.

The district court found "that there is no judgment shown by the record in favor of defendant in error, and that there are no errors complained of by the plaintiff in error, shown by the record," and dismissed the proceedings.

A motion was made about two months afterwards, but whether at the same term of court or not is not shown, to set aside the order dismissing the error proceedings, and to docket the case and treat it as an appeal. This motion was overruled. The proceedings in error were a nullity and were properly dismissed. If considered as an appeal, it was taken too late, and sufficient cause was not shown for the failure to perfect it in time. The motion was properly overruled. We have examined the complaint and find it sufficient.

AFFIRMED.

LOUIS GLEBE V. STATE OF NEBRASKA.

FILED JUNE 6, 1921. No. 21883.

1. **Criminal Law:** "THIRD TERM" OF COURT. The words "the third term" in section 9022, Rev. St. 1913, quoted at length in the opinion, refer to regular terms as distinguished from special terms or sessions of the court.
2. ———: CONSENT TO CONTINUANCE. When a defendant actively consented to a continuance of his case over a certain term, such consent is equivalent to a delay on his application within the meaning of said section 9022, Rev. St. 1913, and constitutes a waiver of his right to count such term as one at which he should be tried.

ERROR to the district court for Webster county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

Bernard McNeny, for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

DAY, J.

The defendant, who is plaintiff in error herein, was convicted of the offense of having unlawfully in his possession intoxicating liquor and was adjudged to pay a fine of $100 and costs. He prosecutes error to this court.

The only question presented by the record is whether

the court erred in overruling the defendant's two motions that he be discharged.

The record shows that a transcript on appeal from conviction of defendant for this same offense was filed in the district court for Webster county August 26, 1919, the defendant being out on bail. The record is not entirely clear as to the character of the terms of court held in Webster county during the time in question, but, giving the defendant the benefit of all cases of doubt, they were as follows:

Regular—September 29, 1919.
Regular—October 27, 1919.
Special—February 11, 1920.
Regular—April 5, 1920.
Special—May 20, 1920.
Regular—May 24, 1920.
Regular—October 20, 1920.

At the April, 1920, term, and also at the October, 1920, term, the defendant filed motions that he be discharged for the reason that he was not brought to trial before the end of the third term of court held after the filing of the transcript. Both motions were overruled. These rulings constitute the basis of the error to this court. The correctness of the rulings of the trial court depends upon the proper construction of section 9022, Rev. St. 1913, reading as follows:

"If any person indicted for any offense, who has given bail for his appearance, shall not be brought to trial before the end of the third term of court in which the cause is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happen on his application, or is occasioned by the want of time to try such cause at such third term."

The question is: What is the meaning of the expression "term of court?" If these words are applicable to every term, sitting or session of the court, whether reg-

ular or special, then the overruling of the motions was error; otherwise, if they refer only to "regular" terms.

Regular terms are those terms beginning at certain dates fixed by law, or by the judge in conformity with authority of law, as distinguished from special terms which the judge may call at some other time in his discretion. In this state the district judge on January 1 is required to fix the regular terms of court for the ensuing year (Rev. St. 1913, sec. 1162); the terms so appointed have the same validity and efficacy as if definitely fixed by statute.

We are clearly of opinion that section 9022, Rev. St. 1913, when considered with other enactments upon the subject, should be considered as applying to regular terms only. The words must be given their ordinary meaning, and it seems that only regular terms are ordinarily understood by the expressions "May Term," "October Term," etc. A session of the court held at other times than those fixed by law would ordinarily be designated as a special term, as in fact they are by section 1163, Rev. St. 1913. Furthermore, it is more reasonable to conclude that by the words in question the legislature had in mind those particular terms required to be fixed at the beginning of the year rather than an indefinite number of special sessions, which might result in a wide disparity of time between the filing of the information and the trial, in different localities, resulting in great confusion, and possible prejudice to the rights of the defendant or the state. For example, a defendant is recognized at the February term to appear for trial on the first day of the next term of court, which, as then fixed, was in October. Is it possible that the bond could be forfeited for nonappearance of defendant at a special term thereafter called in May? Or, if three special terms were called in May, July, and September, could defendant be heard to say that he was entitled to be discharged in October? Again, at the adjournment of a term all matters not otherwise disposed of are continued automatically by statute or by

order of court to the next term. Would the calling of a special term (perhaps for a two-hour session as appears in this record) reopen the entire docket? These illustrations will suffice to show the ordinary meaning of the words used. The *accident* of a special term should not alter such ordinary signification. We are not without authority for our conclusion.

In *Stripland v. State,* 115 Ga. 578, it was held in a similar statute the words, "or at the next succeeding term thereafter," mean the next regular term. See, also, *Commonwealth v. Lovett,* 2 Va. Cas. 74.

The case of *Critser v. State,* 87 Neb. 727, relied upon by defendant, is not in point, as the only terms in question were regular terms, so far as appears. At any rate the question now raised was not discussed.

The situation then is as follows: At the September, 1919, term the case was continued by consent of the parties. Whatever might be the ruling in a case of mere failure of defendant to object, an active participation in the act of continuing the case by positive consent thereto must be considered as equivalent to a continuance upon his application, and such term should not be counted. *Healy v. People,* 177 Ill. 306. It could hardly be claimed if defendant consented to a continuance over the third term that he would be heard to demand his discharge at the next term. In such case he would be deemed to have waived his right. *State v. Dewey,* 73 Kan. 735. (The reversal of the case on rehearing, at page 739, did not disturb the holding as to the effect of defendant's consent to a continuance.)

While the record is not entirely clear when the information was filed, yet we think it is fairly inferable that it was filed at the September, 1919, term, and, if so, that term should not be considered in the calculation. *Whitner v. State,* 46 Neb. 144. The case was continued over the April, 1920, term at the request of defendant. There remains only three regular terms, at the last of which defendant was tried.

In view of our construction of section 9022, Rev. St. 1913, it will not be necessary to refer to other questions discussed in the brief. It seems proper, however, to suggest that all presumptions are in favor of the correctness of the rulings of the trial court and defendant is required to show error affirmatively, and, there being no evidence in the record tending to show that there was time to try the defendant at any time prior to October, 1920, the presumption must prevail that the court acted without error. *Korth v. State,* 46 Neb. 631. We conclude that defendant was not entitled to be discharged upon either motion.

No error appearing in the record, the judgment of the district court is

AFFIRMED.

JOHN A. ROEBLING'S SONS COMPANY, APPELLEE, V. NEBRASKA ELECTRIC COMPANY ET AL.: CHICAGO SAVINGS BANK & TRUST COMPANY ET AL., APPELLANTS.

FILED JUNE 6, 1921. NO. 21362.

1. **Electricity:** ELECTRIC PLANT: APPURTENANCE: MORTGAGE. Where a company, owning independent electric generating and distributing plants in several small towns, connects these plants by a high tension transmission line, with the object of producing economy and efficiency in operation, and of assisting and enlarging the work of the electric plants, *held,* that such transmission line, though extending across the country over property not owned by the company, and over which it had only a license to go, would constitute an appurtenance to the existing plants from which the line was constructed, and be subject to the lien of a mortgage, which had been given before the transmission line had been constructed, and which was to cover the plants and their appurtenances, and which contained a clause covering additions and extensions and properties to be afterwards constructed or acquired.
2. ———: ———: ———. Such transmission line constructed from one of the electric lighting plants becomes an appurtenance and an integral part of such plant from the time construction is commenced, its character in relation to the main property being de-

termined by the purpose for which it is being built, and its character as such appurtenant part of the plant from which it is constructed does not await its completion and operation as a part thereof.

3. ———: ———: ———: MORTGAGE. Where the mortgage provides for the payment of further moneys in case improvements and extensions are made, and the mortgagee, after the construction of such a transmission line has begun, advances moneys on the faith and credit of such construction, the acceptance of such moneys constitutes such an act on the part of the mortgagor as will subject the transmission line to the lien of the mortgage.

4. ———: ———: LIENS: PRIORITY. Where one furnishes material for the construction of such transmission line, after the line has been partly erected, *held*, on a claim for a mechanic's lien, that his rights are subordinate to the lien of the mortgage.

5. ———: ———: ———. The mere fact that the mortgage money was given with the intention that it should be used in the purchase or in the improvement or extension of the property does not render the mortgage subordinate to the mechanic's lien, where it does not appear that the mortgagee had retained any control over the use of the funds furnished under the mortgage, and had not ordered or required, and had no power to order or require, that any extensions or improvements should be made.

6. Appeal: TRUSTEE FOR BONDHOLDERS. *Held*, that the trustee for the bondholders under the mortgage was entitled to bring an appeal to this court, where a judgment had been rendered subordinating the lien of the mortgage to that of the mechanic's lien.

APPEAL from the district court for Knox county: ANSON A. WELCH, JUDGE. *Reversed.*

Fisher, Boyden, Kales & Bell, Albert M. Kales, W. D. Funk and *William K. Otis*, for appellants.

Newman, Poppenhusen, Stern & Johnston, Montgomery, Hall & Young, Charles T. Farson and *Raymond G. Young, contra.*

FLANSBURG, J.

Action by plaintiff Roebling's Sons Company to foreclose a mechanic's lien upon an electric transmission line, the property of the Nebraska Electric Company, and for the construction of which plaintiff had furnished copper

wire. The Chicago Savings Bank & Trust Company, hereinafter called defendant, claim a prior lien by virtue of a trust deed. The sole controversy presented is between these two lien claimants. The trial court found that the mechanic's lien was the superior one, and from that decision and the decree in accordance therewith the trustees for the defendant and for others holding bonds secured by the trust deed bring this appeal.

In March, 1917, the Nebraska Electric Company purchased the electric light and power plants situated, respectively, in the towns of Creighton, Wausa, Bloomfield, Hartington, Wakefield, and Emerson, all in Nebraska. During that month, and, in fact, to procure funds to apply upon the purchase price, the Nebraska Electric Company executed and delivered to the defendant Chicago Savings Bank & Trust Company the trust deed in question. This trust deed, or mortgage, as we shall call it, was, during April, 1917, filed of record in the several counties where the properties were situated. The mortgage by its terms covered, by specific description, the real estate of each one of the electric lighting plants and, by general terms, all buildings and improvements, the distribution systems in and about said towns, together with all the appurtenances of said plants and systems. There was superadded to these several descriptions the following general description of property intended to be covered by the mortgage:

"All engines, boilers, stacks, tanks, condensers, heaters, pumps, switchboards, dynamos, batteries, generators, pipes, connections, transformers, boilers, wires, meters, machinery, fixtures, tools, appliances and equipment of every kind and nature constituting the electric light and power plants in each of the above-named cities and villages and the distribution systems connected therewith or appertaining thereto, with all the appurtenances and property of every kind relating to or used or intended for use in connection with said plants and systems, and all contracts, accounts, and other things of value pertaining

to the business heretofore conducted through or in connection with any of said plants, and the good will of such business.

"All ordinances, contracts, franchises, instruments, licenses, privileges, revenues, income, profits and rights of every kind now or hereafter in any manner held, owned or enjoyed by said Nebraska Electric Company; and all property, real, personal and mixed, of every kind and description, not hereinabove specifically described, now owned or hereafter acquired by said Nebraska Electric Company."

The mortgage provided for the immediate issuance of $100,000 in bonds, which bonds were issued and sold and the net proceeds delivered to the Nebraska Electric Company. The mortgage further provided for the immediate issuance of another $25,000 in bonds. The proceeds from the sale of these bonds, it was provided, should be paid to the Nebraska Electric Company from time to time, and only in payment or to reimburse the company "for expenditures for, not more than four-fifths of the actual cost, and in no event for an amount exceeding the reasonable value, of property constructed or acquired as and *for permanent additions to and extensions of the property of the company.*"

In September, 1917, the Nebraska Electric Company began the construction of the high tension electric transmission line in question. This line was to extend from Creighton for a distance of 3½ miles to Bazile Mills, thence 17½ miles to the town of Wausa, and thence several miles to the town of Bloomfield, with the object of connecting the several electric lighting plants of the company for the purposes of economy and efficiency in operation, and for the purpose of allowing the steam generating plant at Creighton to furnish power to the other plants connected by this line.

During the time that this work of construction progressed, the expenditures upon this and other improvements of the several plants were certified to the trustee

under the mortgage. The $25,000 in bonds was issued and sold on the receipt of these certificates, and from time to time the net proceeds of these sales were remitted to the Nebraska Electric Company until, on November 14, 1917, the company had received the remainder of the proceeds of these bonds owing to it under its agreement.

The certificates upon which the proceeds of this $25,000 in bonds were issued did not cover expenditures made upon the transmission line alone. There are items, some in the certificate of August 28, 1917, amounting to a total of $149.80, which are attributable to the expense of construction of this transmission line, and, in the certificate of November 14, it appears that $21,380.71 had been expended upon the transmission system "connecting Creighton, Bazile Mills, Wausa, and Bloomfield." In that certificate, it may be further said, expenditures on improvements, other than on the transmission line in question, were also shown, making the total of the expenditures certified for improvements and extensions $30,909.38. On receiving this certificate the trustee remitted a balance of $20,407.48 as proceeds from the sale of bonds.

It was upon these certificates of August 28 and November 14, and thus in part upon the faith of these expenditures in the construction of the transmission line in question, that the trustee remitted the proceeds of the sale of the $25,000 in bonds.

The Nebraska Electric Company continued with the construction of the transmission line, and on January 8, 1918, poles had been set the entire distance, except for 1½ miles between Wausa and Bloomfield, and wire had been strung for some 2 miles distant beyond Bazile Mills toward Wausa.

It was at that time and at that stage of the construction of this transmission line that the plaintiff, under contract of December 8, 1917, delivered its copper wire. The wire so delivered was used on that part of the line from a point 1½ miles east of Bazile Mills to Wausa Junction,

a point just outside of the town of Wausa. On March 1, 1918, plaintiff filed a claim for a mechanic's lien.

The trial court held a mechanic's lien attached to that portion of the transmission line extending from Bazile Mills to Wausa Junction, but that such lien attached to no other part of the Nebraska Electric Company's property, and that such lien was superior to defendant's mortgage.

Plaintiff contends that the transmission line across the country and along the highways, not constructed upon real estate belonging to the Nebraska Electric Company, but upon property in which the said company had only a license and no title interest, was personal property, and that defendant's mortgage would not attach to such personal property acquired by the Nebraska Electric Company after the mortgage had been given.

This court has held that a mortgage, which is given to cover personal property to be afterwards acquired, or which is not in existence, as on crops yet to be planted, or on the future increase of live stock, will not attach to such properties which are afterwards acquired or afterwards come into existence, unless there is some new and intervening act on the part of the mortgagor, after he has become possessed of the property, sufficient to subject the property to the lien of the mortgage. *Cole v. Kerr,* 19 Neb. 553; *Battle Creek Valley Bank v. First Nat. Bank,* 62 Neb. 825.

In these cases the court pointed out that, to allow a person to mortgage properties which were to be acquired through his labor, would virtually be allowing him to mortgage his labor in advance of its performance, and it seems such was the primary reason given in this state for refusing to give such mortgages any validity. The principle has been extended, however, to the mortgaging of personal chattels generally, such as furniture to be afterwards acquired and placed in a hotel (*New Lincoln Hotel Co. v. Shears,* 57 Neb. 478), and to building materials which were to be afterwards purchased for the construc-

tion of extensions to a street railway system, but which materials were, in fact, never so used. *Steele v. Ashenfelter,* 40 Neb. 770.

In these cases the court has taken the position that it is against public policy to permit a person to mortgage what he does not have. A mortgage of future acquisitions might deter one from the effort of making acquisitions or of producing such property.

In each of these cases the after-acquired property, sought to be subjected to the lien, had no potential existence at the time the mortgage was given, and the property sought to be covered was in no sense an after-acquired accessory or appurtenance to property already in existence and covered by the mortgage.

We think the above-mentioned cases are quite different from the case of a mortgage given on a mechanical establishment, and which covers the entire property constructed, or to be constructed, and such future improvements, additions and extensions as are to become appurtenant parts of such original property. Where the original property is improved by an extension or a newly added appurtenance, such addition is not a new and independent property, but becomes an integral part of the old, and, though the original property may be improved in character and value, it would be difficult, if not impossible, to segregate in all cases the original properties from their improvements. Such mechanical establishments are constantly undergoing changes, due to the requirements of repair, obsolescence, and the necessity for progressive extensions and improvements. A denial of the right of the owners of such plants to provide that the mortgage should cover all after-acquired appurtenances to the plant would, through the course of time, by the process of improvements and changes in the plant, gradually allow a destruction of the original security of the mortgage.

The transmission line in question was an appurtenance to the electric lighting plants covered by the mortgage. It was an accessory to the plants. It was constructed

with a view only to assist in their operation. It could be utilized for no other purpose. Taken by itself, it is without use or value, except as salvage, a mere string of poles and wires, insufficient as security for either a mortgage or mechanic's lien, but, as an integral part of the electric system, it will no doubt produce substantial economies in operation and, as such, be a valuable property.

The terms of the mortgage are clearly sufficient to cover the property here involved. It is not essential that the transmission line be an indispensable part of the plant, in order that it be held to be an appurtenance, or that it be so interwoven with the entire system that the plants could not be operated without it, but it is enough that it was constructed solely as a part of the system, as an extension and improvement of it, and to assist in the operation of the work.

The court, in *Brady v. Johnson,* 75 Md. 445, where the question was raised as to whether the newly-added property had become such a part of the original plant as to be subject to the lien of a mortgage, containing an after-acquired property clause, said (p. 449): "The levy upon the property in the possession of the trustees has been made upon the theory and contention, as set forth in the answer of the judgment creditors, that such property as that described in the schedule of the sheriff is not necessary or essential to the operation of the canal, and therefore it is liable to execution. But from the nature of the property, its location, and connection with the canal and the use heretofore made of it, I cannot hesitate to conclude that the property levied on is needed and essential to the operation of the canal. *It is not a question whether the property be absolutely necessary or indispensable to the operation of the work, but whether it has been used, or is of a nature to be of practical use, in operating the work.* The wharf, and parcel of land connected therewith, as described, would certainly appear to be of a nature to be essential to the operation of the canal, and, from the evidence in the case, I think all the property

levied on is and will be of practical use in conducting the affairs pertaining to the canal and its operation. And that being so, it is clear, upon well-settled principles, that an execution will not lie, or will not be allowed to be executed against such property."

Electric transmission lines and similar structures, though extending beyond the real estate upon which the mechanical plant is situated, have been quite generally held to be such an appurtenance to the plant as will be considered a part of the plant and pass under a clause of a mortgage subjecting after-acquired property to the lien, and, furthermore, are held to be such an integral part of the plant as to subject the entire plant to a mechanic's lien for work or materials rendered or furnished in the construction of such extension. *Southern Electrical Supply Co. v. Rolla E. L. & P. Co.*, 75 Mo. App. 622; *Badger Lumber Co. v. Marion Water Supply, E. L. & P. Co.*, 48 Kan. 182, 187, 15 L. R. A. 652; *Stearns L. & P. Co. v. Central Trust Co.*, 223 Fed. 962; *Steger v. Arctic Refrigerating Co.*, 89 Tenn. 453, 11 L. R. A. 580; *Keating Implement & Machine Co. v. Marshall E. L. & P. Co.*, 74 Tex. 605; *Metropolitan Trust Co. v. Dolgeville E. L. & P. Co.*, 71 N. Y. Supp. 1055; *Wells v. Christian*, 165 Ind. 662; *New England Water Works Co. v. Farmers Loan & Trust Co.*, 136 Fed. 521; *Westinghouse Electric Mfg. Co. v. Citizens Street R. Co.*, 24 Ky. Law Rep. 334.

In the case of *Metropolitan Trust Co. v. Dolgeville E. L. & P. Co., supra,* the court, speaking as to the policy of the law in that respect, said (p. 1058): "The mortgage in question, as must generally happen in such a case, was executed to secure bonds running for a long period of time, and liable to be scattered in the hands of many holders. It probably was executed, and said bonds issued (and in most cases a similar course would be followed), for the purpose of securing money with which to build and equip a plant. Every corporation of the same class as that to which defendant belongs will, at least if it is successful and prosperous and thrifty, desire from time

to time to extend its plant, purchase more modern machinery, and replace old and worn-out construction with new construction. It becomes practically a matter of public necessity that, if bonds such as those involved in this action are to be available and merchantable in the public market, they must be secured through the lien of a mortgage upon such extensions and new property. No other course is practicable if the security and standing of the bonds is to be maintained. If this course is not allowed, the more prosperous and more progressive a corporation issuing the bonds becomes, the less valuable the security of the latter through interchange of old property for new."

It is urged by the plaintiff that the line in question was not an appurtenance nor an integral part of the plants, since it had never been completed, nor in operation, and hence had not become useful or beneficial or an accessory to the plants. It was, however, constructed from the company's property at Creighton to Bazile Mills, and from there partially completed to and through the town of Wausa. It was attached to the plant of the company at the point where the construction of the line began and was obviously constructed as an appurtenance to the plant. Though only partially completed, that did not prevent its character as an appurtenance from attaching. The object with which it was being constructed determined its relation to the main properties.

For still another reason we believe the property should be held subject to the lien of the mortgage. There was a new and intervening act between the parties to the mortgage, which, as we view it, would subject the property to the lien. After the electric transmission line had been partially constructed, and some $21,000 had been expended upon it, the mortgage trustees forwarded the proceeds of the $25,000 bond issue, with the express intention that the moneys were to reimburse the Nebraska Electric Company for the expense of this construction. Certainly, the Nebraska Electric Company could not ac-

cept such moneys and deny that the transmission line, on the faith of the construction of which the moneys were advanced, had not become subject to the mortgage lien.

The plaintiff, when it furnished its copper wire, was charged with notice of that provision of the mortgage, requiring the defendant to make immediate remittance of the proceeds of the $25,000 in bonds, in proportion to the value of the extensions of property that the Nebraska Electric Company should, from time to time, undertake and create. Plaintiff was bound to know that the structure in question was an extension and an accessory to the plants covered by the mortgage. Manifestly, it could be nothing else. It was, in any event, covered by the terms of the mortgage as a "permanent addition or extension," owing to its close relation to the principal properties, and plaintiff was charged with notice that the mortgagee was obligated to advance moneys to pay for or reimburse the expense of its construction. The fact that the mortgage was filed and moneys advanced prior to the furnishing of the materials, upon which the claim of the mechanic's lien was based, would, on this theory of the case, give the mortgage priority. *Creigh Sons & Co. v. Jones,* 103 Neb. 706; *Byers v. Chase,* 102 Neb. 386.

It is contended that the mortgagee was a promoter, and that the Nebraska Electric Company was merely an instrumentality through which the mortgagee acted, and that, for this reason, the rights of the mortgagee should be held subordinate to the claims of laborers and material men, who had contributed to the construction of the property. The record, however, fails to bear out this contention. What the value of these several plants was, in comparison with the initial $100,000 advanced to the Nebraska Electric Company, does not appear, and, without some other and further showing, the fact that the money advanced was applied upon the purchase price of these plants and that provision was made in the mortgage for the further issuance of bonds to provide moneys for such extensions or improvements of the plants as the

Nebraska Electric Company should make, does not bring the case within the promoter rule. It does not appear that the mortgagee had any direction or control over the use of the funds to be furnished under the mortgage, nor that the mortgagee had required or could order or direct that any extensions or improvements should be made. The mere fact that the mortgage money was given with the intention that it should be used in the purchase or in the improvement or extension of the property does not render the mortgage subordinate to the mechanic's liens thereafter attaching. *Henry & Coatsworth Co. v. Halter,* 58 Neb. 685; *Byers v. Chase, supra; Patrick Land Co. v. Leavenworth,* 42 Neb. 715; *Hoagland v. Lowe,* 39 Neb. 397; *Chaffee v. Sehestedt,* 4 Neb. (Unof.) 740; *Grand Island Banking Co. v. Koehler,* 57 Neb. 649; *Creigh Sons & Co. v. Jones, supra,* 27 Cyc. 238.

A further objection is raised to the right of the trustee under the mortgage to bring this appeal. This objection is based upon the assertion that the defendant Chicago Savings Bank & Trust Company is the holder of all the bonds under the trust deed, and is the real party in interest, and should, itself, have appealed, if the decree of the lower court was unsatisfactory to it. The record, however, by stipulation shows that the bonds are owned by this defendant, or have been sold by it to *bona fide* purchasers for value. The trustee represented all bondholders. The company's mortgage provided that no bondholder should have the right to institute suit for foreclosure or proceedings to protect rights under the mortgage unless the holders of one-third of the bonds should request the trustee to do so, and he, after reasonable opportunity, have refused or failed to act. It was clearly the intention, as indicated by the mortgage, that the trustee was to act in such proceedings for the protection of the interests of the bondholders. It seems clear to us that under such a contract, and in view of our statute (Rev. St. 1913, sec. 7585), the trustee clearly had the right to bring the appeal. See 3 C. J. 656, sec. 524.

As the case is presented, it appears that a determination of the validity of the mortgage as to the property in question, and its priority as to the mechanic's lien, settles the matters in controversy.

For the reasons given, the judgment of the lower court is reversed and the cause remanded for further proceedings.

REVERSED.

ALBERT HANDLIER, APPELLANT, V. KNIGHTS OF COLUMBUS, APPELLEE.

FILED JUNE 6, 1921. No. 21515.

Insurance: APPLICATION: ACCEPTANCE. Where, in his application for insurance in a fraternal benefit association, the applicant agrees to be bound by the laws of the order providing that no insurance shall be effective unless approved by the head medical examiner, actual acceptance of the application by that officer is required to create a contract of insurance, and, if the applicant dies before such acceptance, no liability will arise upon the theory of implied contract, although the application was prevented from reaching said officer by the negligence of a subordinate lodge officer whose duty it was to transmit it.

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

Burr & Brown, for appellant.

John A. Maguire and *E. J. Hainer, contra.*

DORSEY, C.

The appellant, Albert Handlier, a minor, by his next friend, brought this action against the appellee, the Knights of Columbus, a fraternal benefit association, upon an alleged contract of insurance in the sum of $1,000, upon the life of his brother, William Handlier, who died August 22, 1918. The deceased made written application in May, 1918, was examined by the local examining physician, but the papers never reached the officers of the supreme coun-

cil, and no benefit certificate was issued or delivered to the applicant. At the conclusion of the evidence, the court directed a verdict for the appellee and entered judgment dismissing the action.

The undisputed facts are as follows: William Handlier made application in due form for insurance membership upon the regular printed blank of the appellee, to which was affixed the regular medical examiner's blank. He was examined upon this blank by the local medical examiner, who passed and approved the applicant in due form thereon, and, after inclosing the application and medical examination in an envelope addressed to the supreme physician, gave it to a boy in his office to mail. The applicant, in conformity with the laws of the association at the time of his application, paid to the financial secretary of the local council the required membership fee of $10, local quarterly dues in the sum of $2.50, and 70 cents assessment for May, 1918, upon $1,000 insurance. He was initiated into the order, but paid no further dues or assessments. In August, 1918, a notice was mailed to and received by him from the local financial secretary, stating that he was indebted to the council for assessments in the sum of $3.50 to October 1, 1918, local dues in the sum of $1.25, and 50 cents special assessment, total $5.25. After his death, on September 11, 1918, his father paid $4.55 to the financial secretary, who issued a receipt therefor in the name of the deceased, itemized as follows: "Monthly assessment to September 1, 1918, $2.80; council dues, $1.25; special, 50 cents." This was not tendered back until after the action was commenced.

The appellant pleaded the foregoing facts as establishing a valid contract of insurance. The appellee defended on the ground that no contract was ever made, because the application did not reach and was never approved by the supreme physician, as required by the laws of the appellee, and no officer of the supreme council ever passed or had the opportunity to pass upon the application, because it never came into their hands. The further de-

fense was made that, even if a contract had been entered into, the claim could in no event be valid because, under the laws of the order, the deceased was in suspension and his membership forfeited for nonpayment of dues and assessments at the time of his death.

It must first be determined whether there was, in fact, any contract on the part of the appellee to insure the life of William Handlier. That depends upon whether the application, which, in legal effect, was an offer to make a contract, was accepted. It was necessary that the minds of the parties should meet. The appellee's mind or will in the transaction could be made manifest only through the officer or officers empowered under its laws to bind it in contracts of insurance. There was a clause in the printed application by which the applicant agreed to be bound by the laws of the order, which, among other things, provided that no officer or agent of the order or of any local council should have authority to waive any of the conditions upon which benefit certificates were issued or to vary or waive any of the provisions of the laws of the order.

It was further provided in the laws that, in case of insurance applicants, election to membership should be conditional upon the approval of the application by the supreme physician and that no person should be initiated as an insurance member or entitled to a death benefit without such approval. The mode by which insurance membership in the order was obtained was that the application, if acted upon favorably by the lodge, should be referred to the local medical examiner, whose duty it was to examine the applicant and to forward the examination, together with the application, to the supreme physician, who, in turn, was required to notify the local council of his approval or rejection of the applicant, and also to indorse his approval or rejection upon the application and file it with the supreme secretary; the latter being charged with the duty of issuing benefit certificates to insurance members.

The testimony of the local medical examiner was that he inclosed the application in an envelope addressed to the supreme physician and intrusted it to an office boy to be mailed. The application never reached the supreme physician, according to his testimony. The supreme secretary also testified that he had no knowledge of it. There being no evidence of an express acceptance of the application, the question remains whether, under the circumstances as stated, there could be, in law, an acceptance by implication.

The rule has been followed in this state, with regard to insurance upon property, that, where an insurance company receives the application but delays the acceptance or rejection of it until after the loss occurs, acceptance will not be implied from the fact that such delay ensued; that there must be actual acceptance or there is no contract. *St. Paul Fire & Marine Ins. Co. v. Kelley*, 2 Neb. (Unof.) 720; *Lowe v. St. Paul Fire & Marine Ins. Co.*, 80 Neb. 499; *Johnston v. Indiana & Ohio Live Stock Ins Co.*, 94 Neb. 403. In each of these cases the application contained a recital to the effect that the insurance was not to be binding until the application had been approved by the home office, and the authority of the agent who took the application was limited to taking and forwarding applications to the company.

In the case before us we are dealing with an application for fraternal benefit insurance containing an agreement by the applicant that he should be bound by the laws of the order providing that no person could become an insurance member or claim the death benefit until the application had been approved by the supreme physician, and providing further that no officer or agent could waive the conditions established by the laws of the order for the issuance of benefit certificates. In the instant case the application never reached the supreme physician or the head offices of the society, and the failure to pass upon the application was attributable to the local medical examiner, or to the neglect of the person to whom he intrusted

the application for mailing, and not to the home office, as was the fact in the cases hereinbefore cited. But, so far as the question of implied acceptance is concerned, we can perceive no difference in principle whether the delay was due to the failure of the local agent to forward the application or to the failure of the head officers to act upon it after it had been received. The question is whether or not, after an application for insurance has been lodged with an agent duly authorized to receive and forward it to the proper officer for approval or rejection, the insurance company or society becomes bound to act promptly upon it, to such extent that, if it does not, the inference will arise that a contract of insurance has been entered into.

In *Home Forum Benefit Order v. Jones,* 5 Okla. 598, the applicant was examined by the local medical examiner on December 3, but the application was not forwarded to the head officers of the association for approval until after his death on December 20. In that case, as in this, the laws of the order provided that insurance should not be effective until approved by the head medical examiner. It was contended that the local lodge officers had led the applicant to believe that his contract for insurance was complete when they took his application, adopted and initiated him as a member under the ritual, and accepted his membership fee and mortuary assessment, and that the negligence of the local officers in failing to forward his application was chargeable to the society. The court nevertheless held that "delay upon the part of the local lodge in forwarding the application to the grand lodge will not create a contract in the face of the provisions of the constitution and laws of the order."

The weight of authority supports the rule that delay in passing upon the application will under no circumstances be equivalent to or a substitute for actual acceptance by the insurer. *Bradley v. Federal Life Ins. Co.,* 295 Ill. 381. See case note to *Northwestern Mutual Life Ins. Co. v. Neafus,* 36 L. R .A. n. s. 1211.

There is a line of authority holding an insurance company liable in tort for negligent delay in passing upon an application, upon the theory that there is a duty to act and to notify the applicant promptly. *Duffie v. Bankers Life Ass'n,* 160 Ia. 19; *Boyer v. State Farmers Mutual Hail Ins. Co.,* 86 Kan. 442. This view was adhered to by this court in *Wilken v. Capital Fire Ins. Co.,* 99 Neb. 828, three of the justices dissenting. In *National Union Fire Ins. Co. v. School District,* 122 Ark. 179, it was held that the insurance company was not liable for failure of its soliciting agent to forward the application, either upon the theory that a contract had been consummated or upon the theory of an action in tort.

In the case before us, the appellant is not aided by the authorities supporting the right of action in tort for negligent delay, for the reason that the petition is founded squarely upon alleged contract, and not upon the theory of tort. We are convinced that there was no acceptance of the application by inference from the facts and circumstances in this record and, therefore, no contract upon which the action could be based.

No contract being shown, no theory is maintainable either that there was a forfeiture for nonpayment of assessments or a waiver thereof by virtue of subsequent acts of the officers of the local council, and those contentions need not be discussed.

We recommend that the judgment be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

FRANK SEBERGER, APPELLEE, V. GEORGE W. WOOD ET AL., APPELLANTS.

FILED JUNE 6, 1921. No. 21477.

1. **Statute of Frauds:** SALE OF LAND: CONTRACT. A contract for the

sale of real property is valid and binding upon the owner of the property, when subscribed by his agent who has been authorized in writing by said owner to enter into said agreement.

2. ———: ———: ———. Section 2628, Rev. St. 1913, *held* to have no application to the provisions of section 2650, Rev. St. 1913, authorizing an agent by writing to subscribe a contract for the sale of lands.

3. **Brokers:** SALE OF LAND: AUTHORITY OF AGENT. Where the owner of real estate signs a writing authorizing an agent to bargain and sell real estate within a certain time, at a stated price, and upon certain terms, and further agrees to furnish abstract and convey the lands on sale of same, *held*, that the agent was authorized to enter into a contract for sale of said lands.

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

J. J. Harrington and *A. W. Scattergood,* for appellants.

J. A. Donohoe and *J. A. Douglas, contra.*

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ., BEGLEY and LESLIE, District Judges.

BEGLEY, District Judge.

On May 15, 1919, George W. Wood, being the owner of the lands and the holder of the school land lease therein described, executed and delivered to F. L. Hutton a writing as follows:

"931. Contract for sale of farm. State Journal Co., Lincoln, Neb. Office of F. L. Hutton, Real Estate and General Agents, Ainsworth, Nebraska.

"Farm No. ———. The W.½ Sec. 31, W.½ S.E.¼ Sec. 31 and S.W.¼ N.E.¼ of Section 31 in Township 29 North of Range 17, containing 440 acres. Number of acres prairie, ———. Number of Forest Trees, ———. How watered, ———. Number of acres under cultivation, ———. Number of acres fenced, ———. Number and kind of fruit trees, ———. Description of dwelling house, ———. Lease on N.E.¼ Sec. 36-29-Range 18, ———. Description of buildings, ———. Lowest price

and terms of sale, fifty dollars per acre for deeded land and twenty-five hundred dollars for school land lease, all cash, or will take one-half cash and bal. on 5 years time at 6% Int. payable semi-annually. Taxes, ———. Distance from R. R. Station, ———. Distance from school house, ———. Quality of land, ———.

Contract.

"I, Geo. Wood, of Ainsworth of the county of Brown and state of Nebr., do hereby authorize F. L. Hutton of Newport, Nebraska, to bargain and sell the above lands at the price set forth, and do hereby agree that I will convey as above said lands on sale of the same. I further agree that the above described lands shall be left with said F. L. Hutton for sale as above, for the term of sixteen days from date hereof in full for all trouble in showing or advertising said lands. I will furnish abstract in case of sale, and I agree not to place the property in the hands of any other agent during the continuance of this agreement. G. W. Wood.

"Dated at Ainsworth, Nebraska, May 15, 1919."

On May 19, 1919, F. L. Hutton, as agent, entered into a written contract with Frank Seberger, by the terms of which Seberger agreed to purchase the said premises for the sum of $24,500, payable as follows: $1,000 in cash; $10,500 on or before July 1, 1919, at which time deed was to be executed, and to give mortgage back on the deeded land for $13,000, five years' time, interest at 6 per cent, payable semi-annually. This contract was signed "George Wood, by F. L. Hutton, his agent; Frank Seberger, party of the second part," in the presence of one witness. After the execution of these contracts and on May 20, 1919, Wood entered into a contract in writing by which he agreed to convey the premises to Earl Peterson, who immediately went into possession of the same. Frank Seberger brought this action for specific performance against Wood and Peterson as defendants. The trial court found that Hutton was duly authorized under the contract of May 19, 1919, to sell the lands and make con-

tract therefor; that he entered into a contract with Seberger for the sale of the same, and that Wood was bound thereby; and that Peterson had notice of such sale and of the rights of Seberger thereto at the time he entered into his contract of purchase with Wood; and decreed specific performance of Seberger's contract and that Peterson vacate and surrender possession of the premises to Seberger. Wood alone has appealed.

Appellant contends that Hutton was without authority to sign the contract of sale to Seberger in the name of his principal, because the contract of agency was not signed by both Wood and Hutton, as required by section 2628, Rev. St. 1913. His position is stated in his brief as follows: "The real point which we will rely upon in this case for a reversal is that Hutton is not the agent of the defendant, Wood; that while the defendant, Wood, signed the contract of agency, that contract of agency was never completed as it was never signed by the claimed agent, F. L. Hutton."

It is conceded that to be enforceable the contract must comply with the provisions of the statute of frauds as contained in sections 2625 and 2650, Rev. St. 1913. Section 2625 provides: "Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." Section 2650 reads as follows: "Every instrument required by any of the provisions of this chapter to be subscribed by any party may be subscribed by his agent, thereunto authorized by writing." The whole case rests upon the construction of the phrase "may be subscribed by his agent thereunto authorized by writing."

The supreme court of California construed a similar section of their statutes in the case of *Bacon v. Davis,* 9 Cal. App. 83, and said: "In simple language, the section provides substantially that any agreement for the sale of real property to be valid and binding must be subscribed either

by the owner of the property or by his agent who has been authorized in writing by said owner to enter into such an agreement. The word 'thereunto' has its ordinary signification of 'to that' and is obviously an elliptical form of expression for the phrase 'to do that.' Hence, as far as the agent is concerned, he must be authorized in writing 'to do that,' in other words, to execute an agreement of sale, to make it binding and operative."

In *Spanogle v. Maple Grove Land & Live Stock Co.*, 104 Neb. 342, it is said: "A contract of an agent in the name of his principal, for the sale of land, is void unless the authority of the agent to make the sale is in writing signed by the principal."

It is, therefore, plain that it is unnecessary under section 2625 that an agent sign the writing authorizing him to subscribe a contract for the sale of real estate, it being a sufficient compliance with said section if said writing is signed by the principal, and a contract for the sale of real property is valid and binding upon the owner of the property when subscribed by his agent who has been authorized in writing by said owner to enter into said agreement.

Section 2628, Rev. St. 1913, does not originate in the statute of frauds, but was enacted in 1897, and is section 1, ch. 57, Laws 1897. It provides that every contract for the sale of land between the owner thereof and any broker or agent shall be void unless in writing signed by both parties, describing the land and setting forth the commission. Previous to its enactment there was no law in this state requiring commission contracts for the sale of land to be in writing, and innumerable actions had been brought by real estate brokers against the owners of real estate to enforce the collection of commissions for negotiating sales which in many instances were never completed, and it was to remedy this evil that the section was passed. *Danielson v. Goebel,* 71 Neb. 300. Such contracts can have no application to the provisions of section 2625, they being merely contracts for compensation be-

tween the broker and the owner. As said in *Young v. Ruhwedel,* 119 Mo. App. 231: "It is not to be regarded as a 'contract for the sale of lands' but as an agreement enlisting the services of another to aid the owner in effecting a sale." It has been repeatedly held by this court that such contracts are mere listing agreements between the owner and the broker, whereby the broker is to procure a purchaser and receive compensation for that purpose. *Gould v. Rockwell,* 105 Neb. 724; *Whitehouse v. Gerdis,* 95 Neb. 228; *Ross v. Craven,* 84 Neb. 520; *Miller v. Wehrman,* 81 Neb. 388.

The trial court correctly construed the agreement to be one of express authority to Hutton to enter into the contract pursuant to its terms. Where the owner of real estate signs a writing authorizing his agent to bargain and sell real estate within a certain time, at a stated price, and upon certain terms, and further agrees to furnish abstract and convey the lands on sale of the same, it is a sufficient authorization to the agent to make a written contract of sale for his principal. *Whitehouse v. Gerdis, supra; Peterson v. O'Connor,* 106 Minn. 470.

The decree of the district court was right and is

AFFIRMED.

STATE, EX REL. KENNETH W. MCDONALD ET AL., APPELLEES, V. WILLIAM I. DYSON, APPELLANT.

FILED JUNE 6, 1921. No. 21881.

1. **Sheriffs:** REMOVAL: PROOF. In an action brought for the removal of a sheriff under the provisions of section 50, ch. 187, Laws 1917, for failure to do his duty in the enforcement of the provisions of said law, satisfactory evidence that the respondent himself gave away or sold intoxicating liquor is sufficient to sustain an allegation in a complaint charging that the respondent permitted intoxicating liquors to be given away in his presence and with his knowledge.
2. **Appeal:** SHERIFFS: REMOVAL: PLEADING. An action under the provisions of section 50, ch. 187, Laws 1917, for the removal of a

sheriff for failure to do his duty in the enforcement of said act, is a civil proceeding, and the respondent is required to file an answer to the petition or complaint as in any other civil action. If the respondent fails to file an answer questioning the constitutionality of said act, or fails to tender that issue by demurrer, motion, or objection to the offer of testimony in the trial court before judgment, and said cause is tried in the lower court upon the theory that respondent filed a general denial, or entered a plea of not guilty, this court will not consider the question of the constitutionality of said act if presented on appeal.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed.*

R. J. Greene and *H. C. Wilson,* for appellant.

Clarence A. Davis, Attorney General, C. L. Dort and *K. W. McDonald, contra.*

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., BEGLEY and LESLIE, District Judges.

LESLIE, District Judge.

This is an action brought in Morrill county, by the State, ex rel. Kenneth W. McDonald, County Attorney, and Clarence A. Davis, Attorney General, Relators, against William I. Dyson, Sheriff, under the provisions of chapter 187, Laws 1917.

A petition was filed in the district court on the 14th day of December, 1920, which broadly charges the respondent with failing and refusing to enforce the laws of the state of Nebraska generally, and with wilfully neglecting, failing and refusing to perform his duty as sheriff in the enforcement of the provisions of chapter 187, Laws 1917, and of habitual drunkenness, and wilful neglect of duty in failing to faithfully perform numerous other duties devolving upon him as sheriff during his term of office.

A special appearance was filed by the respondent, which was overruled by the court, and, following this, a motion was filed by the respondent to require the relators to make their petition more definite, which was overruled. No

answer was filed by the respondent, but the case appears to have been tried upon the theory that the respondent filed a general denial. At the conclusion of the evidence and argument of counsel the court found that the allegations of relators' petition relative to respondent giving away and receiving intoxicating liquors were sustained by the evidence, but that the allegations charging respondent with selling liquors were not sustained by the evidence. The court entered a judgment finding the respondent guilty of giving away and receiving intoxicating liquors contrary to law and ousting him from office as sheriff of Morrill county. From this judgment and order overruling respondent's motion for a new trial the respondent has appealed to this court. Numerous assignments of errors are relied upon by respondent for reversal, but we do not deem it necessary to give consideration to all of them.

No issue as to the constitutionality of the section of chapter 187, Laws 1917, under which this action is brought, was tendered by the pleadings in the court below. The respondent filed no answer, nor did he demur to the petition, nor move to quash the same, nor object to the introduction of testimony upon the ground that section 50 of said act was unconstitutional. This is a civil action, and the respondent for the first time raised the question of the constitutionality of this law in his motion for a new trial. The case was tried upon the theory that the defendant had filed a general denial to the petition. We must decline to consider the question of constitutionality at this time, since it was not tendered as an issue at the trial of the case in the court below. If the respondent desired to raise that question he should have demurred to the petition, or tendered it as an issue in his answer, or moved to quash or dismiss the petition, or objected to the introduction of testimony upon the ground that the section of the law under which said action was commenced was unconstitutional. Not having done any of these, and the cause having been tried upon the theory that the law

was constitutional, this court should not now consider that question.

The important question for consideration is whether the evidence is sufficient to sustain the judgment of the trial court.

Paragraph 5-A charges that the respondent within the present term of his office failed and refused to do his duty in the enforcement of the provisions of chapter 187, in that he permitted intoxicating liquors to be given away and disposed of with his knowledge, and permitted it to be transported and kept in places other than dwelling houses or residences.

Paragraph 5-B charges that the respondent on or about the month of June, 1919, sold liquors to a person, or persons, in Morrill county, contrary to the provisions of chapter 187.

The trial court found that the allegations in the petition charging the respondent with selling intoxicating liquors were not sustained by the evidence, but further found that the allegations relative to respondent giving away and receiving intoxicating liquors to and from different persons were sustained by the evidence. A perusal of the petition discloses that it charges respondent with selling it himself, and permitting it to be given away. The respondent's contention is that, the court having found there was no evidence to sustain the charge that the respondents sold intoxicating liquors, the evidence will not sustain the finding that he gave it away, for the reason, as respondent contends, that it is not charged in the petition that he gave it away. The only direct evidence with reference to disposition of intoxicating liquors by the respondent is found in the testimony of the witness Dugger, who testified to having seen the respondent deliver a bottle of whiskey to one Wiles and received a check back from him in June, 1919. The testimony of Dugger is as follows: "Q. Do you know William I. Dyson? A. Yes, sir. Q. How long have you known him? A. Ever since I can remember. Q. Do you know him

since June 9, 1919? A. Yes, sir. Q. Whereabouts did you see him? A. In town here. Q. Did you ever see him up here at the stock-yards? A. Yes, sir. Q. Any one else present? A. Yes, sir; R. L. Wiles. Q. That is Rich Wiles? A. Yes, sir. Q. Did you see any transaction between him and Mr. Dyson there at the stock-yards? A. Yes; I saw Mr. Dyson give Wiles a quart of whiskey. Q. That was in June, 1919? A. Yes, sir. Q. Did you see these same parties in the month of July of that year? A. Yes, sir. Q. Where? A. Out there south of Wiles' place. Q. Any transaction occur there? A. I saw Bill Dyson sell—I guess he sold it—Wiles gave Bill a check for a gallon of whiskey. Q. That was all in Morrill county? A. Yes, sir."

The respondent's counsel appears to argue that, since the trial court found that the evidence did not sustain the charge that the respondent sold liquors, there is no evidence under the allegations of the petition to support the finding that the respondent gave it away; in other words, since he had been charged, first, with having sold it, and, second, with permitting others to give it away, the court could not find him guilty of giving it away under the allegations of the petition charging that he sold it. We cannot agree with counsel in this. If the evidence satisfied the trial court that the respondent gave the intoxicating liquor to Wiles in June, 1919, but did not satisfy him that Wiles paid for it, then the court could properly find the respondent guilty of giving away intoxicating liquors under the charge in the petition that he sold it, since giving away and selling intoxicating liquors are the same offense under this law. The allegations of the petition are very general, and the trial court may have erred in not sustaining the respondent's motion to require the relators to make their charges more specific. However, it does not appear from the record, or brief of respondent, that the substantial rights of the respondent were affected by reason of the trial court's failure to require the petition to be made more specific, and this error was,

therefore, without prejudice.

The evidence is conflicting and some has been received that relates to no issue in the case. The trial was had, however, to the court, and the judge thereof is presumed not to have considered evidence that was incompetent.

The section of the law under which this proceeding was instituted is broad in its scope and purpose. It provides that, if a sheriff fails to do his duty, neglects to do his duty, or refuses to do his duty in the enforcement of this law, he may be removed from office. Evidently the legislature intended that, if the law was being violated and the sheriff was failing habitually to do his duty because of incompetency, inefficiency, or unwillingness to aid in its enforcement, there should be a direct method provided by law for his summary removal.

That the provision which denies the respondent the right to supersede the judgment may, in some instances, work an injustice is conceivable. This law is the creation of the legislature, however, and must be construed according to its obvious meaning, regardless of any contingency which the court may think the legislature should have provided against.

As we view it, the evidence not only sustains the findings and judgment of the trial court, but justifies us in finding, further, that the respondent had wilfully failed, neglected and refused to do his duty in the enforcement of the liquor laws during the present term of his office.

There being no reversible error, the judgment of the district court is

AFFIRMED.

HENRY MACKE, APPELLEE, V. MARY WAGENER, APPELLANT.

FILED JUNE 6 1921. No. 21265.

1. **Libel and Slander: EVIDENCE: ADMISSIBILITY OF DECREE.** On the trial of an action for slander, a decree in an equitable action between the same parties canceling certain notes given by defendant

in attempted settlement of the damages growing out of such slander, on the ground that they were "without consideration," was received in evidence over objections of plaintiff; such decree had been affirmed, but upon the ground of undue influence, the supreme court expressly holding that they were *not* without consideration. *Held*, that the objections should have been sustained.

2. **Trial:** EXCEPTION: WAIVER. By introducing in evidence, upon rebuttal, the opinion of the supreme court, plaintiff did not waive his exception to the ruling of the trial court admitting the decree.

3 **New Trial:** ADMISSION OF DECREE: PREJUDICIAL ERROR. The decree was immaterial and incompetent evidence, and had a tendency to mislead the jury, and its admission was therefore prejudicial error calling for a new trial.

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

Vail & Flory and *William L. Dowling*, for appellant.

W. R. Patrick, V. E. Garten and *Benjamin S. Baker, contra.*

Heard before MORRISSEY, C.J., DAY, DEAN, FLANSBURG and ROSE, JJ., REDICK, District Judge.

REDICK, District Judge.

This is an action for slander brought by Mary Wagener, plaintiff, against Henry Macke, defendant; this is the reverse of their designation in the record, but for purposes of clearness they will be placed in their true position in this opinion.

The present action is the development of the following facts: On March 30 and 31, and April 1, 1915, Macke is alleged to have spoken and published certain slanderous words of and concerning Mary Wagener, and on April 7, 1915, in an attempted settlement of the claim of the latter for damages, Macke executed and delivered to her four notes aggregating $3,000, secured by mortgage upon certain lands in Boone county, Nebraska. On April 14, 1915, thereafter, Macke brought a suit in equity in the district court for Boone county against Mary Wagener to cancel said notes and mortgage, alleging that they were procured from him by duress and undue influence on the

part of the friends and agents of said Mary (she not having taken part in the negotiations) and were without consideration. Mary answered, denying all duress and undue influence, and set up in part the speaking of the slanderous words, and alleging that the release of her claim for damages on account thereof was the consideration for said notes, Macke replied by a general denial and setting up some special defenses. The trial resulted May 15, 1916, in a decree for Macke finding that the notes were *"void for want of consideration,"* canceling them, and granting a perpetual injunction.

Mary Wagener prosecuted an appeal to this court, and the decree of the district court was affirmed as modified, the opinion being written by Cornish, J. (*Wagener v. Jungels,* 102 Neb. 123), in which he said, speaking for the court: "We are unable to agree with the trial court that the incident was of such trifling nature that the court can say, as a matter of law, that the words used were not slanderous, nor sufficient to base a claim for damages." But it was held that the circumstances surrounding the execution of the notes and mortgage, "while not amounting to duress, did amount to a social and mental force exerted upon him (Macke) controlling the free action of his will, and preventing that voluntary action in the giving of the notes which equity will relieve against on the ground of undue influence."

It was further held that it would be inequitable that Mary Wagener's claim for damages should be lost by running of the statute of limitations while the equity suit was pending, she having defended said suit in good faith upon the ground that undue influence was not exerted; and she was therefore permitted, at her election, "to plead, setting up her alleged cause of action against Macke, and, upon issues being joined, the cause tried as a law action for damages;" and the cause was remanded for further proceedings as indicated.

Thereupon, following the filing of the mandate of this court, Mary Wagener, described as *defendant,* filed her

petition in slander against Macke, described as *plaintiff,* in the district court, wherein she began: "Comes now Mary Wagener and files her petition *in pursuance of the mandate* of the supreme court in this case and complains of Henry Macke, and says:" The petition then proceeds at great length to set out the speaking by Macke, concerning plaintiff, in the presence of numerous persons, of words in the German language, which translated meant: "You have got man's fever or otherwise you would not want to sit here with the men." "She squeezes herself into the pew like a bull to heifers in the cornfield," and other words of like import, all of which, plaintiff alleged, were understood by those who heard them and were intended to charge plaintiff "of having an uncontrollable sexual desire," etc.; the petition closing with a prayer for $12,000 damages.

Defendant Macke answered, denying generally the allegations of the petition, and that the words spoken had, or were understood as having, any opprobrious meaning, and alleging that, properly translated, his words meant, "if she has man's fever," or "if she wishes to be amongst menfolks," "why does she not marry one?" and "she squeezes herself into the seat like a steer in the cornfield," etc. And then follow allegations of matters claimed to be in explanation or excuse, not necessary to set out. Plaintiff replied generally.

Upon the issues so framed trial was had before the district judge and a jury, which resulted in a verdict for the plaintiff for one cent damages. Motion for new trial having been overruled, plaintiff brings the case here on appeal, alleging error: (1) In allowing counsel for defendant to recite the history of the equity case in his opening statement; (2) in admitting in evidence the pleadings and decree in the equity suit; (3) in overruling plaintiff's motion for a new trial.

The first two assignments may be considered together, as they involve but one principle of law, which is applicable to both. The bill of exceptions shows the fol-

lowing proceedings during the opening statement by counsel for defendant Macke:

"Mr. Patrick: The evidence will further show, gentlemen, that this preliminary meeting was followed by another one later in the evening at the priest's house, at which the priest obtained a note from Macke, in favor of the housekeeper, Mary Wagener, for the sum of three thousand dollars.

"Mr. Dowling: The defendant, who is now the plaintiff, objects to counsel in his opening statement going into the details of the transaction tried out in the former case, because the same is incompetent, immaterial, and irrelevant, and prejudicial, and moves the court to exclude such statements.

"Motion overruled. Defendant excepts."

"Mr. Patrick: Counsel went into the statement that there was a meeting at Mr. Vail's office, and—

"Mr. Dowling: Defendant-plaintiff objects to the statement of counsel just made, and moves the court to strike out the statement and instruct the jury to pay no attention to it, for the reason that none of the matters and things suggested are capable of proof and are immaterial in the present case, because the other case, or branch of the case, is settled and determined, and this is a suit for slander, and the statement is prejudicial to the rights of Mary Wagener.

"Court: That may be true, but I don't know, in the present situation of the case. Motion overruled. Defendant excepts.

"Mr. Patrick: There was a proceeding to cancel the notes and mortgage in this suit, which was begun originally by Henry Macke, as plaintiff, v. John W. Jungels, the priest, and Mary Wagener, his housekeeper, and it resulted in a trial in this court, in which the mortgage and notes were canceled. The case found its way to the supreme court and was decided there, in which the judgment of this court was affirmed, and on October 15, 1918—about three years and six months after the occurrence of

the events in the chapel and the church—this petition was filed in this case, charging that Mary Wagener was grievously injured in the sum of fifteen thousand dollars by a controversy provoked and precipitated by herself, as the evidence will show, as I have stated, in substance and as briefly as I can, the particulars concerning—

"Mr. Dowling: I move to strike out all this statement, which amounts to testimony of counsel, for the reason that all of the transaction respecting the former trial, the decision of the court, etc., in this case, is not subject to proof under the issues here, because the facts are not stated correctly and because the statement is made for the purpose of prejudicing the minds of the jury, and the entire judgment and transaction is not stated truthfully or completely.

"Court: Of course, it would be entirely different if we had two separate cases; but it is all one case.

"Mr. Dowling: They are two separate cases, to all intents and purposes, your honor."

Later on, the trial court received in evidence the pleadings and decree in the equity case, overruling plaintiff's objection as follows:

"Mr. Dowling: To each of which the defendant, Mary Wagener, objects, because the same is incompetent, irrelevant and immaterial, and tends to raise a collateral issue and is prejudicial to her rights; and for the reason that the decree offered as Exhibit 8 has been modified and the case reversed by the supreme court of the state of Nebraska."

Beyond doubt, the trial court erred in permitting to be made these statements of defendant's counsel referring to the equity case and in refusing to instruct the jury to disregard them; also in admitting the pleadings and decree in that case. *Adams v. Fisher,* 83 Neb. 686. In fact, appellee's counsel do not discuss nor cite any authority upon the question, but impliedly concede the point in their brief: "Perhaps the opening statements of Macke's counsel and the introduction of the pleadings in the equity

case might have been irregular or surplusage unless withdrawn from the consideration of the jury in a proper instruction"—but argue:

(1) That, in the absence of the court's instructions from the record, it will be presumed the offending matter was withdrawn from the consideration of the jury; but at the close of the hearing in this court appellant was given permission to supply the instructions, and they have been made a part of the record, and contain no reference to the above matters.

(2) That appellant invited the error by referring to the mandate of this court in the first paragraph of her petition, as above set out. We think this argument more facetious than persuasive, recalling the excuse of the lion for devouring the lamb that "He tried to bite me," and in a manner justifying an infraction of the second paragraph of section 9 of the Bill of Rights prohibiting cruel and unusual punishment.

(3) That the error, if any, was cured by the trial court admitting in evidence the opinion of this court affirming and modifying the decree in the equity case, excerpts from which are cited above. We think plaintiff should not be charged with complicity in the error complained of; the immaterial and incompetent evidence had been received with the approval of the court, and plaintiff was not required to rely upon her exception, but might reasonably proceed in accordance with the view of the trial court and offer evidence of a similar character to rebut the inferences which might be drawn from defendant's evidence without waiving the objection. *See v. Wabash R. Co.*, 123 Ia. 443; *City of Chicago v. Spoor*, 190 Ill. 340, citing, *San Antonio & A. P. R. Co. v. De Ham*, 54 S. W. (Tex. Civ. App.) 396; *Richardson v. Webster City*, 111 Ia. 427; *Horres v. Berkeley Chemical Co.*, 57 S. Car. 192; *Washington Township Farmers C. F. & G. L. Co. v. McCormick*, 19 Ind. App. 664.

In the case last cited the court said: "After the court had held, over appellant's objection, that the evidence was

competent; * * * appellant, in seeking to overcome the case made by appellee, could follow the theory laid down by the court without impliedly admitting the court's theory to be right and without waiving his right to question the court's action."

This brings us to the third and last assignment, which involves the question whether the errors pointed out were prejudicial. There is some diversity of opinion among the cases as to where the burden lies to prove the error prejudicial, but the long-established rule in this state is that, where immaterial and irrelevant testimony has been admitted over objection, and which may have a tendency to mislead the jury, it is good ground for a new trial. *Simpson v. Armstrong,* 20 Neb. 512; *Harrison v. Baker,* 15 Neb. 43.

COBB, J., in the case last cited, said: "While we may not be able to see what particular effect this testimony had upon the jury, it was well calculated to divert their minds from the true issues involved in the case, and it was the right of the defendant to have his case go to the jury without being incumbered with illegal or irrelevant matter."

The same rule is announced in *George v. K. & D. M. R. Co.,* 53 Ia. 503, 505: "When such evidence is admitted, which bears upon the issues and questions to be considered by the jury, prejudice must result therefrom unless it can be satisfactorily shown that such was not the case, and this should affirmatively, not negatively, appear. In other words, the court must be able to say that it appears no prejudice has been caused by the erroneous ruling." This case is cited with approval in *Bee Publishing Co. v. World Publishing Co.,* 62 Neb. 732.

In the case at bar the verdict was for plaintiff, Wagener, for one cent; the evident purpose of the statement to the jury, and offer of the decree in the equity suit, was to get before the jury the fact that the judge then presiding had found that there was no consideration for the notes and mortgage, as a basis for the argument that plaintiff had

suffered no damage. True, the opinion on appeal upset this finding, but by submitting both to the jury the trial court (had no special instructions been given on the point) impliedly told the jury they might weigh the two and take their choice. By an instruction given at the request of Macke, the trial court told the jury "that the decision of the supreme court in this action was admitted in evidence merely to aid the jury in determining what the issues in the present controversy are, and that the same is not to be considered by them for *any* other purpose. Nor, should you consider said decision, or any expression therein, in determining whether the words spoken by Macke were intended by him to, or in fact did, charge Mary Wagener with conduct which in any way reflected upon her moral character." This left the finding of the district court on the question of "consideration" in full force, and effectively deprived appellant of any benefit which appellee's counsel claims resulted from the introduction of such decision. Whether or not in sound logic the finding touched the question of damages in this case, it had no legal status as evidence, and clearly tended to mislead the jury upon a pivotal question; and while we are not unmindful of the disinclination of courts to multiply trials in this class of cases, and express no opinion upon the question whether nominal, substantial, or any damages should be given, we are forced to the conclusion that plaintiff was not accorded a fair hearing upon that question.

Considerable space in brief of appellee is devoted to a discussion of the correctness of our former decision in "extending the statute of limitations." Of course, we did no such thing; we held "that the statute of limitations does not run during the period covering the pendency of said action." We must decline to enter upon this question, however, as it is settled by the law of the case.

There seems to have been considerable confusion upon the trial in the district court growing out of the designation of the plaintiff as defendant, and defendant as plain-

tiff, and the pleadings should be reformed to correct this; the defense of the statute of limitation should be stricken from the answer, and the case tried as an ordinary action of slander.

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

REVERSED.

GERTRUDE L. CRANE, APPELLEE, V. GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN, APPELLANT.

FILED JUNE 6, 1921. No. 21631.

1. **Death**: PRESUMPTION. Seven years of continued and unexplained absence from one's home or place of residence is sufficient to give rise to a presumption of the death of the absentee, where nothing has been heard from or concerning him during that time by those who would naturally have heard from him, had he been living.
2. **Appeal**: AFFIRMANCE. The action of the trial court in discharging the jury and entering judgment for the plaintiff will not be disturbed if the evidence is such that reasonable minds could not have disagreed upon findings of fact leading to such judgment.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Edward J. Lambe and *Edward F. Leary*, for appellant.

Jefferis, Tunison & Wilson, contra.

Heard before LETTON, DAY and DEAN, JJ., SHEPHERD and STEWART, District Judges.

SHEPHERD, District Judge.

In this case the plaintiff sues on an Ancient Order of United Workmen benefit certificate issued to her brother and naming her as beneficiary. She says that he had not been heard from for more than seven years, alleges that he is dead, declares that his insurance has been kept in force, and prays for a judgment compelling payment. The defendant denies. The trial court discharged the jury

and entered a judgment in plaintiff's favor. Complaining of this judgment, the defendant appeals. Practically only one point is contested, the sufficiency of the evidence to establish the death of the insured.

The insured, Allen E. Goble, was an unmarried man. After years of steady employment in Omaha, he visited the plaintiff at her home in Joplin, and passed through a lengthy period of ill health there, including an attack of typhoid fever. Convalescing, he went to Kansas City to find something to do, and there almost immediately disappeared. This was in about 1910. It is fairly certain that he worked for the Loose-Wiles people a day or two, or for a short time, but after that he seems to have dropped out of sight, so far as any subsequent knowledge of him or of his whereabouts is concerned.

Shortly following his departure for the point named, the plaintiff moved out to the coast and lived for several years at different places in California and Oregon. And, on account of her much moving, it is argued by the defendant that she hardly could have expected to hear from her absent brother, and that, under the circumstances, the passage of years ought not to operate as proof of his demise. Counsel also point out, with some basis in the evidence, that the insured was uncommunicative, unsociable, reserved, and not inclined to value the society of plaintiff's husband. Counsel contend that he was not the kind of man to keep in touch with his relatives or to write to his friends. They assert as probable that he parted with his family and with his friends to seek new fields and new associates.

But, while his father describes him as peculiar, neglectful of his duty to write, and "one of those boys that draws himself into his shell," it is clear from the evidence that he cherished a real affection for his sister, the plaintiff. His father says that he and his sister were very affectionate. The two were the only children of their parents, and were much together in early manhood and womanhood, as well as in childhood. For a number of years,

and until the plaintiff and her husband left Omaha, he was a member of her household. It is significant, as the undisputed evidence shows, that after she had left Omaha the insured wrote her every two or three weeks practically up to the time of his disappearance. Significant, too, is the fact that when he left Omaha, out of a job and out of health, he went to her at Joplin. It is fair to conclude that he would have acquainted her with his whereabouts within the first seven years of his absence, had he lived. It is true that she was moving and changing her residence a good deal; but, as he was well informed, their father continued to reside at Joplin (he was living there when the insured went to Kansas City), and a letter to her in his care would have been certain to reach her.

It, moreover, appears that the plaintiff made a considerable effort to find him, had him looked for by attorneys and detectives, addressed letters to him at different places where he was known to have friends and acquaintances, and at various places where he might be thought to have gone, advertised for him, notified the defendant company of his disappearance, sought him among relations; and all without avail.

In view of the foregoing, we are constrained to believe that the insured died during the seven years following his disappearance in Kansas City. The case is ruled by the already considerable number of similar Nebraska cases in consonance with the great weight of authority throughout the states. *Coe v. National Council of K. & L. of S.*, 96 Neb. 130; *McLaughlin v. Sovereign Camp, W. O. W.*, 97 Neb. 71; *Rosencrans v. Modern Woodmen of America*, 97 Neb. 568.

The law of these cases, and of a number of others discussed in their opinions, is that seven years of continued unexplained absence from one's home or place of residence is sufficient to give rise to a presumption of the death of the absentee, where nothing has been heard from or concerning him during that time by those who would naturally have heard from him, had he been living. It is

obvious from an examination of the record that this doctrine is applicable to the case at bar, and consequently that the ruling of the lower court should be approved.

Objection is made that the question should have been submitted to the jury for its determination. In any event the decision must, we think, have been the same. The jury could not reasonably have found to the contrary.

The judgment is, accordingly,

AFFIRMED.

BEE BUILDING COMPANY, APPELLANT, V. PETERS TRUST COMPANY ET AL., APPELLEES.

FILED JUNE 6, 1921. No. 21622.

1. **Appeal.** A question not raised by the pleadings will not be considered on appeal by the supreme court.
2. **Landlord and Tenant:** USE OF PREMISES: SIGNS. A lessee, in the absence of restrictions, acquires the right to use all the premises, including both the outer and inner wall, for all purposes not inconsistent with the lease, and may place on the walls any sign or signs which work no injury to the freehold.
3. ———: ———: CHANGE OF NAME. The name of a building may be changed by a lessee, in the absence of a restrictive provision in the lease, and in a manner not damaging to the freehold, unless a contrary intention appears from the instrument as a whole.
4. ———: ———: ———. Where a 99-year lease provides conditions whereby the lessee may purchase the property, or remove the old and erect one or more new buildings, the right of the lessee to change the name of the old building at his election will be implied.
5. ———: ———: ———: INJUNCTION. An injunction will not issue, commanding a lessee to restore to a building a panel bearing its name, where the lease provides that the lessee may, at will, make changes in the building to enhance rentals, although the removal of the name neither increased nor decreased the rental rate.
6. **Waste.** "Waste is a destruction or material alteration or deterioration of the freehold, or of the improvements forming a material part thereof, by any person rightfully in possession, but who has

not the fee title or the full estate." *Hayman v. Rownd*, 82 Neb. 598.

7. **Contracts:** CONSTRUCTION. The rule that courts will construe a contract more strongly against the party by whom it was drafted, and who had time to select language with a view to his own interest, has no application to a contract executed with care by the aid and approval of the attorney for each party to the contract.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Rosewater & Cotner, for appellant.

Stout, Rose, Wells & Martin, contra.

Heard before LETTON, DAY and DEAN, JJ., SHEPHERD and STEWART, District Judges.

STEWART, District Judge.

Suit to enjoin defendants from tearing down a parapet wall, and from changing the name of the "Bee Building," in the city of Omaha. From a judgment of dismissal the plaintiff appeals. All parties to the suit are Nebraska corporations, and the case was submitted upon the pleadings, arguments, and agreed state of facts.

February 1, 1917, the Bee Building Company leased the premises in question to the Keystone Investment Company for 99 years, at the rate of $35,950 per annum. Subsequently the Peters Trust Company acquired all the capital stock of the Keystone Investment Company for $181,000, and assumed control of the demised premises. The trust company was threatening to, and later did, partially dismantle and rebuild a 17-inch parapet wall which was about 50 feet long and 6 feet high above the roof line of said building, thereby eliminating a panel, facing Farnam street, and over the main entrance containing the words, "The Bee Building."

Appellant prays in its petition that the appellees be perpetually enjoined from removing the name, "The Bee Building," and from placing any other name thereover, or from defacing the building around said name, and from

changing the name to the Peters Trust Company Building, and for general relief.

Appellant states in its brief that the object of this suit is to prevent the defendants from removing the south parapet wall of "The Bee Building," and from changing the name of "The Bee Building."

The lease provides that permanent alterations and improvements should be made within three years of its date, to cost not less than $75,000, in accordance with plans to be approved by the lessor. Pursuant to this requirement said trust company expended about $300,000 modernizing the building and constructing a banking room on the ground floor for a permanent home for said trust company and the Peters Joint Stock Land Bank. Consent of the lessor to any acts under the lease are not required by its terms, except as to making permanent alterations and improvements and to the assignment of the lease. The trust company complied with the first requisite. However, no mention was made, in the plans approved, of the words, "The Bee Building," or of said parapet wall. No assignment of the lease has been made. The legal capacity of the trust company to acquire the capital stock of said Keystone company, and incidentally its ownership, not having been raised by the pleadings, will not be considered here. *Mauzy v. Hinrichs*, 89 Neb. 280.

The lease provides: "That the lessee shall not be prevented by any of the foregoing provisions of this lease from making such changes from time to time in the building on the premises, as shall be found necessary in order to secure the best rental results." This provision of the lease confers the right upon the lessee to make changes in the building without the consent of the lessor, "in order to secure the best rental results." This right is not limited by the restrictive phrase, "and the value of the premises," contained in the provision relating to permanent improvements to be made in three years with the approval of the lessor. The testimony shows that the changes in

the parapet wall did not increase or decrease the rental value of the building. The fact that the change proved ineffectual to enhance rentals is not controlling, when it appears no injury was sustained. *Wakefield v. Wakefield,* 97 Neb. 652; *Stephenson v. Murdock,* 88 Neb. 796.

Has a lessee the right, as an incident to a lease, in the absence of express provisions, to abandon or change the name of the leased building? We have been cited no authority bearing directly upon the question, nor have we been able to find one. It is a general rule that a tenant has the right to everything reasonably necessary to the use and enjoyment of the demised premises. *Miller v. Fitzgerald Dry Goods Co.,* 62 Neb. 270; *Herpolsheimer v. Funke,* 1 Neb. (Unof.) 471; *Kitchen Bros. Hotel Co. v. Philbin,* 2 Neb. (Unof.) 340.

In 1 Tiffany, Landlord and Tenant, 271, it is said: "A lease of a part of a building *prima facie* passes the outer wall adjacent to the rooms or apartment named as a part of the premises leased, and consequently the lessee has the exclusive right to use such wall for advertising purposes."

In *Forbes v. Gorman,* 123 N. W. 1089 (159 Mich. 291), the syllabus reads: "A lessee, in the absence of restrictions, acquires the right to use all of the premises, including the walls, both outer and inner, for all purposes not inconsistent with the lease, and may put any sign or signs on the walls which work no injury to the freehold." To the same effect are *Riddle v. Littlefield,* 53 N. H. 503, and *Lowell v. Strahan,* 145 Mass. 1.

Nims, Unfair Competition and Trade Marks (2d ed.) sec. 21, declares that a buyer, or one who acquires the right to occupy buildings, will have the right to use the name attaching thereto, in the absence of very explicit contract.

It is apparent that the trust company has the right to retain the name in question. It is equally clear that the Bee Building Company is without right to remove or use it without the consent of, or the abandonment of its use by, the lessee. It is stipulated that the right to change

said name to "The Peters Trust Building Company" is a valuable asset to said trust company. Under the facts and circumstances shown by the evidence the Peters Trust Company has the implied right to eliminate the name in controversy from the parapet wall of said building in any manner not detrimental to the freehold. Bearing upon appellant's right to maintain the name, "The Bee Building," cases are cited as follows: *Booth v. Jarrett & Palmer,* 52 How. Pr. (N. Y.) 169; *Sicward v. Denechaud,* 120 La. Ann. 720; *Pepper v. Labrot,* 8 Fed. 29; *Armstrong v. Kleinhaus & Simonson,* 82 Ky. 303.

The lease further provided that, upon giving sufficient security for the construction of a new building or buildings to cost at least $250,000, the lessee might, any time during the term, remove said building. Said lease also gave the lessee an option to purchase the premises on specified terms and contracts. The contention that the lessee could not change nor obscure the words "The Bee Building" from public view is repugnant to the rights granted to purchase the whole property, or to remove all buildings. Appellant seeks to prevent the possible happening of an event which it provided by contract might occur.

Said lease provided: "It is expressly agreed that no buildings upon said premises shall at any time suffer waste, but the same and the appurtenances thereto shall be kept in good order and repair by the lessee."

The testimony shows that said wall over the main entrance to the building was out of line, and out of perpendicular about two inches; that the changes in said wall were not necessary to make it safe, but were necessary to restore it to perpendicular and perfect alignment, and that it could have been temporarily repaired by filling spaces between the brick with cement mortar.

It was lessee's duty to keep the premises in good order and repair. Restoring said wall to its former condition was reparation, rather than reconstruction, and did not constitute waste. In *Hayman v. Rownd,* 82 Neb. 598, this

court defined waste as follows: "Waste is a destruction or material alteration or deterioration of the freehold, or of the improvements forming a material part thereof, by any person rightfully in possession, but who has not the fee title or the full estate." To the same effect is *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288.

The rule that a written contract will be most strictly construed against the party drafting it has no application to a case where it appears that in its execution both parties were represented by their attorneys, who approved the lease.

Finding no reversible error, the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

J. E. SALLACK, APPELLEE, V. JESSE FREEMAN ET AL., APPELLANTS.

FILED JUNE 6, 1921. No. 21653.

Brokers: CONTRACT: EXCHANGE OF LANDS. A parol contract for payment of commissions for procuring an exchange of lands is not governed by the provisions of section 2628, Rev. St. 1913.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Arthur C. Pancoast and *Williams & Kryger*, for appellants.

Gaines, Ziegler, Van Orsdel & Gaines, contra.

Heard before LETTON, DAY and DEAN, JJ., SHEPHERD and STEWART, District Judges.

STEWART, District Judge.

Action, upon agreed facts, to recover broker's commissions for exchange of real estate. Plaintiff recovered, and defendants appeal.

Both parties concede in their briefs that the only ques-

tion involved is the right of a broker to recover commissions for the exchange of real estate, without having had a contract as provided by section 2628, Rev. St. 1913, which reads as follows:

"Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent."

The testimony shows appellee's employment under the following contract:

"The Merchants Hotel, Dan W. Gaines, Proprietor, 15th and Farnam Sts.

"Omaha, Nebr., Feb. 13-18.

"This is to certify that I hereby agree to pay a commission of $500 to my agent, J. E. Sallack, in the exchange of the So.½ Sec. Three and the N.E.¼ Sec. 10, Twp 30, Range 10, W. 6 P. M., Holt county, Nebr., upon any terms that are acceptable to me for the apartment house located in the City of Omaha, Nebr., and known as the Peoria. Minor B. Freeman."

The testimony further shows that through the efforts of appellee, on March 13, 1918, a written agreement was entered into between Dan W. Gaines and Jesse L. Freeman for the exchange of the properties mentioned in the employment contract, and soon thereafter transfers were made accordingly.

Appellants contend that the employment contract is void because not signed by the appellee. The contract in question was for an exchange, and not a sale of real estate. We must determine the meaning of this statute, in the absence of ambiguity from its terms, and from what the legislature plainly said. 25 R. C. L. 957, 958, secs. 213, 214.

In *Lucas v. County Recorder of Cass County,* 75 Neb. 351, this court defined the distinction between a sale and

an exchange of property, as follows: "A sale is a transmutation of property or a right from one person to another, in consideration of a sum of money, as opposed to barters, exchanges and gifts." The case also affirms a judgment obtained by a broker, acting under an oral agreement for an exchange of land, effected by his efforts.

In *Nelson v. Nelson,* 95 Neb. 523, this court gave the statute a strict construction. It said: "A contract by which one employs an agent to assist him in making an exchange of properties is not governed by the provisions of section 2628, Rev. St. 1913. The purpose of that section was to protect landowners from fictitious claims of real estate dealers." The written contract in that case contained no description of the real estate exchanged, and did not come within the requirements of said section, and therefore was not better than an oral contract. The same statute was given a strict construction in *Reasoner v. Yates,* 90 Neb. 757, holding it inapplicable to a contract between the agent of the owner and a subagent.

At common law, a contract between the owner and a broker for commissions arising from the sale or exchange of lands was not required to be in writing. The statute is in derogation of the common law, and, in jurisdictions other than our own, it has for that reason been generally declared one which should be strictly construed. 9 C. J. 558, sec. 60; *Brown v. Winter,* 80 N. J. Law, 632; *Levy v. Timble,* 94 N. Y. Supp. 3.

Suggestion is made in appellants' brief that the verdict was directed against both defendants. Under the evidence, and in the absence of the answer from the transcript, we find no error in the proceeding.

We conclude that the contract in question is not within the provisions of the statute, and was valid and enforceable. The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF FRITZ NEBEL.
L. C. PEISIGER, APPELLEE, V. GEORGE DAVIS, APPELLANT.

FILED JUNE 23, 1921. No. 21372.

Appeal: HARMLESS ERROR. "A judgment will not be reversed on appeal, when it clearly appears that the alleged error complained of does not affect the substantial rights of the complaining party." *State v. Quimby*, 104 Neb. 590.

APPEAL from the district court for Webster county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Stewart, Perry & Stewart and *L. H. Blackledge*, for appellant.

Bernard McNeny and *A. M. Walters, contra.*

Heard before MORRISSEY, C.J., DAY, FLANSBURG and ROSE, JJ.

MORRISSEY, C. J.

Fritz Nebel, an aged and illiterate man, died at Blue Hill, Nebraska, March 2, 1919. Two days prior to his death he executed a last will and testament, devising and bequeathing his estate to certain creditors, friends, and relatives, creating certain trusts, and appointing L. C. Peisiger executor. Appellant contested the probate of the will. The issues raised on the contest were submitted to a jury, who returned a verdict in favor of proponent, and from the judgment entered thereon contestant appeals.

Contestant denied that the instrument offered for probate was the last will and testament of Fritz Nebel; alleged that at the time the purported will was executed Nebel was not of sound and disposing mind; and that "said Fritz Nebel at the time of his decease was bound by the terms of an oral agreement between him and his mother, Mrs. Niemeyer, and the said George Davis for the benefit of said George Davis, and which had been fully performed and carried out by all the parties except said

Fritz Nebel, to wit: That the said George Davis, whose correct name is Wylie Thomas Davis, and Tennessee Davis, his sister, were the children of Benjamin and Rebecca Davis, and in the year 1870 were of about the age of seven and five years, respectively, and were not related by blood to the said Fritz Nebel; that the said Rebecca Davis had previously died; that the mother of said Fritz Nebel had married as her second husband Henry Niemeyer, who was not related by blood to said Fritz Nebel; that the said Henry Niemeyer and his wife and her son, said Fritz Nebel, constituted one family, and resided in the state of Illinois, and desired to adopt the said George and Tennessee Davis and to make them their children and heirs; that thereupon it was agreed between the said Henry Niemeyer and his wife and Fritz Nebel, on the one part, and Benjamin R. Davis, father of said George and Tennessee Davis, on the other part, that said Niemeyers and Nebel would take the said George and Tennessee Davis and make them their childrn and heirs and treat them as such, if the said children should continue to live with them until they reached their majority, and the said Benjamin R. Davis agreed to surrender to said other parties possession, care and custody of the said George and Tennessee Davis; that thereupon the said agreement was performed and said Henry Niemeyer and his wife and said Fritz Nebel took said children and said Benjamin R. Davis surrendered them, and thereafter the said George and Tennessee Davis continued to reside with and obey and serve until their majority the said Henry Niemeyer and his wife and said Fritz Nebel; that the said Fritz Nebel during all of said time had a part in the making of the said agreement and the carrying out of the same; that the said Henry Niemeyer died about the year 1890, at which time and for several years prior to his death he had by sickness and disability been unable to participate in the caring for the said children and the same was continued by the said Fritz Nebel and his mother; that in the meantime Fritz Nebel had acquired

by homestead entry and compliance with the homestead laws of the United States land which he owned at the time of his death, to wit, the southeast quarter of section twenty-eight, township four, range ten, Webster county, Nebraska, and agreed that, upon the said George and Tennessee Davis remaining with him until their majority, he made them his heirs and that they or the survivor of them living at his death should take and inherit said land; that in the further carrying out and compliance of said agreement said Fritz Nebel married the said Tennessee Davis, and she remained his wife until her death in the year 1910, leaving no issue surviving her, and the said George Davis remained with and served the said Fritz Nebel until his marriage and at divers times thereafter, and it was always agreed and understood between the said Fritz Nebel and said George Davis after the death of said Tennessee Nebel that the said George Davis was the sole remaining heir and was entitled to and should receive the land upon the death of said Fritz Nebel."

The evidence offered on the main trial is not preserved or presented in a bill of exceptions.

Appellant in his brief says: "It is of the proceedings after the submission of the case to the jury and on the motion for a new trial that particular complaint is made on this appeal." It is claimed, on this appeal, that after the jury retired to deliberate on a verdict it procured, through the agency of the bailiff, certain law books which it is alleged they read and considered in reaching a verdict. Objection is also made to supplemental instructions given to the jury, which instructions it is claimed coerced the jury into reaching its verdict.

These questions were presented to the court on the motion for a new trial, and a bill of exceptions on that branch of the case is presented. However, we do not deem it necessary to discuss or consider the questions presented. Section 7713, Rev. St. 1913, provides: "The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not

affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." In the instant case it appears upon the face of the record that the admission to probate of the will does not affect the substantial rights of appellant. If he has any rights under the contract set up in his answer, it is a right that must be asserted in a court of equity, and the admission of the will to probate in no way affects his rights under his alleged contract.

No error appearing prejudicial to the rights of the appellant, the judgment is

AFFIRMED.

ELIZABETH H. GRAHAM, ADMINISTRATRIX, APPELLEE AND CROSS-APPELLEE, V. CITY OF LINCOLN, APPELLANT AND CROSS-APPELLEE: LINCOLN TELEPHONE & TELEGRAPH COMPANY, APPELLEE AND CROSS-APPELLANT.

FILED JUNE 23, 1921. No. 21431.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: SUBROGATION. Under the workmen's compensation law (section 3659, Rev. St. 1913), providing, in substance, that where a third person is liable to an employee, or to dependents, for an injury or death, the employer shall be subrogated to the right of the employee or to that of dependents against such third person, the fact that the employer's negligence concurred with the negligence of the third person in causing the injury does not bar the employer's right to subrogation, and it is not erroneous to fail to instruct the jury that the amount of plaintiff's recovery should be diminished by the amount of compensation paid to plaintiff by the employer.
2. **Evidence** examined, and *held* to support the verdict.

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

C. Petrus Peterson, Charles R. Wilke and *R. A. Boehmer,* for appellant.

Hall, Baird & Williams, G. W. Berge and *J. S. McCarty, contra.*

Heard before MORRISSEY, C.J., DAY, DEAN and LETTON, JJ.

LETTON, J.

The plaintiff is the widow of one Roy C. Graham, who was fatally injured while in the employment of the Lincoln Telephone & Telegraph Company. She was appointed administratrix of his estate, and filed with the compensation commissioner a claim for compensation from the company for the death of her husband. From the award in her favor the company appealed to the district court, where judgment was rendered against it for $550, weekly payments past due, and for the further sum of $12 a week for 325 consecutive weeks thereafter; $150 of the award, however, being a penalty for delinquency in making payments. She afterwards commenced this action against the city of Lincoln on the ground that by its negligence it had caused the death of her husband. She made the telephone company a party so that it might be reimbursed for any amount it might pay the plaintiff under the workmen's compensation act, except the penalty. The telephone company filed an answer praying it might be subrogated to any judgment against the city to the extent that it was liable under the workmen's compensation act. The jury returned a verdict against the city in the sum of $13,000, and it has appealed. No verdict was rendered as to the telephone company, but it is not here complaining of this; apparently plaintiff and that company having come to an agreement.

Two points are relied upon: First, that the verdict and judgment are not sustained by the evidence. Second, that the court erred in failing to instruct the jury that if they should find against the city they should deduct from the amount of her recovery the amount she had already obtained in judgment against the telephone company, less the $150 penalty.

In addition to the general verdict, the jury made a special finding to the effect that the accident resulted

"solely from the joint negligence of the defendant city and the defendant telephone company," and upon this finding the city bases its contention as to error in failing to instruct.

On the day of the accident a two-story house being moved on Q street was in the intersection of Eighteenth and Q streets. The peak of the house extended east and west, with the roofing sloping north and south at about 45 degrees. A telephone cable and three secondary and two primary electric wires belonging to the city crossed the street and hung so low that it was necessary for the men on the roof to raise them to enable the house to pass under. A permit had been obtained from the city to move the house, and on the day of the accident the city sent two of its men to assist. The primary wires carried between 4,000 and 4,400 volts, and the secondary wires 110 volts. The insulation was insufficient to protect against that voltage. It would have probably taken 10-minutes time to disconnect the primary wires. Deceased, a lineman and a foreman were sent by the telephone company to raise the telephone cable. Some conversation was had with the electricians for the city, one of whom said he would pull the fuse. He climbed a pole and pulled the fuses, but those pulled were on the secondary circuit. This did not affect the wires carrying the 4,400-volt current. When the men were on the roof, one of the city employees directed the work. The house had passed to the eastward so far that the wires were nearly clear, when there was a flash of flame just above the head of the deceased, and he fell backwards from the roof to the ground. At the same time an employee of the city also received a severe electric shock, but was not killed.

Defendant argues that, since there is testimony in the record that linemen are accustomed to handling wires carrying 4,400 voltage on dry roofs of buildings with their bare hands, or with their hands clad in the kind of gloves which they used for ordinary work, there is no negligence proved on the part of the city in failing to furnish com-

plete insulation, or in failing to shut off the current while the men were at work upon the roof; that the circuit must have been closed by the contact of the deceased in some way, either with the telephone cable or with a piece of tin around the chimney hole at a time when he was in contact with the primary wires, and that the city should not be expected to anticipate such a condition, and therefore to guard against the same. And, further, that since the deceased had been instructed by his employer under no circumstances to rely upon insulation as a complete protection against high-tension currents, but always fear such wires and to consider they are alive, he was guilty of gross contributory negligence and cannot recover.

We are convinced that under the facts the city was negligent in not cutting off the current from the primary wires, which the evidence shows could easily have been done without interfering with service to its customers. Furthermore, we are satisfied that there is not sufficient evidence to establish negligence on the part of the deceased, and we think the verdict against the city is amply supported.

The next point argued is that the court erred in failing to instruct that, if the jury should find against the city, they should deduct from the amount the plaintiff shall otherwise recover the amount for which she had already obtained judgment against the telephone company, less $150 allowed for delinquency in making payment. Both the plaintiff and the telephone company prayed that, out of whatever judgment is rendered against the city, the telephone company be subrogated for all sums paid, or to be paid, under the award under the workmen's compensation act. The court instructed that the amount of compensation received was immaterial, and that the jury need not be concerned as to the division of the fruits of the lawsuit, if any. The city did not ask for an instruction that the amount awarded by the compensation commissioner be deducted from the amount of the city's lia-

bility; but, even if such an instruction had been tendered, it would have been the duty of the court to refuse to give it. Section 3659, Rev. St. 1913, provides, in substance, that the employer shall be subrogated to the right of the employee, or his dependents, against a third person who is liable for the injury or death, and provides "such employer may recover any amount which such employee or his dependents would have been entitled to recover." According to the literal language of the statute, if the telephone company had brought the action instead of the plaintiff, it would have been entitled to recover the full amount. In *Otis Elevator Co. v. Miller & Paine*, 240 Fed. 376, in an action against the elevator company to recover for the death of a workman injured through the negligence of that company, counsel for that company claimed they should have been permitted to show that the negligence of Miller & Paine concurred with that of the elevator company, and that therefore there could be no recovery against it by Miller & Paine. The court said:

"We do not think that any such construction can be placed upon section 109 without reading into the statute language that the legislature did not deem proper to place there. The liability of Miller & Paine was positively fixed by law, regardless of the question of negligence on its part. The law then provided that Miller & Paine should be subrogated to the rights of the dependents of Pettengill against the elevator company, providing it was the negligence of the elevator company that caused his death. To construe section 109 as not permitting Miller & Paine to prosecute an action for the benefit of itself and the dependents of Pettengill, if the negligence of Miller & Paine concurred with that of the elevator company in causing his death, would destroy the section. The object of the section, as clearly appears from its language, was to permit the employer to reimburse himself by an action against the party whose negligence caused the death and also to allow the dependents of the deceased employee to recover a sum over and above the amount for

which the employer was absolutely liable, regardless of negligence, if the evidence should permit such recovery. * * * To decide that the concurring negligence of Miller & Paine could defeat such an action would not only permit one wrong-doer to plead the fault of a joint wrong-doer in defense, but would, as heretofore said, destroy the right of subrogation granted by the statute."

In *Fidelity & Casualty Co. v. Cedar Valley Electric Co.*, 187 Ia. 1014, the defendant complained of the giving of an instruction which stated that the rights of the employer were the same as the rights of the employee against the defendant, and of the refusal of an instruction that, if the fault of the employer contributed to the cause of the injury, it could not recover. The Iowa court followed *Otis Elevator Co. v. Miller & Paine,* 240 Fed. 376, and, after saying that the provision of the Nebraska statute does not materially differ from the statute under consideration, proceeds:

"A discussion of the right of one joint tort-feasor to contribution from another, or of the right of an injured person, who has recovered judgment against, or made settlement with, one joint tort-feasor to recover against another, is not germane to the question involved in this case. * * * There is nothing express or implied in section 2477m6 from which the conclusion can be drawn that the payment of compensation by the employer whose act, jointly with that of another, produced the injuries shall operate as a bar against the right of an employee or the party paying the compensation and entitled to be subrogated to his rights to maintain an action against the person other than the employer, although a joint tort-feasor, for damages. To construe the statute otherwise must do violence to the plain language thereof. The instruction complained of correctly stated the law applicable to the facts and the requested instructions were properly refused."

We approve of this reasoning, and are convinced that

these cases interpreted the statute as the legislature intended. We find no prejudicial error in the record.

AFFIRMED.

FORD HOSPITAL, APPELLEE AND CROSS-APPELLANT, V. FIDELITY & CASUALTY COMPANY OF NEW YORK, APPELLANT: MARYLAND CASUALTY COMPANY, APPELLEE AND CROSS-APPELLEE.

FILED JUNE 23, 1921. No. 21259.

1. Insurance: LIABILITY INSURER: STATUS. An insurer engaged in the business of writing liability insurance for profit is not a favorite of the law with the standing of individuals who become sureties or guarantors as mere accommodations.
2. ———: LIABILITY INSURANCE: CONSTRUCTION OF POLICY. In a suit on a liability insurance policy issued by an insurer engaged in the business of writing liability insurance for profit, a narrow or technical construction of the policy, or of the petition in a former action against insured for a liability covered by the policy, is not permissible to defeat the insurance.
3. ———: ———: HOSPITAL PATIENT. Where a child born in a hospital is returned three months later to receive nourishment from its mother, who had previously returned for treatment of ailments attending childbirth, the child, while in the exclusive care of the hospital, is a "patient," and not a mere licensee; the arrangement being that compensation for the treatment of the mother includes compensation for the care of the child.
4. ———: ———: "HOSPITAL TREATMENT." In a hospital with a department equipped for obstetrics, the bathing of a child born therein, if it thereby suffers bodily injury through the negligence or mistake of a hospital nurse while it is exclusively in the care of the hospital, may be "hospital treatment" within the meaning of those words as used in a policy of liability insurance.
5. ———: ———: ACTION: DEFENSE. A liability insurer agreeing to defend a suit against the insured for negligence, whether plaintiff's claim is groundless or not, does not, by making a defense as agreed, lose the right to assert that insured's loss is not covered by the insurance policy, where the insurer notifies insured in advance that such right is preserved.
6. ———: ———: ———: ———. Where a judgment for a loss resulting from negligence covered by a liability insurance policy is

satisfied by means of a secured note given in good faith, the insurer, if it violated its insurance contract by failing to defend a suit for negligence and by refusing to pay the loss or any part of it, may not be allowed to defeat the insurance on the ground that the judgment was not paid in money according to the literal terms of the policy.

7. ———: ———: ———: PARTIES. Insured may maintain an action on his liability insurance policy after he assigns, as collateral security for the payment of a note, any judgment he may obtain against the insurer.

8. **New Trial**: REMITTITUR: FINAL JUDGMENT. Where a judgment debtor, on his motion for a new trial, fails to comply with a conditional order permitting him to pay the judgment upon its being reduced by a required remittitur, and the judgment creditor, by reason of nonpayment, declines to file such remittitur, the judgment as originally entered becomes final.

9. **Insurance**: ACTION: DEFENSE. In a suit on a policy of liability insurance to recover a loss determined by a judgment for damages in a former action against the insured, transactions of the latter's attorneys in purchasing the judgment for themselves for less than its face *held* not available to the insurer as a partial defense under the circumstances outlined in the opinion.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Morsman, Maxwell & Crossman, for appellant.

John J. Sullivan, James E. Rait, George B. Thummel, George W. Pratt and *Smith, Schall & Howell, contra.*

Heard before MORRISSEY, C.J., DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

ROSE, J.

This is an action on two insurance policies, each for $5,000, to recover the amount alleged to be due from the insurers for a loss reduced to a judgment for $5,500, which Mary Jane Hannah, an infant, recovered against the Ford Hospital Company, the insured, in a former action for personal injuries. One of the policies was issued by the Fidelity & Casualty Company and the other by the Maryland Casualty Company. Both are defendants, and insured is plaintiff herein. Each insurer, referring to its

own policy, pleaded, among other defenses, that liability for the negligence resulting in the personal injuries to the child was not covered by its insurance, and that it was not bound by the judgment for damages. After the evidence had been adduced in this action on the liability insurance policies, each party requested a directed verdict in its favor. As a result the trial court excused the jury and entered judgment in favor of the Ford Hospital Company against the Fidelity & Casualty Company for the face of its policy, or $5,000, for interest amounting to $120.83, and for an attorney's fee of $400. The action was dismissed as to the Maryland Casualty Company. The Fidelity & Casualty Company has appealed.

The principal argument is directed to the merits of the defense that the Fidelity & Casualty Company, insurer, did not assume liability for the Ford Hospital Company's negligence in injuring the child, and that the insurer is not bound by the judgment for damages for personal injuries. This requires consideration of the issues, evidence and findings in the former action for damages and of the terms of the liability insurance.

The child was born in the Ford Hospital August 16, 1917, while its mother was an inmate and a patient there for the purposes of accouchement. Within two or three weeks the mother went to her own home, taking her child with her, but returned to the hospital alone from time to time for the temporary treatment of ailments resulting from conditions attending childbirth. For this purpose she returned to the hospital November 7, 1917, but was detained until the next day on account of having to undergo an operation. In the meantime the child was brought to the mother for nourishment and was left in the exclusive care of the hospital. While a hospital nurse, in the performance of her duties, pursuant to a rule of the hospital, was giving the child a bath November 8, 1917, its left hand, through the negligence or the mistake of the nurse, came in contact with a hot appliance and was severely burned. It was for the injuries thus inflicted

that the child recovered in the former suit for damages the judgment against the Ford Hospital Company for $5,500 It was alleged in the petition in the former case mentioned, among other things, that—

"Before and after the birth of said child at said hospital, its mother and said child were inmates of said hospital for some months under treatment; that said child remained at said hospital with its mother during said period of treatment; that during all of the time that the child's mother was at said hospital she paid for the services rendered by said hospital in their care and treatment."

The acts constituting the negligence on which the damages for personal injuries are based were pleaded in the petition of the child and denied in the answer of the Ford Hospital Company.

Was the liability of the hospital for the damages described covered by its policy in the Fidelity & Casualty Company, insurer? The hospital was insured "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any patient or patients at the hospital," says the policy, "in consequence of any malpractice, error, or mistake made, while this policy is in force, within the said hospital, * * * by the assured in the giving of medical, surgical, or hospital treatment, or by any person employed by the assured, in the giving of any such treatment."

It is argued that, within the meaning of this insuring clause, the child was a mere licensee when injured, that it was not a "patient," that it was not receiving "hospital treatment," that the petition in the action for damages alleged the child was an "inmate," but not that it was a "patient," that negligent injury to the child was not within the terms of the insurance contract, and that a loss covered by the policy was not within any material issue in the action brought by the child against the hos-

pital to recover damages for personal injuries. Is the position thus taken tenable?

The Fidelity & Casualty Company insured the Ford Hospital Company. The latter had a department equipped for obstetrics. In that department the mother was both an inmate and a patient. The child was expected. It was born helpless. It had the same right to room and care as the mother, and was not a mere licensee. Both mother and child were under the care of hospital nurses. The liability of the hospital for mistakes or negligence in "hospital treatment" extended to both. These conditions and relations were obvious in a hospital with a department equipped for obstetrics. Accouchement included the right of the mother to return for any hospital treatment required as a result of conditions attending childbirth, and compensation for room and services furnished to her included the care of the child in the meantime while necessarily in the hospital. These conditions and relations existed when the child was injured. After going to her home the mother returned for treatment and was detained for an operation. In the meantime the child was brought to its mother for nourishment. Both were then under the care of hospital nurses. A rule of the hospital required a bath for the child. The mother was not consulted about the rule or its enforcement, and the child was not accountable. The bath was usual, necessary and proper. When given, it was "hospital treatment" within the fair import of that term as used in the policy. For the purpose of hospital care, while the mother was in charge of hospital nurses, the helpless child was both an "inmate" and a "patient" when being bathed by a hospital nurse in compliance with an established rule. Pecuniary gain is not the sole aim of a modern hospital equipped for obstetrics. It has a mission requiring a degree of care prompted by the ordinary dictates of humanity. Of this all are aware. The precaution which resulted in the procuring of liability insurance covering a loss for a negligent injury to the mother would naturally

suggest protection from a like injury to her child. This liability, it may be inferred, was within the contemplation of the negotiating parties, and it is fairly covered by the terms of their written contract. The nurse, while bathing the child in compliance with a rule of the hospital, was guilty of negligence. She made a "mistake" within the meaning of the insurance policy when she allowed the hand of the helpless child to come in contact with a hot appliance.

The trial judge in the former case of Mary Jane Hannah, an infant, plaintiff therein, against the Ford Hospital Company, defendant therein, permitted the child to recover damages only upon a finding that it was an "inmate" under the exclusive care and control of the hospital, and he submitted to the jury for a special finding the question, "Was the plaintiff at the time she sustained her injuries a patient in defendant's hospital?" The answer thereto was "Yes." The facts outlined are inferable from the evidence in the case at bar and are established by the findings of the trial court.

The Fidelity & Casualty Company, insurer, is engaged in the business of writing liability insurance for profit. It is not a favorite of the law with the standing of individuals who become sureties or guarantors as mere accommodations. No narrow or technical construction of the pleadings in the former action for damages or of the policy in the case at bar is permissible to defeat the insurance. For the purposes of the liability insurance the word "inmate" as used in the petition to recover damages for personal injuries and the word "patient" as used in the policy of insurance, to repeat what has already been said, fairly include both mother and child. The conclusions, therefore, are that the relation of hospital and patient existed between the Ford Hospital Company and the child at the time of the latter's injury, that the hospital was liable for resulting damages, and that the policy of the insurer covered the loss on account of that liability to the extent of $5,000.

Could the insurer have defended the action for damages and at the same time have preserved its right to assert that it did not insure the loss? The insurer by its policy had bound itself to defend any suit against the hospital company to enforce any claim for a liability covered by the insurance, "whether groundless or not." The action against the hospital for damages was a suit to enforce such a claim. The action was well founded, but, even if it had been "groundless," the insurer had agreed to defend it. Though notified of the action for damages and requested to make a defense, the insurer refused to do so, or to participate in a settlement of the controversy, or to supersede the judgment or to pay any part of it. The insurer could have performed its contract to defend the former action for damages without losing its right to interpose the defense that insured's loss was not covered by the policy. In a note in 34 L. R. A. n. s. 491, the correct rule is stated as follows:

"An indemnity insurer will not be estopped to set up the defense that the insured's loss was not covered by the contract of indemnity, by the fact that the insurer participated in the action against the insured, if, at the same time, it gives notice to the insured that it does not waive the benefit of such defense." *Sargent Mfg. Co. v. Travelers Ins. Co.*, 165 Mich. 87.

There was no justification whatever for the insurer's failure to perform the contract to defend the action against the hospital.

On one of the assignments of error it is argued that there is no judgment against the hospital in the former suit for damages, and that therefore the insurer is not liable in the present action on its policy. This contention is based on an order directing the child, upon the hospital's motion for a new trial, to file a remittitur for $2,000 and permitting the hospital to satisfy the judgment for damages in the sum of $5,500 by payment of $3,500. The hospital, owing to financial stress and incumbrances on its property, was unable to pay $3,500 or to furnish a

supersedeas, and the insurer upon demand refused to do either. The child, not having received payment, did not file the remittitur. The requirements for it were conditional. There was no compliance by the hospital or by the insurer with any of the conditions. The judgment for damages in the sum of $5,500, which had been entered on a verdict in favor of the child, therefore, remained in force.

It is further argued that the present action to recover insurance is not maintainable because the insurer's liability under the policy depends on insured's payment of the judgment in money—an unperformed condition. To the extent of $5,000 the judgment for damages in the sum of $5,500, if paid by insured in money, was the adjudicated measure of the insurer's liability under its policy. The insurer had an opportunity to discharge its liability to the hospital and to satisfy the judgment by the payment of $3,500, but upon demand refused. The hospital was unable to raise the money to make such a payment and its attorneys afterward bought the judgment with their own funds and satisfied it of record after having taken a mortgage on the hospital property for $5,601.25. The judgment therefore was paid. In these respects counsel for the hospital acted in good faith, as shown by proper findings of the trial court. The policy declared that the hospital was insured "against loss from the liability imposed by law upon the insured for damages on account of bodily injuries or death suffered by any patient or patients at the hospital," in consequence of error or mistake in hospital treatment. The insurer not only denied liability for any loss under its policy, but violated its contract to defend the suit for such a loss, even if groundless. Consequently the insurer is not in a position to insist on payment in money, under the circumstances, as a condition of its liability. It is now well established by precedent that an insurer, having thus violated its contract to defend a suit against the insured, may not be allowed to defeat a recovery on the policy

by objecting to the manner in which the judgment was paid.

Another argument is directed to the propositions that the hospital parted with its liability insurance before it brought its suit on the policy, that it is not the real party in interest, and that consequently it cannot maintain the present action. On these issues the findings of the trial court in favor of the hospital in the present case are supported by evidence that insured's assignment did not transfer title to the policy, that insured, as collateral security for its indebtedness to its counsel, assigned to them any recovery or judgment it might obtain against the insurer, that insured and the latter's assignees so understood their transaction, that the assignment was openly made in good faith, and that the present action to recover the insurance was properly prosecuted in the name of the insured.

It is finally insisted that in any event the recovery on the insurance policy issued by the Fidelity & Casualty Company should not exceed $3,500, the amount for which the attorneys for the hospital bought the judgment from the child. In this connection it is argued that counsel for the hospital acted for their client; that it was the duty of the hospital to make reasonable efforts to lessen the burden of the insurer; that beyond the loss paid in money by the hospital the latter could make no profit out of its insurance contract; and that its counsel could not speculate on the business or interests of their client. Is the partial defense to the claim of $5,000 for the loss covered by the policy available to the insurer? The money invested by the hospital's counsel in the judgment was not the money of their client. It was their own. They thus invested $3,500, after the insurer upon demand had refused to do so, and after the hospital had tried in vain to raise that amount of money while it would satisfy the judgment. What the insurer is demanding is the right to appropriate to its own use the profits on the personal investment of $3,500 by the attorneys for the hospital and

also their services in negotiating in their own behalf for the purchase of the judgment. In other words, the insurer calls on the insured for a credit which, through its inability to raise money, it was unable to procure for itself. The record discloses no good reason for allowing the insurer to make use of the individual investments and the personal services of the attorneys who represented the hospital, the adversary of the insurer in the litigation to recover the insurance. Neither the hospital nor its counsel, whether acting separately or jointly, did anything unlawful to make either accountable to the insurer as trustee in the purchasing of the judgment for damages. The evidence shows, and the trial court found in effect, that the hospital and its counsel acted in good faith. The law did not prohibit the attorneys who represented the hospital in the action on the policy from purchasing the former judgment for damages, nor prevent the insured from ratifying the purchase for the purpose of delaying the execution sale of the hospital until the latter could raise funds to pay the judgment in full. The confidential relations between the attorneys for the hospital and their client, and the ethical standards for testing conduct affecting those relations, are not invokable by the insurer under the circumstances mentioned. On this phase of the case, therefore, the conclusion is that the confidential relations between the hospital and its attorneys and the transactions of the latter in their own behalf in purchasing the judgment for damages are not available to the insurer as a partial defense. It follows that the Fidelity & Casualty Company, to the extent of its policy for $5,000, interest and costs, is bound by the judgment as rendered in favor of the child for damages.

The Maryland Casualty Company and the Ford Hospital Company filed cross-appeals, but discussion thereof is unnecessary in view of the decision on the appeal of the Fidelity & Casualty Company. No error prejudicial to the latter has been found in the record, and the judgment against it is

AFFIRMED.

FLANSBURG, J., dissenting.

I cannot agree to the opinion nor to the conclusion reached by the court in this case. To make clear my reasons, I wish to restate some of the facts.

The defendant casualty company issued its policy of insurance to indemnify the Ford Hospital Company against loss for any payments it should make in money to satisfy judgments which might be rendered against it, growing out of personal injuries received by patients while in the hospital.

While this policy was in effect, one Hannah sued the Ford Hospital Company and recovered a judgment for $5,500. Shortly thereafter the trial judge entered a remittitur of $2,000 from the judgment, and ordered the defendant to pay $3,500 into court on or before December 28, 1918, and that the plaintiff should accept that amount in full settlement of the judgment. The Ford Hospital Company then employed Sullivan & Rait, as its attorneys, with the object of bringing about a settlement with Hannah, and of procuring reimbursement from the Fidelity & Casualty Company. The Fidelity & Casualty Company took the position that its policy covered only such judgments as were based upon claims for damages for personal injuries received by patients in the hospital, and that Hannah was not a patient, and it therefore refused to provide money for the payment of the judgment. The Ford Hospital Company, through the testimony in its behalf, asserts that it had been unable personally to raise the $3,500 required to settle the judgment, though it appears that it made only one application for a loan, and that it did not apply to any bank.

Mr. Rait, one of the attorneys for the hospital company, then, without informing that company of his intended action, took up the matter with Hannah, and on December 24, 1918, before the period for remittitur had expired, paid to Hannah $3,526.82, and privately and in his own right purchased the judgment and had it assigned to Sullivan & Rait. These attorneys thus pur-

chased for themselves a judgment against their own client in a suit in which they were employed to defend their client. Each of the attorneys furnished half of the money. The assignment of the judgment was also, on the motion of the parties to the assignment, approved by the court in which the judgment stood.

Thereupon, Mr. Rait caused execution to issue against his client, the Ford Hospital Company, though he testified that this company had not, until that time, been given notice of the purchase by, or of the assignment of the judgment to, its attorneys.

When confronted by this levy of execution, the hospital company, with the alleged purpose of satisfying the judgment, gave its note to Sullivan & Rait for $5,601.25, payable on demand, and secured the same by a mortgage on its real and personal properties. It is not disputed that the note was as "good as gold" and "amply secured;" Doctor Ford's testimony showing that the reasonable market value of the Ford hospital was $250,000, against which there were mortgages aggregating only $145,000.

The note for $5,601.25, given by the Ford Hospital Company to its attorneys, has not been paid. In fact, though the note is payable on demand, no demand has been, and it is apparent no demand ever will be, made for its payment, since it is the manifest intention of the attorneys, payees of the note, to collect from the Fidelity & Casualty Company, and not from the Ford Hospital Company. The Ford Hospital Company, with that end in view and as security for the note, assigned to Sullivan & Rait whatever recovery could be had against the Fidelity & Casualty Company on the indemnity policy. The relation of these attorneys to the Ford Hospital Company, as attorney to client, has continued without interruption from the time that they were first employed, throughout the period of the transaction just referred to. It is needless to say of these attorneys, whose standing in the profession is high, that what was done by them was not with the purpose or intent of compelling their own client to pay them a profit

of $2,000 in the transaction. Mr. Rait stated that his object was both to profit by the transaction and to educate the insurance company, which he believed was refusing to pay a just claim. These attorneys would not attempt to make a profit by such a transaction, had their client been called upon to pay it. Moreover, the law would not allow of such a profit.

When they purchased the judgment, their client, the Ford Hospital Company, was, under the law, because of the trust relation, entitled to receive the benefit of that transaction. The client, Ford Hospital Company, could, of course, if it desired, and so far as it was individually concerned, either pay to its attorneys what they had paid for the judgment, and defend against all excess above that amount, or waive its defense to the $2,000 item in its attorney's claim for $5,601.25, and pay to them the judgment in full, but it certainly could not, by such a voluntary waiver of its right to defend against the $2,000 excess, throw away the rights of the Fidelity & Casualty Company, which company was, by a contract known to all the parties, subrogated to the rights and entitled to all the protection that the hospital company itself could and should, in all fairness, have asserted. Had the Ford Hospital Company expected to be required to pay the $5,600 out of its own pocket, it is obvious indeed that it would not have waived its defense and allowed its attorneys to make a profit of $2,000 off of it, nor would its attorneys ever have made, or even thought of attempting to make, such a collection. It was the clear and positive duty of the Ford Hospital Company to assert every defense it had and was aware of, and to reduce its obligation, and consequently the obligation of the Fidelity & Casualty Company, all that it could. Before this company can be generous to its attorneys, it must be just to its trust. It is a fundamental rule in such cases that the insured must reduce its liability all that it possibly can, and that it cannot voluntarily waive legal defenses. When it voluntarily pays more than is required, it certainly cannot re-

cover from the insurance company that excess which it has gratuitously given.

In the case of *St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co.*, 201 U. S. 173, where it had been claimed that the insured had paid more than was legally required, though in that particular case there was no proof of that fact, the court said (p. 182): "We assume that the settlement was reasonable, and that the plaintiff could not expect to escape at less cost by defending the suits. If this were otherwise *no doubt the defendant would profit by the fact.* The defendant did not agree *to repay a gratuity, or more than fairly could be said to have been paid upon compulsion.*"

What the Ford Hospital Company has agreed to pay, over and above the amount of money paid by its attorneys in the purchase of the judgment, it has done voluntarily. The promise as to such excess could not have been enforced, nor could the payment of the excess have been compelled by any attempted execution on the judgment.

As a further proposition, let us look particularly to the policy, written by the Fidelity & Casualty Company. It contains express provisions calculated to protect it against just such transactions as this. In the first place the policy is an indemnity, not a liability, policy. It indemnifies only against "loss that the assured has actually sustained by the assured's payment in money of a final judgment rendered after a trial in a suit against the assured for damages."

The parties to the indemnity policy had the right to freedom of contract. The primary obligation of the insurance contract was to indemnify against insured's "payment in money of a final judgment." The obligation of that promise can neither be enlarged nor diminished by a court without doing violence to the rights of the parties to it. Had this been a general liability policy, with a primary obligation to indemnify against loss or liability, resulting from personal injuries, or judgments rendered against the insured, and then had the policy been

further hedged about by conditions which, if not complied with by insured, would release the company from the obligation theretofore expressly assumed, then of course the company might, by its action, waive or be estopped from insisting upon a compliance with those conditions, and yet be bound by its general obligation which it had voluntarily undertaken to perform. But I am unable to see how the court has a right in any case to write an entirely new *obligation* into a contract that was not originally there and nowhere voluntarily assumed by the parties.

The Ford Hospital Company has not paid the judgment in money. It has, therefore, not sustained the loss covered by the policy. It has, on the other hand, given a demand note which, it is quite apparent, it never expects to be called upon to pay. Looking at the substance, rather than the form, this is a suit primarily by the attorneys in the name of the Ford Hospital Company against the Fidelity & Casualty Company to recover moneys in satisfaction of a $5,500 judgment, which they have purchased for $3,500, and which judgment has never been paid in money by the Ford Hospital Company, the note given by it being only a promise, intended to be satisfied by funds to be recovered from the Fidelity & Casualty Company.

The specific obligation of the contract of the indemnity company is to reimburse the Ford Hospital Company for what it shall be *compelled* to *expend in money* in satisfaction of such a judgment.

In 4 Joyce, Law of Insurance (2d ed.) 4822, sec. 2800, it is stated: "A distinction exists * * * between an indemnity against loss or damages and an indemnity against liability for damages, and even though the object of both is to save insured from loss or damage the legal consequences differ, for in the former case payment is essential, while in the latter it is not."

Where, in a policy of indemnity, the obligation is to reimburse the insured for moneys actually expended, it is, by the great weight of authority, the settled rule that the

assured cannot recover on the policy until a loss is sustained by way of an actual money payment. If respect is to be given to a contract obligation, such must be the rule. *Fidelity & Casualty Co. v. Martin,* 163 Ky. 12; *Elliott v. Ætna Life Ins. Co.,* 100 Neb. 833.

Though in the case of *Elliott v. Ætna Life Ins. Co., supra,* this court held that an indemnity company, under certain circumstances, and where it assumed control of the defense of the case, was estopped to deny that the primary obligation of its contract was other than as written, the effect of that decision at most is only to assert an exception to a well-recognized general rule, and an exception which could have no application to the facts in this case.

In some cases also it has been held, and because no substantial rights were there invaded, that a forced sale of property of the judgment debtor will be considered as a payment in money, since the property is actually and presently appropriated by the judgment creditor, and since such property has a money value which may be ascertained. *McBride v. Ætna Life Ins. Co.,* 126 Ark. 528; *Stag Mining Co. v. Missouri Fidelity & Casualty Co.,* 209 S. W. (Mo. App.) 321.

None of these cases, seeming to qualify the rule, has any application here. A present promise to pay money on demand cannot, at least until there has been an actual appropriation of money or property by the judgment creditor, ever be considered to be a present payment in money, as within the meaning or spirit of those provisions found in such indemnity contracts.

Judge Cornish, in his dissenting opinion in *Elliott v. Ætna Life Ins. Co., supra,* well said (p. 839): "Now, when parties have freely contracted, the courts must abide by the terms of the contract, or tell why not; otherwise, the court makes the contract for the parties and becomes a legislative body. A mere inequity as between the parties is not sufficient. Some ambiguity or repugnancy must be shown, or that it is unconscionable, against public

policy, or otherwise forbidden by law. Hard cases make bad law. * * * The insurer, on grounds of business policy, may prefer to make sure that the money goes to the injured employee. Without the provision, it may go elsewhere."

For the reason, then, that the note given by the Ford Hospital Company was not a compulsory payment as to its entirety, and since it was not a payment in money, it cannot justify an action for reimbursement against the Fidelity & Casualty Company.

It is my opinion that the action is premature and should be dismissed.

EDWARD REMALY, APPELLANT, V. CHARLES A. SWEET, ADMINISTRATOR, APPELLEE.

FILED JUNE 23, 1921. No. 21280.

1. **Specific Performance**: PAROL CONTRACT: PROOF. When it is alleged that an oral contract has been entered into between plaintiff and another, and it appears that the party to be charged died without fulfilling the alleged terms of the contract, and it is also alleged that the contract provided that a farm owned by the alleged donor, since deceased, upon his death, should become the property of the alleged donee, the plaintiff herein, such contract, to be enforceable in equity, must possess the element of certainty, and the proof to establish the contract must be clear, convincing, unequivocal and satisfactory.
2. ———: ———: ———. The record examined, and *held* that the evidence does not possess the element of certainty that is required to establish an alleged parol gift of land.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Fawcett & Mockett and *D. W. Livingston,* for appellant.

Pitzer, Cline & Tyler, contra.

Heard before LETTON, DAY, DEAN and FLANSBURG, JJ.

DEAN, J.

This is an action to cancel a deed executed by John

Michael, shortly before his death in March, 1917, wherein the title to a quarter section of land in Otoe county was conveyed to George I. Davidson, a nephew of decedent. For the reasons hereinafter appearing, plaintiff prayed that the title be quieted in himself. Defendant obtained judgment, the suit was dismissed, and plaintiff appealed.

Plaintiff alleges generally that, for many years before Michael's death, he was a tenant living on Michael's farm; that "the said John Michael and plaintiff, about the year 1892, entered into a verbal agreement that in consideration of the kindness of plaintiff and his wife, and the services they had rendered him prior thereto, and which plaintiff agreed that he and his wife would continue to render thereafter, he, the said John Michael, would by will devise to plaintiff the quarter section of land upon which plaintiff was then residing, * * * in said Otoe county, Nebraska. And plaintiff alleges that he and his wife faithfully kept and performed their part of said agreement. They ever remained his true friends and always did everything in their power to contribute to his happiness and comfort, and as long as he lived their home was his home, to which he was always free to come and go as it pleased him." It is averred generally that plaintiff and his family cared for decedent as one of their own family for 12 or more years; that plaintiff's family did Michael's washing, mending and baking and house-cleaning when he lived in his own home alone, he having divorced his wife in 1885; that while plaintiff was a tenant on the land in suit he helped Michael to build a house thereon; that he dug the cellar and the like and boarded the workmen without charge; that he made fences and dug ditches on the farm; that plaintiff moved to Lincoln in 1910, where he has ever since resided; that Michael came with him and lived in his home as one of the family; that when Michael was sick in a Lincoln hospital plaintiff's family took delicacies to him; that all such services were rendered without remuneration and in fulfilment of the alleged agreement that decedent would, by his will, give to plaintiff the

farm in suit; that plaintiff fully performed his part of the contract, but that Michael, shortly before he died, in violation of his contract with plaintiff, conveyed the land to a nephew.

At this point the relations that existed between Michael's family and plaintiff's family for many years may be noticed. It seems that the two families were near neighbors in Pennsylvania, and that early in the seventies Michael left his Pennsylvania home and came to Nebraska for the purpose of filing on government land. He came alone, leaving his wife and his aged parents in Pennsylvania, expecting them to join him here at a later period. Plaintiff avers that, soon after Michael came to Nebraska, "it was arranged between said Michael and plaintiff that plaintiff and his family should come west with the wife and parents of said John Michael, so that they could all be together and continue the close friendship which had theretofore existed between them;" that, as an inducement to plaintiff to come to Nebraska, Michael agreed that, if he would do so, he would furnish plaintiff with a quarter section of land and the stock to farm it; that in reliance upon such agreement, together with his close friendship for Michael, plaintiff moved to Nebraska with his family, bringing Michael's wife and his aged parents with him, "plaintiff having charge of said party and arranging the details of their departure and looking after the welfare of the entire party during the trip west;" that upon arrival in Nebraska he resided in a log house on Michael's land about four or five months, when he concluded that he would leave the farm and work at his trade as a plasterer and a brick-layer, "the said Michael consenting to release him from their agreement that he should go upon a quarter section of the said Michael's land;" that he left the land and resided at Lincoln for about eight months, and then removed to Hickman, about 14 miles from Michael's home, where he continued to reside and work at his trade for five or six years; that Michael then "requested plaintiff to quit working at his

trade and devote himself to farming, and offered to rent plaintiff all of the farm land then owned by said Michael," consisting of about three quarter sections; that Michael, as rent for the land, was to receive one-third of the crops; that he accepted Michael's offer about 1882, and moved upon and continued to reside on and cultivate the land for about 22 years. The alleged verbal agreement with Michael that plaintiff relies on was entered into, as he avers, about 10 years after he began farming on Michael's land as a tenant, namely, in 1892. No witness, however, has testified that he was present when the alleged contract was made, nor are there any letters in the record nor any writing whatever by any person to support plaintiff's contention with respect to the alleged contract.

The evidence of both parties is voluminous and we cannot set it out in detail. Five or six witnesses testified on the part of plaintiff, upon whom he relies to establish the averments of his petition. One of these gave his deposition. The witnesses called by plaintiff were, in part, persons who were old-time friends and neighbors of plaintiff, and they testified respecting remarks that were attributed to Michael, which were to the effect that plaintiff and his family had been good to him; that he intended to give land to plaintiff, and the like. It does not appear that any of these statements were made in Remaly's presence. In view, however, of the relations between Michael and plaintiff, and in view of the allegations of his petition respecting the inducement offered by Michael to plaintiff that if he would come to Nebraska he would furnish him with land and with stock to farm the land, it appears that there might be some confusion in the memory of the witnesses with respect to the language that they attributed to Michael. The testimony here, as in all cases of this character, where one of the parties to the alleged contract is dead, must be construed most strongly against the party who seeks to establish the contract. And this for the very good reason that the other party is dead.

The evidence shows that Mr. Michael was an extensive

landowner and that he owned a large amount of personal property. On the part of defendant it was shown that he was not given to talking much about his business affairs; that for six years or more after Michael divorced his wife she lived in his home in the capacity of housekeeper caring for the children of whose custody she was deprived when Michael divorced her. Subsequently she married, and Michael and two of his sons were left alone. For many years Mr. Michael spent his winters in the south, on the gulf coast, or in California, as the case might be. While he was for the most of his life strong and robust and without the need of an attendant, nevertheless, in the latter part of his life, on account of failing eyesight, he employed a secretary to accompany him on his travels. On one occasion he toured Europe taking with him one of his sons. It was shown that he was a liberal man and inclined to give generous gifts to his friends. It appears that he made loans to plaintiff from time to time and released the obligations without exacting payment; one of the loans so released being in the sum of $2,000. This loan was evidenced by a note secured by mortgage. In 1909 Michael made a will, which he revoked or destroyed about two years thereafter. About this time he said to one or more persons that before the end came he intended to dispose of all of his land by deed. There is evidence tending to prove that in 1915, shortly before he made one of his periodic trips to California, he settled his board and lodging account with Remaly and gave him a check for $200 in settlement. It was about this time that he surrendered two notes to the Remalys, one executed by plaintiff and one by plaintiff's daughter, no consideration passing from them for such release. On this, or a similar occasion, a witness testified that plaintiff said to Michael, in substance, that he was well satisfied with the generous manner in which Mr. Michael treated him in their various settlements.

It appears that Michael built a house on one of his farms for the accommodation of plaintiff's family, the house

formerly occupied by them being insufficient to properly house them. With respect to the building of the house in question, plaintiff contends that the work that he did thereon and the board that he furnished for the men was all without remuneration, and that such work and the board so furnished were all to be considered as a part fulfilment of the contract that he pleads. It is well known that in some farming communities it is a custom for a landlord who has a satisfactory tenant, perhaps for a term of years, to furnish the material and build a house on condition that the tenant make the excavation for the cellar and furnish such personal help as he can toward the erection of the building. But there is evidence tending to prove that a $600 note was released by Michael to reimburse Remaly for work that he had done, and for board, about the time the house was built in which the Remalys lived.

It may be added that, on plaintiff's part, there is evidence tending to prove that Michael, for many years before his death, frequently called at the office of a prominent lawyer, who was his counsel, and that there was some conversation between them with respect to Michael's alleged intention to give a farm to Remaly. But it does not appear in the record that Michael's counsel was consulted by him at any time with respect to such legal procedure, or with respect to the drawing of some written instrument, that it might be advisable to employ, in order to make effective and to make certain so important and so unusual a transaction as the gift of a quarter section of Otoe county farm land to one who was a stranger to the donor's blood. It seems to us that Mr. Michael, man of affairs that he appears to have been, would have consulted counsel on a subject of so great importance if such an intention was seriously entertained by him.

From a review of the record, we do not think the case comes within the rule of *Kofka v. Rosicky,* 41 Neb. 328, nor does it come within the meaning of subsequent cases bearing on the same subject. On this question we have

uniformly held that the evidence to establish a parol contract of the sort involved here must be clear, convincing, unequivocal and satisfactory, and that such evidence must be referable solely to the contract as made. Clearly the proof in the present case does not come within the rule to which we are committed.

It is not out of place to say that the record does not present a situation where, if the alleged parol contract is not sustained, the plaintiff would be deprived of remuneration for the services that he contends he performed for decedent, he having received from Michael, in the form of loans that were not repaid, but were canceled, sums approximating $3,000 or more.

Upon examination of the record, we conclude that the district court did not err in dismissing the action. The judgment of the district court is therefore in all things

AFFIRMED.

LUTHER B. FRYE, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED JUNE 23, 1921. No. 21504.

1. **Negligence: PETITION: SUFFICIENCY.** In an action for personal injuries, sustained by reason of the alleged negligence of the defendant, when the facts pleaded are such that reasonable minds could come to no conclusion other than that plaintiff is guilty of more than slight negligence in comparison with the negligence of defendant, and a demurrer to the petition is sustained, error cannot be predicated thereon.
2. **———: USE OF SIMPLE APPLIANCE.** A leather strap, with a buckle attached, is a simple appliance. Plaintiff, who was a man of mature years, and who knew how to skate, will be presumed to have known the ordinary and usual results of the use of such appliance in the adjustment of roller skates to his feet for use in a skating rink.
3. **Pleading: CONSTRUCTION.** When pleadings are joined they will be liberally construed. But when a pleading is tested by demurrer, before issue joined, it is construed most strongly against the pleader.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

John O. Yeiser and *John O. Yeiser, Jr.*, for appellant.

John L. Webster, contra.

Heard before LETTON, DAY, DEAN and ROSE, JJ.

DEAN, J.

Plaintiff sued to recover damages for personal injuries alleged to have been sustained from a fall while he was skating on roller skates furnished by defendant at a roller skating rink that it maintained at Lake Manawa. Defendant filed a general denial. Subsequently it obtained leave to withdraw its answer and to demur *ore tenus*. The demurrer was sustained; the suit was dismissed, and plaintiff appealed.

Plaintiff alleges generally that defendant, "for the purpose of stimulating traffic over the street railway lines," and for gain, maintains a pleasure resort at Manawa; that it invited the public to the attractions there maintained by it, and that he, on July 25, 1919, "under the usual guaranties and obligations of hospitality and good treatment of servants and safe appliance and equipment, * * * accepted the said public invitation of defendant," and entered defendant's roller skating rink at Manawa, "and paid twenty-five (0.25) cents for the use of the rink and a pair of roller skates which defendant adjusted loosely, and plaintiff returned from the skating floor to complain of looseness. Whereupon defendant corporation, through its agents and servants in charge, used two straps over the toes, but that said straps negligently used by defendant were not suitable and proper toe straps, but were long straps made for some other purpose, and defendant knew or should have known of their unfitness and dangerous length, but nevertheless negligently adjusted and tucked in said long straps without informing plaintiff, who did not know of said improper appliances, the ends of which were hidden and latent in

defect, but relied upon defendant; that plaintiff, relying upon the appliances and services of defendant, resumed skating and after from five to fifteen minutes skating said strap came loose from said long surplus end of useless leather, and said end bent back under the roller of one of the skates, suddenly stopping the skate and throwing plaintiff to the floor." It is then alleged generally that, as a result of the fall, plaintiff suffered an injury to his right arm that he says is permanent. He avers that he is 38, and that he was in good health before the accident.

It plainly appears from the petition that plaintiff discovered, when first he went upon the skating floor, that the skates were loosely adjusted and "he returned from the skating floor to complain of looseness." So that his attention was forcibly drawn to a situation that demanded a remedy, and straps were used for this purpose. There is nothing intricate about the mechanism of a leather strap and buckle. A more simple appliance could hardly be imagined. A person with even a low degree of intelligence knows the use to which straps and buckles are put. It follows that plaintiff should have used the care of a reasonably prudent person to see to it that the straps were properly applied and adjusted before he resumed skating. He did not do so; hence, the accident. Plaintiff was not a child but a mature man of 38 years. Whether he was a novice or an expert skater does not appear. But he could skate. He complains of adjustment. A man of his years, even though a skater of only ordinary skill, should himself have known, in the exercise of reasonable regard for his own safety, whether the straps were properly adjusted, and, if they were not, he should have made complaint at the time, or he should have made the proper adjustment himself. Plaintiff pleaded that the straps used by defendant "were not suitable and proper toe straps" and that they "were long straps made for some other purpose." He is, of course, chargeable with knowledge of the facts that he has pleaded.

In a practical way one person is as capable as another

of judging of the character of straps and buckles with respect to safety in practical use. So that where, as in the present case, a person not only voluntarily, but by his own request, submits to the adjustment of roller skates to his feet by an appliance so simple as a strap and buckle, all as complained of herein, is guilty of as much, if not more, negligence than the person who furnished the appliance and made the adjustment. *Vanderpool v. Partridge*, 79 Neb. 165; *Donehoe v. Crane*, 141 Ga. 224; *Sutton v. Des Moines Bakery Co.*, 135 Ia. 390.

Under section 7892, Rev. St. 1913, we held that, where the facts show, beyond reasonable dispute, that plaintiff is guilty of more than slight negligence in comparison with the negligence of defendant, the case should be taken from the jury. *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224; *McCarthy v. Village of Ravenna*, 99 Neb. 674; *Sodomka v. Cudahy Packing Co.*, 101 Neb. 446.

From the facts pleaded reasonable minds could come to no conclusion other than that plaintiff was guilty of more than slight negligence in comparison with that of defendant.

In a case involving the simple appliance rule, even as it applies to a child who was an infant suitor of tender years, it has been said: "Simple tools and appliances * * * embody no perils that are not obvious even to the mind of a young child, and consequently no recovery will be allowed as a rule for injuries sustained therefrom." 20 R. C. L. 93, sec. 82. In *Koschman v. Ash*, 98 Minn. 312, the rule is discussed and numerous authorities are cited.

Respecting the demurrer: The rule is that, after issues are joined, the pleadings will be liberally construed. But when a pleading is tested by demurrer, before issue joined, it is construed most strongly against the pleader. *McIntyre v. Hauser*, 131 Cal. 11; *Lampman v. Bruning*, 120 Ia.

167. The court did not err in the premises. It follows that the judgment must be affirmed.

AFFIRMED.

MORRISSEY, C.J., not sitting.
ROSE, J., dissents.

ISADORE BERNSTEIN V. STATE OF NEBRASKA.

FILED JUNE 23, 1921. No. 21875.

Criminal Law: EVIDENCE: TELEPHONIC CONVERSATION. Evidence of telephonic conversation between the defendant and another party is hearsay and incompetent, unless the party testifying could recognize and identify the voice of defendant.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

H. Fischer and *W. H. Hatteroth,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

Heard before LETTON, ALDRICH, DAY and DEAN, JJ., GOOD and RAPER, District Judges.

ALDRICH, J.

Plaintiff in error was convicted in the district court for Douglas county on a charge of receiving stolen property, and was sentenced to the penitentiary for an indeterminate period of from one to seven years. He brings the case to this court for review.

The property alleged to have been stolen was a case of cigars belonging to one Kiplinger. His name and address were on the box. The cigars, it is estimated, were worth $405.

The state's principal witness was Henry Slack, a convict. His story was that at the time of the alleged stealing he was employed by the Omaha Merchants' Express and Transfer Company; that he had the case of cigars and some tires in his truck when he left the freight office, and

that he picked up the witness Carl Rose on his way to Frieden's store. Frieden, according to Slack's testimony, said he would take all the "stuff" Slack would bring. Slack testified that they went from Frieden's store to Bernstein's place of business, where he delivered the cigars, receiving $25 in cash from Bernstein, with the arrangement that Bernstein was to pay him another $25 if the cigars were good.

Slack also testified that a telephonic conversation was had between Frieden and the defendant relative to defendant's accepting the cigars in question. The defendant denied that Frieden called him on the telephone, and the establishing of the fact depends almost entirely upon Slack's testimony, as Frieden was not called as a witness. Slack testified that Frieden "went inside and called this Bernstein." Slack did not hear the defendant Bernstein's voice at the other end of the line, and on this proposition the case of *National Bank of Ashland v. Cooper*, 86 Neb. 792, is in point. It was there held: "The conversations, relating to a contract, had between parties thereto by telephone may be received in evidence, where the witness testifies positively that he recognized the person, with whom he was talking, by his voice." It is plain, then, that neither Slack nor Rose could be allowed to testify that it was Bernstein at the other end of the line, unless they could identify his voice. *Dunham v. McMichael*, 214 Pa. St. 485. Slack and Rose were comparative strangers to the defendant, not familiar enough with him to recognize his voice if they had heard it. Slack and Rose could testify only as to what they heard Frieden say. Hence, the reception of this evidence, in our judgment, was prejudicial error, and the defendant is entitled to a new trial on this phase of the case alone.

REVERSED AND REMANDED.

FRANK J. STRONG V. STATE OF NEBRASKA.

FILED JUNE 23, 1921. No. 21845.

1. **Jury: VOIR DIRE.** Upon the *voir dire* examination of a proposed juror, each party has the right, within reasonable limits, to put pertinent questions for the purpose of ascertaining whether there exists sufficient grounds for a challenge for cause, and also to aid the party in the exercise of his statutory right of peremptory challenge.
2. ———: ———: **DISCRETION OF COURT.** The extent to which such examination may be carried rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been an abuse of discretion to the prejudice of the complaining party.
3. **Criminal Law: INSTRUCTIONS.** Where the court on its own motion charges the jury substantially as requested, it is not error to refuse to restate those principles of law.

ERROR to the district court for Madison county: WILLIAM V. ALLEN, JUDGE. *Remanded, with directions.*

Barnhart & Stewart, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

Heard before LETTON, DAY, DEAN and ROSE, JJ.

DAY, J.

Frank J. Strong was convicted in the district court for Madison county on a charge of statutory rape, and was sentenced to the penitentiary for an indeterminate period of from three to twenty years. As plaintiff in error he has brought the record here for review.

For convenience, plaintiff in error will be hereinafter referred to as defendant. The chief complaint of the defendant upon the oral argument, as well as in his brief, is that the trial court erred in restricting and limiting his counsel in the *voir dire* examination of veniremen called as prospective jurors in the case. The record shows that during the examination upon their *voir dire* several pros-

pective jurors were asked by counsel for the defendant whether they were married, how many children they had, and whether the children were boys or girls. During the examination of venireman Fred Recker by defendant's counsel, he was asked: "Q. You are married? A. Yes, sir. Q. And got some children? A. Yes, sir." At this juncture the court interrupted, saying: "I am going to stop you. It is wholly immaterial whether this man has children or not. Avoid that, Mr. Barnhart."

The principal purpose of the *voir dire* examination is to ascertain whether the proposed juror is free from bias or prejudice, and whether he is in such attitude of mind with respect to the case in hand that he would be a fair and impartial juror. With this end in view, it is the policy of the law to give to the parties ample opportunity to question the venireman upon matters bearing upon his competency, and questions which tend to show his attitude of mind and feelings should not be unreasonably abridged. And as each party has the right to exercise a certain number of peremptory challenges, it is proper, within reasonable limits, to propound questions which, in the judgment of the respective parties, may assist them in the exercise of that right. The extent to which the examination may be carried rests in the sound discretion of the trial court, and its ruling will not be disturbed unless there has been an abuse of discretion to the prejudice of the party complaining. *Van Skike v. Potter,* 53 Neb. 28.

The question here presented is not a new one in this jurisdiction. In *Bayse v. State,* 45 Neb. 261, it was held: "On the examination of a juror on his *voir dire,* each party has the right, within reasonable limits, to put pertinent questions for the purpose of ascertaining whether or not there exists sufficient ground for a challenge for cause, and also to enable the party to properly exercise his statutory right of peremptory challenge."

From an examination of the questions propounded to the veniremen, as shown by the record, it is perfectly clear that the fact sought to be elicited from the proposed

juror was for the purpose of assisting counsel in their peremptory challenges. In directing the trial, a large amount of discretion must necessarily be given to the trial judge, to the end that trials be expedited, and that the examination of proposed jurors be not extended beyond reasonable bounds. In the case at bar we are of the view that the restrictions placed upon the examination of the proposed jurors did not amount to an abuse of judicial discretion.

Complaint is also made of the failure of the court to give instruction No. 1 requested by the defendant. This instruction related to the weight to be given to character evidence, and was responsive to the evidence given upon the trial. The court did, however, in language of its own choosing, correctly instruct the jury upon this subject in instruction No. 10. It is well settled that it is not necessary to give an instruction in the language of counsel, where the subject is covered by instructions in the language of the trial court. *Jameson v. Butler,* 1 Neb. 115; *Curry v. State,* 5 Neb. 412; *Coffey v. Omaha & C. B. Street R. Co.,* 79 Neb. 286.

It is urged that the verdict is not supported by sufficient evidence. We cannot agree with defendant's counsel in this contention. No useful purpose will be subserved in reviewing the evidence. While the defendant denied the act of intercourse, the overwhelming testimony, including his confessions, point to the contrary. The case is one clearly for the determination of the jury, and we are satisfied with its finding.

It is urged that there was error in the giving of instruction No. 12, defining the meaning of the term "reasonable doubt." The instruction is criticised, not so much because it does not correctly give the meaning of that term, but because it closed with these words: "It is important to the administration of justice that no man proved to be guilty of a crime should be permitted to escape, and that no man of whose guilt there is a reasonable doubt should be convicted. The important and solemn

duty is with you to determine the guilt or innocence of the defendant and to return a verdict accordingly." We can see no prejudicial error in this statement.

It is also urged that it was error to permit the prosecutrix to testify to other acts of intercourse with the defendant. This question has been determined adversely to the contention of defendant in *Woodruff v. State*, 72 Neb. 820.

It is finally urged that the court erred in pronouncing sentence under the provisions of the indeterminate sentence law. An examination of that law as it now appears (Laws 1919, ch. 190, p. 791) will disclose that the crime of rape is excepted from its provisions. The trial judge should have determined the duration of the sentence.

On the entire record we conclude that there is no error necessitating a new trial, but it is ordered that the cause be remanded, with directions to the trial court to impose a sentence of a definite term.

REMANDED, WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. SOUTHERN ELKHORN TELEPHONE COMPANY, APPELLEE.

FILED JUNE 23, 1921. No. 21387.

1. **Telegraphs and Telephones: "COMMON CARRIER:" SUPERVISION.** Where several farmers in cooperation constructed a rural telephone line, so as to connect their farms with a public service telephone company in town, from whom they purchased telephone boxes and rented transmitters, and were afforded switching service to local and long-distance subscribers over the lines of such telephone company, and paid to the telephone company the same rates as regular subscribers, but did not exact nor receive compensation for messages transmitted over their rural line, and raised no revenue except such sums by mutual assessment as were needed to maintain and keep in repair their properties, *held* that they were not operating as a common carrier, defined by our statute (Rev. St. 1913, sec. 6124) as "telephone companies * * * engaged in the transmission of messages * * * for

hire," and were not under the supervision of the Nebraska state railway commission.

2. ———: ———. Though section 7418, Rev. St. 1913, grants a right of way over the public roads of the state to "any telegraph or telephone company incorporated or doing business in this state," it does not follow that any one who erects poles and strings telephone wires upon a public road is a telephone company or a common carrier.

3. ———: ———. Though such a rural telephone line may render impracticable the extension of further telephone service in that particular locality, and hence be a matter of public concern, the fact that the situation is of public interest does not alone characterize the rural line as a public service company, nor identify it as a common carrier. Its character is to be determined rather by the purpose for which the property is intended to be used and the actual use to which it is devoted.

APPEAL from the district court for Madison county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

Clarence A. Davis, Attorney General, and *Hugh LaMaster,* for appellant.

M. D. Tyler, contra.

Heard before MORRISSEY, C.J., ALDRICH, FLANSBURG, LETTON and ROSE, JJ.

FLANSBURG, J.

This was an action by the state of Nebraska, brought against a number of farmers, who had constructed a rural telephone line and who called themselves the Southern Elkhorn Telephone Company, and was to compel them to obey an order of the Nebraska state railway commission, commanding them to furnish to one Doxstader, a farmer living in the vicinity, a connection with their telephone line. The trial court found in favor of the defendant and entered a dismissal, from which order the state appeals.

The sole question for determination is whether or not the so-called Southern Elkhorn Telephone Company is a common carrier and therefore under the jurisdiction of the Nebraska state railway commission. If found to be

such a common carrier, then the order of the railway commission, requiring it to extend its service to the farmer, Doxstader, must be enforced; otherwise, the order of the commission is without legal authority.

In 1917 the farmers mentioned, living in the vicinity of Norfolk, had requested telephone service from the Nebraska Telephone Company, which company was a public service corporation doing a telephone business at Norfolk and throughout the state. This the telephone company, in the first instance, refused to give, but the negotiations resulted in an agreement, in pursuance of which the farmers constructed at their own expense a telephone line from Norfolk to their farms, and purchased telephone boxes and rented transmitters from the telephone company, and were thereupon received by the telephone company as subscribers upon the same terms as the subscribers in Norfolk. Each one of the farmers contributed toward the expenses of constructing this party line. The telephone poles were placed, some in the highway, some along the property lines and used as fence posts, and some across private property. The farmers never incorporated or associated themselves as a company. They, however, adopted the name of Southern Elkhorn Telephone Company, for the purpose of convenience in their dealings as a collective body with the Nebraska Telephone Company. They kept their lines in repair and the expenses for such repairs were borne by mutual assessments made from time to time as needed. The repairs amounted to from $2 to $2.50 yearly for each farmer. The Nebraska Telephone Company at Norfolk furnished switching service for them and arranged to connect them with the Norfolk subscribers or with long-distance lines, and for this service the farmers paid the same rates as the Norfolk subscribers. One of their number each month collected from the others the regular rates and whatever long-distance tolls had been incurred by any of them, and remitted the entire amount in one sum to the Nebraska Telephone Company at Norfolk. The subscribers at Norfolk, or any one

at distant points, who wished to talk with these several farmers, could call through the exchange at Norfolk and be connected with the farmers' line. There are only 10 farmers connected with the rural line in question, but it is their contention that their line is already burdened and is insufficient to afford service for additional telephone users. The agreement, under which the farmers are acting, does not provide for taking in new members, nor for extending service beyond the lines already constructed.

It is the contention of the attorneys for the state that the rural telephone line in question, having become connected with the Norfolk telephone system, has necessarily become an integral part thereof and therefore has become a common carrier. It is argued that the farmers on the rural line send messages to whomsoever they please, and hold themselves out as ready to accept and deliver all messages that may come to the rural line from subscribers at Norfolk and, in fact, from any part of the country over long-distance.

The legislature defined common carriers, so far as that term is applicable here, to be "telegraph and telephone companies * * * engaged in the transmission of messages * * * for hire." Rev. St. 1913, sec. 6124.

In order that a company be a common carrier, it is essential, in view of this statutory definition, as well as by the generally recognized meaning of the term "common carrier," that the service rendered by it must be a service that is rendered for hire. It was said by Justice Story in *Citizens Bank v. Nantucket Steamboat Co.*, 5 Fed. Cas. (No. 2730) 719, 725: "I take it to be exceedingly clear that no person is a common carrier in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result." If no compensation is received, "he is not in the sense of the law a common carrier; but he is a mere mandatory, or gratuitous bailee; and of course his rights, duties and liabilities are

of a very different nature and character from those of a common carrier."

As pointed out in 10 C. J. 41, sec. 10: "The law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have neither expressly assumed that character nor by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it."

It is quite apparent that the farmers, when they constructed the rural line in question, had no idea of rendering service to the public. Their sole purpose was to procure telephone service for themselves. It was to that purpose, and that purpose only, that they dedicated their property. To now subject that property to another purpose than that for which it was given, or intended to be used, would be to take from them the right and the use of the property which has not been voluntarily yielded up. Where a person enters into the business of public service and operates as a common carrier, he voluntarily dedicates his property to the public use and acquiesces in a necessary public control of the business conducted; but where there is no such dedication to the public use, the state has no arbitrary right to take from an individual the control of property devoted to private interests. The farmers who constructed the line in question did not provide that they would extend service to whomsoever might apply, nor that they would engage in the business of transmitting telephone messages. They have not become bound to each other, nor to the public in general, to see that their rural line is always in first-class order and that messages received will be promptly and efficiently transmitted. To hold them as a common carrier would fix a liability upon them for negligence in failing to keep their lines in efficient order. The lines that they have constructed are for their own private use, and certainly are subject to such control and provision for repair and maintenance as they themselves shall elect to adopt.

It is argued that the rural line is similar to branch lines

of a railroad which are constructed to meet the demands of some private industry and become a part of the railroad system and subject to control as a part of a common carrier. The case of *Union Lime Co. v. Chicago & N. W. R. Co.*, 233 U. S. 211, is one of the cases cited as bearing out that contention. In that case it is to be noted that railway companies which were common carriers were given a statutory right to acquire necessary right of way and to extend spur tracks in order to meet the needs of manufacturing establishments, and that such a spur track, operated by a railroad company, was held to be a part of the railway system, and not a private side track belonging to the private establishment. In that case the court said (p. 222): "There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings."

The case of *State v. Union Stock Yards Co.*, 81 Neb. 67, is relied upon as furnishing an analogy to the present case. There the court held that the stock-yards company, which operated tracks for the purpose of distributing cars of live stock, shipped in over various railroads, was a common carrier, though it distributed such shipments only to the several packing houses and industrial establishments directly connected with its lines. But in that case the Union Stock Yards Company was engaged in the business of carrying freight, and held itself out to the public generally to receive all live stock shipped over the railroads and to carry it from the railroad terminus to its destination, and this service was rendered for hire. In that case it is said (p. 82): "If a person or a corporation holds itself out to the public as offering its services to all persons similarly situated, and performs a service in the transportation of persons, freight or intelligence, it is a common carrier in the particular spheres of such employment." Obviously, the rule stated there has no application to the case under consideration.

It is argued, since the rural line is partially constructed

upon public highways and since our statute (Rev. St. 1913, sec. 7418) grants a right of way upon the public roads of the state to "any telegraph or telephone company incorporated or doing business in this state," that the defendant cannot deny that it is a common carrier, nor that it is subject to public control as such. That contention, however, is to mistake the effect for the cause. Though the statute gives to all telephone companies engaged in public service a right of way over the public roads, it does not follow that any one who erects poles and strings telephone wires upon a public road is a telephone company or common carrier. If the farmers' rural line is not the line of a "telephone company," it may be that it has no right upon the highway and is there only by public sufferance, but the fact that it is on the highway certainly does not characterize the nature of the service which it renders.

Again, it is contended that the property of the defendant is impressed with a public interest, for the reason that it monopolizes telephone territory. It is argued that the line extending through this territory and rendering the service that it does creates a situation which would render it unprofitable and impracticable for any other telephone company to extend a line into the same territory, by reason of the fact that so few are left to become subscribers. The situation may be a matter of public interest and may render impracticable the extension of telephone service in that territory, but, unless the rural line constructed by the defendant is a common carrier, it does not come within the jurisdiction of the railway commission, no matter how great the public interest in the matter may be. The state, through its legislative authority, even though the enterprise is not a common carrier, may, when it pleases, deem it wise to prevent such organizations from constructing their lines upon or across the public highways, and thus save that territory to public service companies which will serve the entire community,

but this is not a matter for the railway commission, nor, at this time, for the court to pass upon.

In Illinois, where the law places public utilities and the property thereof, "devoted to a public use," under the supervision of the public utilities commission, it is held that a mutual telephone association, which has no charter authority to engage in public telephone service, to take on new members, or to devote its property to a public use, and is organized for the private use of its members only, and not for profit, is not within the jurisdiction of the commission as a common carrier. *State Public Utilities Commission v. Bethany Mutual Telephone Ass'n,* 270 Ill. 183; *State Public Utilities Commission v. Okaw Valley Mutual Telephone Ass'n,* 282 Ill. 336. The court in the case first above cited said (p. 185): "To constitute a public use all persons must have an equal right to the use, and it must be in common, upon the same terms, however few the number who avail themselves of it. It is not essential to a public use that its benefits should be received by the whole public or even a large part of it, but they must not be confined to specified, privileged persons."

In Missouri, where a statute, somewhat similar to our own, places under the public service commission utilities engaged "in the conduct of the business of affording telephonic communications for hire," it was held, in *State v. Public Service Commission,* 272 Mo. 627, L. R. A. 1918C, 820, that a mutual telephone company, the members of which own their own instruments and maintain their lines to a central station and contribute a quarterly amount to maintain such station, does not furnish telephonic communication for hire, although a fee is exacted in case a nonsubscriber talks on a telephone on the company's switchboard to one on a connecting line. The court in that case said (p. 640): "The constitution and by-laws and the oral testimony all point to the conclusion that the Auxvasse Company is primarily a private organization not operated for hire. Operation for hire is a pre-

requisite to supervision by the commission. The reason is plain. The commission was created, as is evident from the entire statute defining its powers, not to interfere with individual action except where same assumes a public nature, but to provide regulations and give plenary power as defined by the statute to the commission to control such utilities as from their nature and operations may affect the interests of the general public. All such organizations are commercial in their nature in that they are not conducted for favors, but for fees. Recognizing this fact, the framers of the public service act made this a condition precedent to commission control. That a fee may be exacted from nonsubscribers for talking from a telephone on the company's switchboard to one on a connecting line does not militate against the correctness of the conclusion that this company does not afford telephonic communications for hire. * * * The fee thus authorized to be charged is but an incident in the general conduct of the business of the company, and is not indicative of its character, which is to serve those who sustain it and not the general public."

In the case under consideration, the association of these ten farmers and their joint ownership in a rural telephone line, extending from Norfolk to their properties, cannot be dignified by the appellation of a public service company. Their property has never been dedicated nor devoted to a public use. It was provided merely as a private convenience. These farmers do not pretend to, nor do they, render a service to the public. Though outsiders may call them over their lines, they do not guarantee a faithful and careful transmission of the message, nor are they obligated to the public to any degree of care in keeping their lines in efficient readiness for use. They permit and invite such messages to come to them for their own convenience. They render no service, they make no profit, they exact no compensation, and cannot be held to be "a telephone company engaged in the transmission of messages for hire," within the meaning of our statute.

Since they were not operating as a common carrier, the railway commission has no jurisdiction, and the order made was without authority of law.

The judgment of the trial court is therefore

AFFIRMED.

CHARLES THOMPSON ET AL., APPELLANTS, V. COLFAX COUNTY ET AL., APPELLEES.

FILED JUNE 23, 1921. No. 21505.

1. **Evidence** examined, and *held* to justify a directed verdict.
2. **Counties and County Officers:** DRAINS: AGENCY: COUNTY SURVEYOR. Under article I, ch. 19, Rev. St. 1913, the county surveyor acts under the mandate of the statute, and not as agent or trustee of the county, and there is no statutory provision making the county liable for his neglect of duty.
3. ———: ———: ———: COUNTY COMMISSIONERS. Under article I, ch. 19, Rev. St. 1913, the board of county commissioners act as agents or trustees of the persons whose property is chargeable with the cost of the work, and not for the county, and the statute having failed to make the county liable for their neglect or delay, this action cannot be maintained.
4. **Drains:** CONTRACT: AUTHORITY OF COUNTY. The construction company, in entering into the contract mentioned in the opinion, is presumed to have known the extent of the county's authority and the limitations thereof, and to have contracted with reference to such delays as might grow out of the work to be performed.
5. **Trial.** It is not error to reject documentary evidence of an admitted fact.

APPEAL from the district court for Colfax county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Switzler & Switzler, for appellants.

B. F. Farrell, W. B. Sadilek and *George W. Wertz, contra.*

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., ALLEN and REDICK, District Judges.

ALLEN, District Judge.

Charles and George K. Thompson, doing business in the trade name of Charles Thompson Company, appealed from the judgment of the district court entered on a directed verdict for the defendants.

During the trial, by leave of court and by interlineation, the plaintiffs amended their amended petition by striking out all allegations respecting the depreciation of the machinery during the time it is said to have been idle, and stated the substance of their claim as follows: "That on account of the acts of the defendant in preventing it from continuing the work in digging the ditch it was compelled to leave on the ground and exposed to the elements all of its machinery; that it was prevented from using said machinery in other work on account of the promises from time to time by the defendants that the marking stakes would be furnished plaintiff so that it could continue its work. Plaintiff says that the damage to plaintiff by reason of increased cost to return machine and crew to the right of way for additional excavation was $100, and loss of use of said machinery was the sum of $4,200, or a total loss of $4,300, for which plaintiff has made claim and demand, and payment has been refused."

By a cross-petition the Union Pacific Railroad Company was brought into the case, but went out on a demurrer, so that the controversy is between the plaintiffs and Colfax county.

June 28, 1917, the Elkhorn Construction Company and Colfax county, by its board of county commissioners, entered into a written contract pursuant to article I, ch. 19, Rev. St. 1913, for the digging of a drainage ditch northwest from the city of Schuyler and across the right of way of the Union Pacific Railroad Company, and for several miles beyond the initial point; but before the work was commenced, and by the consent of the board of county commissioners, the contract was assigned to the plaintiffs, and they became subrogated to the rights, duties and obligations of the construction company thereunder. The

work began August 18, 1917, and ended for that year, because of the frozen condition of the ground, December 6, 1917. The ditch was dug to the south line of the railroad company's right of way and for a distance of 200 feet north thereof, but no marking stakes were placed on the right of way or work done thereafter until after the railroad company was forced to permit it to proceed.

The testimony shows that the plaintiffs requested the county surveyor to place marking stakes from the point where the work ceased December 6, 1917, to the end of the proposed ditch, but he refused to do so until the question of crossing the railroad company's right of way was settled, because the ditch might cause the right of way to be flooded.

It appears that the plaintiffs and Colfax county, acting in good faith, negotiated with the Union Pacific Railroad Company for some months to secure an easement across its right of way, but, failing therein, the railroad company was forced to yield by a peremptory writ of mandamus issued by the district court July 18, 1918, and the work was resumed the following August and completed November 10, 1918, and full payment was made by the county.

There is no testimony that the plaintiffs made any effort to employ the machinery in other work, or that they took steps to prevent, or to minimize, the damage they claim to have sustained by reason of its lying idle.

Assignments of error 1 and 2 are to the effect that the district court erred in directing a verdict for the defendant on the ground that there was not sufficient evidence to sustain a verdict for the plaintiffs and that there was no question of fact for the jury's determination.

Readily conceding that, in directing a verdict, the court must construe the testimony favorably for the plaintiff, and that it is error to direct a verdict when there is testimony sufficient to support a verdict for the plaintiff, in the absence of countervailing evidence, we have to say that we think that these assignments are not well taken.

The plaintiffs base their right to recover on two propositions: (1) That there was unnecessary delay and neglect on the part of the county surveyor in setting marking stakes from the point north of the railroad company's right of way where the work ceased in 1917 to the end of the proposed ditch so that work could not be promptly resumed in the spring of 1918. This contention, however, is removed from the case when it is remembered that the county surveyor acted under the mandate of the statute, and not as agent or trustee of the county, and there is no statutory provision making the county liable for his neglect of duty. And (2) that there was unnecessary delay and neglect on the part of the board of county commissioners, and therefore damage to the plaintiffs, in procuring the right to carry the work across the railroad company's right of way. But in executing the contract the board of county commissioners acted as trustees for the persons whose property was chargeable with the cost of the work, and not for the county, and, the statute having failed to give the plaintiffs a remedy in damages for their neglect, this action cannot be maintained. *McDonald & Penfield v. Dodge County,* 41 Neb. 905, 908; *Cement Products Co. v. Martin County,* 142 Minn. 480; *Hughes v. Monroe County,* 147 N. Y. 49, 39 L. R. A. 33, and notes; *Snethen v. Harrison County,* 172 Ia. 81; *Plumbing Supply Co. v. Board of Education,* 32 S. Dak. 270; 1 Beach, Public Corporations (1893) sec. 262. Nor is there an implied liability. *Alden v. Todd County,* 140 Minn. 175.

In entering into the contract, the construction company is presumed to have known the extent of the county's authority and the limitations thereon and to have contracted with reference to such delays as might grow out of the work to be performed. *Humbolt County v. Ward Bros.,* 163 Ia. 510.

It is urged that the district court erred in refusing to admit in evidence the pleadings and documents in the case of the State of Nebraska, ex rel. County of Colfax v. Union Pacific Railroad Company, but the ruling was not

erroneous. It was conceded that there was delay in securing the right to cross the railroad company's right of way until July 18, 1918, and, as these documents were offered to prove an admitted fact, they were properly rejected.

Other reasons which would sustain the rulings of the district court readily suggest themselves to the mind, but are not noticed because the court is committed to the doctrine that it will consider no error not assigned.

We have carefully examined the record and find no reversible error. The judgment of the district court is, therefore,

AFFIRMED.

FREMONT SCOTT, APPELLEE, V. SCOTTS BLUFF COUNTY, APPELLANT.

FILED JUNE 23, 1921. No. 21572.

1. **Sheriffs**: DEPUTY SHERIFF: "PUBLIC OFFICER." A deputy sheriff who is appointed by the sheriff to act as jailer is a public officer, and a contract between him and the board of county commissioners by which he agrees to perform the duties of jailer for a different compensation than that fixed by law is against public policy and void.
2. **Officers**: "PUBLIC OFFICER." A janitor of a courthouse is not a public officer, but an employee.
3. **Sheriffs**: JAILER: COMPENSATION. Under the statute, a duly appointed and qualified deputy sheriff who has been selected by his principal to perform the duties of jailer is entitled to $1.50 a day for his services, "where there are prisoners confined in the county jail."
4. **Appeal**: LAW OF THE CASE. Evidence introduced on the second trial of the case examined and found to be substantially the same as that introduced on the first. *Held*, that the rule, the law of the case, applies.
5. **Judgment**: RES JUDICATA. *Res judicata*, the law of the case, and *stare decisis* belong to the same family and have in view the determination of controverted questions of fact and of law.

APPEAL from the district court for Scotts Bluff county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. L. Grimm and *Morrow & Morrow,* for appellant.

F. A. Wright and *Mothersead & York, contra.*

Heard before MORRISSEY, C.J., ALDRICH, FLANSBURG and ROSE, JJ., ALLEN and REDICK, District Judges.

ALLEN, District Judge.

The plaintiff, Fremont Scott, filed a claim against Scotts Bluff county with the board of county commissioners for $1,684.50 for 1,123 days' services as jailer at $1.50 a day in caring for prisoners confined in the county jail. From an order refusing to allow his claim he appealed to the district court, where the case was tried to the court, a jury being waived, and judgment was entered for the defendant, and Scott appealed to this court, where the judgment was reversed and the case remanded for further proceedings.

On a retrial to a jury before Westover, Judge, sitting for Hobart, Judge, the court directed a verdict for the plaintiff in the sum of $1,964.50, and from judgment thereon this appeal was taken.

September 30, 1913, by a resolution duly adopted, the board of county commissioners employed the plaintiff as "janitor for courthouse, salary $50 per month," and the next day, October 1, 1913, the sheriff duly appointed him "deputy sheriff to act as jailer and to do other work pertaining to the office of sheriff." October 4, 1913, he duly qualified as deputy sheriff and jailer and entered upon the discharge of his duty as jailer on the 7th, the bond reciting that "Fremont Scott has been appointed deputy sheriff and jailer in and for Scotts Bluff county, Nebraska."

1. The defendant does not seriously contend that the services were not performed by the plaintiff as he claims, but it is said that by a contract with the board of county commissioners he was to act as janitor and jailer at $50 a month, that the evidence on the second trial differs from that on the first, and that the rule, the law of the case, does not apply.

On the first trial, Harry Johnson, chairman of the board of county commissioners, testified as follows: "Q. Mr. Johnson, on that day the record shows that Fremont Scott was appointed janitor for the courthouse. Do you know whether or not that contains the complete transaction that was made there that day? A. The record does not show the complete transaction that took place. Q. What was the complete transaction? A. I invited Mr. Scott in the office and asked him if he would take care of the courthouse and jail at $50 a month, and Mr. Scott said he would." On the second trial Johnson testified as follows: "Q. Do you remember the conversation that took place between the commissioner and Mr. Scott at that time? A. I know what the agreement was. Q. What was the agreement? A. Mr. Scott agreed to take care—It was the understanding that Mr. Scott was to take care of the jail and to do the janitor work at $50 a month. Q. And did he agree to that? A. He agreed to that."

We think that the evidence was substantially the same as that introduced on the first trial and that the rule, the law of the case, applies. *Roper v. Milbourn,* 100 Neb. 739.

2. It is provided by section 5738, Rev. St. 1913, that "The sheriff may appoint such number of deputies as he sees fit." It is provided by section 3541 that "The jailer or keeper of the jail shall, unless the sheriff elect to act as jailer in person, be a deputy appointed by the sheriff, and such jailer shall take the necessary oath before entering upon the duties of his office; provided, the sheriff shall in all cases be liable for the negligence and misconduct of the jailer, as of other deputies." And by section 2441: "Where there are prisoners confined in the county jail, one dollar and fifty cents per day shall be allowed the sheriff as jailer."

Under the holding in *Dunkel v. Hall County,* 89 Neb. 585, we think the plaintiff is entitled to recover.

3. It is clear that the plaintiff was duly appointed and qualified as deputy sheriff and acted as jailer, performing the duties claimed by him. It is equally clear that, for the

performance of such duties, he received no compensation save $50 a month as janitor. In view of the fact that this court has repeatedly held that a contract with a public officer to perform the duties of his office for a different compensation than that fixed by law is void, and that it has been so held in this case, the rule, the law of the case, is applicable. *Res judicata,* the law of the case, and *stare decisis* are members of the same family and have in view the final termination of controverted questions of fact and of law. Where a final judgment has been entered on a proved or admitted state of facts, it is conclusive on the parties and their privies, and where this court has declared that a given rule is applicable to a question before it, and the case is brought here a second time, the rule thus announced becomes the law of the case and will not be changed, unless the testimony on the second trial materially differs from that on the first, or there is some other strong reason for adopting a different rule. So, where the court has decided a question of law in another case and a like state of facts is subsequently presented, the rule of *stare decisis* applies and will not be easily changed.

The judgment of the district court is

AFFIRMED.

SWIFT & COMPANY, APPELLANT, V. FOY S. PRINCE, APPELLEE.

FILED JUNE 23, 1921. No. 21998.

1. **Master and Servant:** WORKMEN'S COMPENSATION: APPEAL: CONFLICTING EVIDENCE. Where the district court in a workmen's compensation case finds, on substantially conflicting evidence, that the employee was injured in a particular manner, such finding of fact will not be reversed on appeal unless clearly wrong.
2. ———: ———: PENALTY. *Held,* that a reasonable controversy existed in this case between the employer and the employee as to liability for compensation, and that the employer is not liable for 50 per cent. penalty added for waiting time for delinquent payments.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed in part, and modified in part.*

Gurley, Fitch, West & Hickman, for appellant.

T. J. McGuire, contra.

Heard before MORRISSEY, C.J., ALDRICH, FLANSBURG and ROSE, JJ., BEGLEY and LESLIE, District Judges.

BEGLEY, District Judge.

This is a proceeding under the workmen's compensation act. On December 11, 1919, Foy S. Prince was employed by Swift & Company as demurrage clerk, doing special work out of the superintendent's office, receiving as his wages the sum of $27.50 a week, and on said date he received personal injuries causing the second vertebra of his neck to be broken. He applied for and received an award of compensation from the compensation commissioner of the state of Nebraska. From this award Swift & Company appealed to the district court, where it filed a petition admitting the relationship of employer and employee; that both were bound by the workmen's compensation act; and that defendant received an injury on December 11, 1919, while engaged in the employ of Swift & Company, consisting of the fracture of the second vertebra of his neck; and further alleging that "said injury was caused by the defendant engaging in fooling, scuffling and horseplay with one McLaughlin, all of which was not a part of nor incident to said defendant's employment; and plaintiff contends that said injuries did not occur in the course of nor arise out of defendant's employment, and therefore he cannot recover compensation under aforesaid law." Defendant filed an answer in which he alleged that an injury was received while in the course of and arose out of his employment; that plaintiff had notice of same, and told defendant and others that it would compensate defendant therefor.

The district court found that Prince sustained his injury

as the result of an accident arising out of and in the course of his employment, and that at the time he sustained such injury he was not engaged in any playful or sportive acts of any kind with any person, and that he had no knowledge of any playful or sportive acts being perpetrated, and awarded him compensation in the sum of $15 a week for 300 weeks and 45 per cent. of his wages, or $12 a week for the remainder of his life, all medical and hospital expenses provided by law, $7.50 a week from the 11th day of December, 1919, to the date of the decree, February 18, 1921, being a 50 per cent. penalty added for waiting time, and $600 for attorney fees. Swift & Company has now brought the case to this court for review.

It will be noted that the question to be determined is primarily one of fact as to how the injury occurred. The defendant testified that his duties were watching and taking the temperature of meat in various cooling-rooms and inspecting cars for loading as to temperature, icing, etc.; that his headquarters *was* in the checkers' office, which was a room adjoining the shipping-room with a door opening between; that he was using a thermometer and a flashlight for the purpose of his work, which he kept in the shipping-room for safe-keeping; that both rooms were poorly lighted, and on the morning in question he went from the shipping-room into the checkers' office, when he discovered he did not have his flash-light, and turned to go back to the shipping-room to get it, when he "bumped" into one James L. McLaughlin, a government meat inspector, whose duties required his presence in and about the shipping and checking-rooms; that he does not remember what happened after that, and when he recovered consciousness McLaughlin was assisting him to arise; that there was no wrestling, scuffling, or horse-play, or anything of that nature with McLaughlin or any one else on that day; that he was thereupon taken to a hospital where an X-ray examination showed that the second vertebra of his neck was broken, which is a permanent injury. His testimony is corroborated by that of McLaugh-

lin. Two employees of the company who were present at the time testified that there was no wrestling, scuffling, or horse-play, or anything of that nature, at the time of the accident. One employee who was present testified that Prince and McLaughlin were scuffling; but he was at work, with his back turned, and did not see the accident.

Appellant claims to have successfully impeached the testimony of Prince and McLaughlin by the introduction of written statements signed by them, in which they stated that at the time of the accident they were engaged in scuffling and fooling, and also by evidence of oral statements to the same effect made by Prince. Prince and McLaughlin explained the circumstances attending the signing of the statements by testifying that they were prepared by the attorney for Swift & Company, and upon being presented to them for signature they objected to the statements, and both were induced to sign on the representation of the attorney for Swift & Company that it was merely a plant record and a matter of form for the benefit of the Chicago office; that Prince had always been a reliable and trustworthy employee, and that Swift & Company would do what was right by him, and that he had nothing to worry about; that after signing said statement Prince was paid $15 a week for 13 weeks by Swift & Company, which he supposed was compensation, but, upon the hearing before the compensation commissioner, learned that the same was from some welfare fund of the company. Prince also denied making any oral statements except in the office of Dr. Lord, to whom he was sent by Swift & Company after making the written statement to them. If this evidence is to be believed, the writings signed by the witnesses are of little or no value.

The trial court saw the witnesses and heard their testimony, and its findings, upon conflicting evidence, should not be disturbed. It is the rule in cases of this kind that findings of fact, supported by sufficient evidence, or findings of fact on substantially conflicting evidence, will not be reversed unless clearly wrong. *American Smelting & Re-*

fining Co. v. Cassil, 104 Neb. 706; *Christensen v. Protector Sales Co.,* 105 Neb. 389.

The appellant further urges that the court erred in finding that Prince was entitled to recover $7.50 a week from December 11, 1919, to the date of the decree, on the ground that there was a reasonable controversy between the parties hereto, and with this contention we are inclined to agree. Where the appellee furnishes a written statement over his own signature which shows that no liability is attached by reason of the accident, the same furnishes a reasonable ground for the employer to withhold payment of compensation and to have that statement tested in a court of competent jurisdiction.

Objection is also made as to the amount of allowance for attorney fees, but the same is not so disproportionate to the services rendered as to cause a reversal. The findings and awards of the district court are therefore affirmed in all instances, except the finding and awarding Prince $7.50 a week from December 11, 1919, to February 18, 1921, which is set aside, and the proceedings remanded, with direction to the district court to reform the decree to comply with these views.

AFFIRMED IN PART AND MODIFIED IN PART.

ROSS ROBERTS V. STATE OF NEBRASKA.

FILED JUNE 23, 1921. No. 21752.

1. **Criminal Law: INSTRUCTIONS.** Where the first count of an information charges the defendant with having committed statutory rape in October, 1918, and the second count charges him with the same offense committed in March, 1919, and the state was required to elect upon which count it would prosecute, and elected to prosecute under the allegations contained in the second count thereof, *held* prejudicial error for the court to incorporate the first count of the information in an instruction defining the issues to be tried, without further instructing the jury that the state had abandoned its charge made in the first count of the information, or that said first count had been dismissed by the court.

2. **Rape:** EVIDENCE: CORROBORATION. In a prosecution under an information charging statutory rape, where the prosecuting witness has testified positively to the offense having been committed and the defendant has positively denied committing the offense, testimony of a brother-in-law of the complaining witness that he saw the defendant near the building in which the complaining witness claims said act was committed is not sufficient corroboration of the testimony of the complaining witness to sustain a conviction.

ERROR to the district court for Red Willow County: HANSON M. GRIMES, JUDGE. *Reversed.*

J. F. Cordeal and *F. M. Colfer,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

Heard before MORRISSEY, C.J., FLANSBURG and ROSE, JJ., BEGLEY and LESLIE, District Judges.

LESLIE, District Judge.

A complaint and information was filed by W. R. Starr, an attorney specially appointed by the court to prosecute the plaintiff in error, who will hereafter be referred to as the defendant.

The first count of the information charges that the defendant, on or about the last day of October, 1918, in the county of Red Willow, "being then and there a male person of the age of 18 years and upwards, knowingly, unlawfully and feloniously did carnally know and abuse one Anna Clary, a female child other than his daughter or sister, without her consent, and said Anna Clary then and there being not over 15 years of age, and of previous chaste character."

The second count charges that "on or about the 29th day of March, 1919, one Ross Roberts, a male person over the age of 18 years, in the county of Red Willow and state of Nebraska, in and upon one Anna Clary, then and there being a female child under the age of 18 years, and not his daughter or sister, unlawfully, feloniously, forcibly and against her will, did carnally abuse; she, the said

Anna Clary then and there being of previous chaste character."

The defendant was found guilty, motion for new trial was overruled, the defendant was sentenced to confinement in the penitentiary for a period of three years, and from this judgment has prosecuted error.

Nine assignments of error are presented to this court by counsel for defendant. We need consider only the fourth, fifth, sixth and eighth assignments.

The fourth assignment relates to instruction No. 1. This instruction is a copy of counts 1 and 2 of the information.

At the conclusion of the state's evidence it was required to elect upon which count it would stand, and elected to prosecute under the allegations contained in the second count, which charges the defendant with having sexual intercourse with the complaining witness in March, 1919. The first count charged the defendant with having had such relations with her in October, 1918, when she was under 15 years of age.

It was error for the court to have incorporated the first count of the information as a part of instruction No. 1, without instructing the jury it had been dismissed by the court, and that it was not to consider the charge contained therein.

This court has repeatedly criticized the practice of copying pleadings in full as a method of stating the issues to the jury. The inclusion of a count of an information which contains allegations which were not supported by evidence, and which the state elected not to stand upon, ordinarily constitutes prejudicial error. Jurors are not lawyers and many of them cannot discriminate between the portions of a lengthy charge which contains statements made in pleadings and the remainder of it. Where a count in an information charging rape contains allegations which are supported only by the testimony of the complaining witness, and the state has elected not to prosecute under such count, it is error to include the alle-

gations of such count in that part of the court's instructions which define the issues to be tried, and if the reviewing court is satisfied that the jury has been misled by so doing it is its duty to grant a new trial. *Hutchinson v. Western Bridge & Construction Co.*, 97 Neb. 439.

The fifth assignment relates to instruction No. 14. By this instruction the trial court told the jury that "It is a rule of law that, if a witness is found to have wilfully or intentionally sworn falsely upon any material fact, such witness is presumed to have testified falsely as to other material facts." This instruction does not correctly state the law, but was probably not in this case prejudicial to the rights of the defendant.

The sixth assignment relates to the sixteenth instruction, which is as follows: "You are instructed that the time of an alleged offense must be alleged in an information with certainty, but proof is admissible to show that the offense charged was actually committed at or near the time alleged. That is, the state must satisfy you beyond a reasonable doubt, by the evidence, that the crime charged was committed within three years next prior to the date of the filing of the information in this case, to-wit, November 17, 1919."

This instruction could only have confused the jury. There is no evidence in the record from which they could have found that the defendant had ever had sexual intercourse with the complaining witness other than in October, 1918, or on March 29, 1919. There is no evidence in corroboration of the testimony of the complaining witness as to the assault alleged to have been committed in October, 1918, and the first count of the information alleging such assault was dismissed by the court. Under these circumstances the jury were not at liberty to consider, nor speculate as to, whether he had ever assaulted her at any other time than on March 29, 1919.

The eighth assignment deals with the sufficiency of the evidence. The complaining witness testified that the accused entered the building in which she was sleeping, and

which was in the rear of defendant's restaurant, early on the morning of March 29, 1919, and there had sexual intercourse with her. The only evidence tending in the least to corroborate the testimony of the complaining witness is the testimony of Ulmer, her brother-in-law, who testified he saw the defendant near the door of the building in which she was sleeping between 1 and 2 o'clock that morning. He further testified that the defendant's restaurant was lighted, and that the lights outside of both buildings made the surrounding as light as day. At most, Ulmer's testimony merely shows that the defendant was in the vicinity of the building in which prosecuting witness said the act was committed; in other words, that the opportunity was present. Mere opportunity is not in itself sufficient to corroborate the otherwise unsupported evidence of the complaining witness. In *Mott v. State,* 83 Neb. 226, the complaining witness testified that the defendant had sexual intercourse with her at a certain time and place. He as positively denied it. There was evidence that he had been seen with her. Subsequently she gave birth to a child, which was born within the period of gestation from the date of the alleged act of intercourse with the defendant, thus proving intercourse with some one about that date. The court said this did not corroborate her evidence. In the case at bar the complaining witness did not become pregnant, and there is no evidence, aside from her own testimony and the testimony of a Mrs. Alexander, that she ever had intercourse with any one. The witness Alexander testified she was with the complaining witness in an automobile when the complaining witness had sexual intercourse with a young man in the rear seat of the car in the presence of the other occupants. In cases of this character, where the complaining witness is a young girl, a physician should, and usually does, make an examination and testify to conditions present and what such conditions indicate. No medical examination appears to have been made in this case.

A charge of illicit sexual relations is easily made. Such a charge is frequently difficult to prove and usually difficult to disprove. It is difficult to prove because evidence in corroboration of the testimony of the complaining witness is required, and the nature of the offense is such that the state is seldom able to procure positive or direct evidence of the commission of the crime beyond the testimony of the complaining witness. It is usually difficult to disprove the charge, also, if the relations between the complaining witness and the man she accuses have been such as to offer opportunity for the commission of the offense. Public sentiment seems preinclined to believe a man guilty of any illicit sexual offense he may be charged with, and it seems to matter little what his previous reputation has been. This natural tendency may be due to the fact that a woman in charging a man with unlawful intercourse with her is casting odium upon herself as well as charging him with a felony. Be this as it may, where statutory rape is charged, the law requires that the testimony of the complaining witness must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction. We do not think her testimony has been corroborated in this instance. For this and other reasons referred to herein, the judgment of the district court is reversed and the cause remanded.

REVERSED.

DAWSON COUNTY IRRIGATION COMPANY, APPELLANT, V. DAWSON COUNTY, APPELLEE.

FILED JUNE 23, 1921. No. 21937.

1. **Waters: IRRIGATION SYSTEM: ABANDONMENT.** Under the evidence, facts and circumstances disclosed by the record, *held* that the finding of the trial court that the irrigation system and bridges in question had been abandoned by the owner, before the commission of the acts complained of, is sustained.
2. **Counties: LIABILITY.** Counties are not liable to individuals for

damages sustained through the negligent or tortious acts of their officers in the discharge of their official duties, in the absence of a statute creating such liability.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Affirmed.*

W. A. Stewart, T. M. Hewitt and *Cook & Cook*, for appellant.

N. M. York and *D. H. Moulds, contra.*

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS and MORNING, District Judges.

MORNING, District Judge.

The plaintiff, an irrigation company, sued Dawson county for damages for wrongfully removing and destroying certain of its bridges and filling up its ditches while repairing public roads. This is the second appearance of the case in this court. The former opinion of this court (*Dawson County Irrigation Co. v. Dawson County*, 103 Neb. 692) is here referred to for a more detailed statement of the facts. Upon a retrial of the case in the court below, a jury being waived, the court found for defendant and dismissed the action, and plaintiff again appeals to this court.

One of the defenses presented by the answer is that the irrigation system and the bridges in question had been wholly abandoned, and that the bridges had become rotten, worthless, and dangerous to public travel. In our former opinion in this case, on the first appeal, this court said: "Mere delay, however, in repairing, while endeavoring to find a purchaser for the property, would not ordinarily constitute such an abandonment, unless the circumstances were such as would lead reasonable men to believe that the property had been finally abandoned for irrigation purposes."

At the last trial the court found as follows on the subject of abandonment: "Farmers living along the ditch and some of the laterals operated the ditch and laterals,

to a limited extent, for their own private use. The owner, seemingly having abandoned the operation of the system, and seemingly only holding the system until such time as he could find a purchaser, certainly by such acts abandoned the operation of the system. That he kept no manager to look after it, had no one to look after the headgate, to make any repairs, or to see to the carrying of water in the ditch or any of its laterals, or to see that the water-users had an opportunity to receive the water to which they were entitled, are all circumstances, which lead me to believe, and such as would lead reasonable men to believe, that the property was abandoned for irrigation purposes."

We think the evidence in the record sufficient to sustain the foregoing finding of the trial court, and that the abandonment as found would, in itself, constitute a complete defense to this action.

It is urged by appellee that, in no event, can the county be held liable in damages for the alleged wrongful acts complained of, and that, for this reason, the petition does not state a cause of action. This point was presented by a general demurrer to the petition contained in the answer of defendant and it is insisted upon here. We think this contention is sound. Counties are not liable in damages resulting from the negligent or tortious acts of their officers in the discharge of their official duties, in the absence of a statute creating such liability.

See 11 Cyc. 492; *Wehn v. Commissioners of Gage County,* 5 Neb. 494; *Woods v. Colfax County,* 10 Neb. 552; *Stocker v. Nemaha County,* 4 Neb. (Unof.) 230; *Hollingsworth v. Saunders County,* 36 Neb. 141; *Madden v. Lancaster County,* 65 Fed. 188; *Hopper v. Douglas County,* 75 Neb. 329; *Davie v. Douglas County,* 98 Neb. 479; *Symonds v. Board of Supervisors,* 71 Ill. 355; *Hughes v. Monroe County,* 147 N. Y. 49; *Hollenbeck v. Winnebago County,* 95 Ill. 148; *McAndrews v. Hamilton County,* 105 Tenn. 399; *Kincaid v. Hardin County,* 53 Ia. 430; *Lindley v. Polk County,* 84 Ia. 308; *Webster v. Hillsdale*

County, 99 Mich. 259; *Wenck v. Carroll County*, 104 Ia. 558.

Our attention has been called to no statute in this state creating liability against counties for injuries of the character here complained of, and we have found none.

It follows that the judgment of the lower court is right and should be affirmed.

AFFIRMED.

WILLIAM R. FAY, APPELLEE, V. WILBUR W. DAY, APPELLANT.

FILED JUNE 23, 1921. No. 21661.

1. **Trusts: CONTRACTS BY TRUSTEE.** A trustee contracting for the benefit of a trust is personally and individually bound by the contracts which he makes as trustee, unless he stipulates that he is not to be personally responsible, but that the other party is to look solely to the trust estate.
2. ———: ———: **LIABILITY.** If a trustee chooses to bind himself by a contract for the benefit of the trust estate, he is liable at law for a breach thereof in the same manner as any other person, even if the other contracting party knew it was for the benefit of the trust estate.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed on condition.*

M. V. Beghtol and *C. E. Sanden*, for appellant.

Fred C. Foster, O. K. Perrin and *S. M. Kier, contra.*

Heard before LETTON, DAY and DEAN, JJ., GOOD and RAPER, District Judges.

RAPER, District Judge.

This cause was begun in the county court of Lancaster county by the plaintiff against Wilbur W. Day and Cooperative Garage Delivery, and on issue joined the county court found for plaintiff against defendant, Wilbur W. Day, and in favor of the Cooperative Garage Delivery. The defendant Day appealed.

In his petition in the district court, the plaintiff alleges that defendant Day and persons unknown to plaintiff have and are doing business of transporting freight for hire by motor transportation between Lincoln, Nebraska, and other towns in the vicinity, under a trust agreement; that defendant Day entered into a verbal contract with plaintiff, under which plaintiff was to act as field manager of the business conducted by said defendant; that plaintiff, in compliance therewith, performed the service of field manager for 13 weeks and 2 days, at a salary of $25 a week, and an expense account of $12.50 a week; that plaintiff, while in said employment, under a verbal agreement with defendant Day, advanced certain sums of money for the use and benefit of said defendant; that plaintiff had received from said defendant Day and collected from freight transportation certain amounts, and asks judgment against defendant Day for balance. To this petition the defendant answers by general denial. Trial was had, with verdict and judgment for plaintiff, and motion for new trial was overruled.

It is disclosed in the evidence that the defendant Day and others formed or attempted to form an association of persons, not partners, neither were they incorporated, to carry on a system of freight transportation by motor trucks with Lincoln, Table Rock, and other towns in the vicinity, and the defendant Day and some two or three other persons were purporting to act as trustees to hold the property of the association and carry on the business for the company. It has been referred to by some of the parties in the case as a common-law trust. We are not concerned with the legal effect of this arrangement, for it is undisputed that the defendant Day was acting as one of such trustees, and was in general charge and control of the business at the time plaintiff alleges the agreement was made between himself and the defendant Day, and that they were endeavoring to put such system of freight transportation into effect. There is a very sharp conflict of testimony as to whether any agreement was made by

Mr. Day, and, if so, whether Mr. Fay did not agree to undertake the employment without any liability on Mr. Day's part. The jury on this issue found for the plaintiff, and the evidence is sufficient to sustain the verdict on that proposition. Under the law and the verdict, the defendant Day is liable personally on the contract.

The first two assignments of error relate to the giving of instructions No. 4 and No. 7. Instruction No. 4 is to the effect that a trustee who contracts, as such, is personally bound by the contracts he makes as such trustee, and if he desires to protect himself from individual liability on such contracts he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate. No objection is made to this instruction as a legal proposition, but appellant claims it applies only to express contracts, and insists that plaintiff is suing on an implied contract, and therefore the instruction is inapplicable. Whether or not such distinction exists between express and implied contracts need not be considered, because under the plaintiff's petition and his testimony he is relying upon an express contract. The amount of salary and expenses were not agreed upon at the time of the employment, but the contract of employment itself was entered into by plainly expressed words according to the averments of the petition and the appellee's testimony. The fact that the parties later agreed upon the amount of salary and expenses does not change the contract into an implied one. The instruction seems to have been given under the authority of *Taylor v. Davis' Admx.*, 110 U. S. 330, and correctly states the law. See, also, *Johnson v. Leman*, 131 Ill. 609; *Roger Williams Nat. Bank v. Groton Mfg. Co.*, 16 R. I. 504; 39 Cyc. 333, and cases cited.

Instruction No. 7 perhaps may have been worded with a little more clearness as to the right of the jury to determine whether plaintiff had received the item of $308.47, but in general terms it states the proper measure of plaintiff's recovery. There was no objection to the in-

struction, nor exception taken, and the defendant offered none other. If he desired a further direction to the jury he should have tendered such instruction as he deemed necessary. The instructions as a whole fairly submitted the issues.

There was no error in refusing to admit exhibit 6 in evidence. This exhibit was simply a legal opinion by an attorney, giving his views of the liability of the shareholders and officers in the trust. If the plaintiff knew its contents, it would not in the least affect his right of recovery.

The third assignment, that the verdict is not sustained by the evidence, raises a more serious question. Plaintiff's petition contains 50 distinct items of money paid out for defendant's use and benefit, and the verdict is for the full amount of each of these items, less the $165.25 which plaintiff admits he received.

To questions 168 and 169 plaintiff gave some testimony as to items: $10 for automobile to come in and get repairs (presumably this item is the one in petition as 6-20, to car for repairs to Lincoln $10); 6-19 Abe Fuller, $4.50; $100 for labor; labor on truck 4-30, $11.50. This was stricken out on motion of defendant, and there is no other evidence on these items. Besides these items are the following that have no testimony to support them: 3-10, to 10 gals. gasoline $2.80; 4-6, to 12 gals. gasoline $3.36; 4-16, to tapping out clutch $.25; 4-25, to expense on worn gear, $2.31; 4-25, to labor and expense of expert $8.70; 4-25, to extra labor $3.50; 5-19, to 10 gals. gasoline $2.80; 6-27 to 7-17, telephone, long-distance calls $3.90; 5-27 to 6-19, long-distance calls, $6.93; 3-23 to 4-19, long-distance calls, $5.44; 3-17, long-distance call, $.61; 2-8, long-distance call, $.61; discount on two bonds, $1.82. All of these must be disallowed. These items amount to $169.03. The total of the 50 items claimed is $586.85, from which should be deducted $169.03, and the $169.25, admitted payment, leaving a balance of $248.57 on the claims for money paid out, and plaintiff is entitled to

interest on this from December 25, 1919, at 7 per cent., and he is entitled to his claim for salary and expenses, $497.05, and interest at 7 per cent. from June 13, 1919, making plaintiff's total amount $787.13. The verdict was for $975.83, and is excessive in the sum of $188.70.

It is surprising that persons should keep accounts in so lax a manner as did both the parties in this case, particularly when they are transacting business for other people. The testimony of plaintiff as to the credit claimed by defendant of $308.47 is not very lucid. He had given credit apparently on one of the statements for this sum, and his explanation of that is not entirely clear, but it was such as to satisfy the jury, and on that item there is sufficient evidence to sustain the jury's finding.

If the plaintiff will remit from the judgment the sum of $188.70 within 20 days, the judgment is affirmed, with costs in this court taxed to plaintiff; otherwise, the cause stands reversed and remanded for new trial.

AFFIRMED ON CONDITION.

PATRICK MCGOWAN, APPELLEE, V. DRESHER BROTHERS, APPELLANT.

FILED JUNE 23, 1921. No. 21669.

1. **Damages:** PERMANENT INJURY. To warrant a recovery for a permanent injury, the future effect of the injury must be shown with reasonable certainty; a mere conjecture, or even a probability of future disability which may never exist, is not sufficient.
2. **Evidence.** It is not error to refuse to permit a physician to testify whether he could discover any reason why the plaintiff could not have been at work when the physician examined him, where the physician had fully detailed the condition of the affected parts. Such conclusion was for the jury to draw.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed on condition.*

James C. Kinsler, for appellant.

Smith, Schall & Howell and *F. E. Sheehan, contra.*

Heard before LETTON, DAY and DEAN, JJ., GOOD and RAPER, District Judges.

RAPER, District Judge.

On May 14, 1919, plaintiff and appellee was struck and injured by an automobile belonging to and driven by an employee of defendant, on a street in Omaha. Suit was brought for damages because of alleged negligence of defendant, which resulted in verdict and judgment for plaintiff.

Several alleged errors are assigned, two of which relate to the instructions No. 4 and No. 12. There is no merit in the claim against No. 4. There is no doubt left by the record but that the driver of the automobile was guilty of negligence, and there is no evidence of facts from which negligence of the plaintiff can be inferred, consequently that portion of instruction No. 4, of which appellant complains, even if it were erroneous (which we do not determine), was without prejudice, and particularly in view of instruction No. 10, which would have obviated any wrong impression of instruction No. 4 if it were erroneous.

The alleged fault of instruction No. 12 is that it submitted the question of there being a permanent injury, and appellant urges that there is no evidence to sustain such submission to the jury. The plaintiff gave the only testimony as to the injury and its effects. He details the injuries to his ankles, feet, and legs, and in one statement says one of his feet "was swelled up and was painful and is painful to this day, right across that ankle (indicating). It swells up occasionally; that has swelled up on me very much until lately and it gets numb at times and practically as if there is no feeling in that foot," and again he says it is painful yet; that he is able to put all his weight on that foot, but sometimes it goes numb for some reason, if he leaves the weight on it and walks with it, and for that reason he has to support it; the foot that got bruised is not a very good foot; the broken foot has swelled occasionally and gets numb for some reason.

That is substantially the testimony given by plaintiff that touches on the present or future effect of the injury. He was 48 years old, and weighed slightly over 200 pounds, in good health, and had never suffered any previous injury. Dr. Fitzgibbons and Dr. Harris were called for defendant and testified that they examined plaintiff in January, 1920, and made X-ray pictures of his feet and ankles, and these physicians testified that both ankles and feet were normal and the motion of the joints free and they could bend them forward, backward or laterally without causing pain, and that plaintiff could move them the same way, and the muscles and tendons were not hampered or hindered in their motion, and their range of motion was normal, and found no sign or indication of anything in the bones, nerves or muscles that would cause any disability; that there was indication of there having been a fracture of the internal maleolus, but it is perfectly healed leaving all bones of both feet in normal size, shape and position. On cross-examination, Dr. Fitzgibbons says: "We always regard a fractured bone as a little second-hand after it is injured, it is never as good as it was," and, further, that "usually an injury of that kind afterwards produces a sort of rheumatic, what they call a rheumatic, joint—when the weather changes you have some pain referred to there—that is usually true of any injury to a joint, or any bone in any place in the body." The plaintiff does not state the extent or frequency of the swellings, numbness or pain, nor to what extent he can use the foot without discomfort, and so far as his own testimony shows there is no reason why there should be a permanent impairment of his ability to earn money.

Indeed, it is hardly apparent from the record why he has not at least attempted to get employment. It seems so improbable that there will exist a permanent impairment of the use of his feet and ankles that the court should not have submitted the question of a permanent disability, when there is no torn or displaced or inflamed muscles or

ligaments and a completely healed fracture of the maleolus. A party is not required to prove permanent injury with absolute certainty, yet a mere conjecture or probability is not sufficient. The burden of proof was on plaintiff, and the testimony must show such permanent injury with reasonable certainty. 8 R. C. L. 469, sec. 34. Furthermore, there was no attempt to prove the degree of the future impairment in the use of the members or in the loss of earning power.

Plaintiff did sustain a severe injury, and was incapacitated for several months. He was earning $110 a month with steady employment as a night watchman, whose duties required him to be almost continuously walking during his working hours, and plaintiff, under the evidence, is entitled to substantial damages, but the verdict of $3,500 appears excessive, and probably the award was enhanced by the speculative view of a permanently disabled foot, yet we cannot say that the verdict was the result of passion and prejudice.

The court did not err in excluding the questions asked of Doctors Fitzgibbons and Harris as to whether they could discover any reason why plaintiff could not have been at work in January when they examined him. The testimony had already covered that point rather definitely, and the questions called for a conclusion, which it was the jury's duty to determine. 22 C. J. 634, sec. 731.

If the plaintiff remits the sum of $1,000 within 20 days, the judgment will stand affirmed; otherwise, the judgment is reversed and the cause remanded for a new trial.

AFFIRMED ON CONDITION.

TULLIUS C. HALLEY, APPELLANT, V. OSCAR E. HARRIMAN, APPELLEE.

FILED JUNE 23, 1921. No. 21543.

1. **Boundaries:** EVIDENCE. Where the question in dispute is the proper location of quarter corners of a section of land, and de-

fendant produces evidence tending to show the establishment of such corners by the government surveyor at points conforming to the field notes, and plaintiff produces no evidence of their location elsewhere, a verdict for defendant is sustained by the evidence and will not be disturbed.

2. ———: ———. Monuments or other markings placed by government surveyor locating corners will control field notes and all other surveys.

3. ———: ———. Where there is no other evidence on the subject, and the location of a quarter corner may be fixed with reasonable certainty by using the field notes of the government surveyor, such location will be adopted.

4. ———: LOCATION OF CORNERS. In such case there is no authority for fixing the quarter corner at a point midway between the known section corners if such point does not conform to the field notes.

5. ———: ———. Where a township corner has been definitely located by government surveyors, and the field notes show the location of a quarter corner in a straight line at the proper distance, a change of the location of the township corner by state, county, or other surveyors, accepted by the owners of contiguous lands, will not affect the location of such quarter corner, in the absence of evidence that such quarter corner was actually established at some other point by the government surveyor.

6. ———: ———. Even though the new township corner was also marked by the government surveyor, this would not change the quarter corner, in the absence of field notes or other evidence showing the establishment of a quarter corner consistent with such new corner, and would not render the surveys inconsistent to such a degree as to require the fixing of quarter corner midway between new township corner and southwest corner of section.

APPEAL from the district court for Scotts Bluff county: RALPH W. HOBART, JUDGE. *Affirmed.*

Morrow & Morrow, for appellant.

L. L. Raymond and *R. G. Simmons, contra.*

Heard before MORRISSEY, C.J., ALDRICH, FLANSBURG and ROSE, JJ., ALLEN and REDICK, District Judges.

REDICK, District Judge.

This is an action of ejectment brought by appellant

against appellee to recover the possession of about 26 acres of land in the west half of section 6, township 22, range 54, and the dispute arises from the existence of two township lines separating townships 22 and 23, the distance between them adjoining the north line of section 6 being about 1,000 feet; appellee claims that the northwest corner of section 6 was originally located in the north township line about 300 feet east of a corner in the south township line, which latter corner is now accepted by the parties as the northwest corner of section 6 so far as this litigation is concerned. The question is further complicated by the existence of double corners at the southwest corner of section 6, one being approximately a mile due south of the accepted northwest corner above referred to, and the other one to the northeast in the same relative position to the southwest corner just mentioned as the corner on the north township line bears to the accepted corner on the south township line; this last described southwest corner is accepted by the parties as correct; and it is shown that one Jones, who preempted the northeast quarter of section 12 in 1883, built his fence to the southwest corner of section 6 first described, and in 1899 moved the corner of his fence northeast to the accepted southwest corner of section 6, and has maintained it there ever since.

The southeast corner of section 6 is accepted and is established as an original corner, from which, if a line be drawn due north about one mile, it would intersect the north township line and be continuous with the line between sections 31 and 32, township 23, range 54; however, the northeast corner of section 6 is fixed and accepted by the parties at a point in the south township line about 550 feet west of the point of intersection of said south township line with the line just described.

Assuming the established southeast corner and the three accepted corners of section 6 to be correct, the section is irregular in shape, the south line being 80 feet longer than the north, and the west line 189 feet longer

than the east, and the acreage about 120 short.

In 1906 the United States reclamation service caused a survey of section 6, *inter alia,* to be made, by which the exterior lines of said section were drawn conforming to the established southeast and other accepted corners, and the east and west center line drawn approximately midway between the north and south lines.

Now, the line in dispute between the parties, the proper location of which will determine their rights, is the east and west line dividing the section; the plaintff claiming that the line should be drawn as fixed by the reclamation survey, and the defendant claiming that it should be drawn through two points on the east and west line, respectively, which bear about the same relation to the quarter-section corners established by the reclamation survey that the northwest corner in the north township line bears to the accepted northwest corner in the south line, and the accepted southwest corner bears to the original Jones corner, the ground in dispute lying in the west half of the section between the disputed quarter-section lines.

The plaintiff bases his claim upon the proposition that no government quarter corners were established on the east or west sides of section 6, or, if once established, they have been obliterated so that they could not be found, and that, therefore, the reclamation survey fixing the quarter corners at approximately equal distances between the section corners must be accepted as determining the lines of the respective owners; while the defendant claims that the quarter corners were established by government survey at points approximately 40 chains north of the two south corners, respectively, and that the line should be drawn through those points, which for clearness, and as described in the evidence, will be referred to as the Rosenfelt corner on the east and the Perry Harris corner on the west side.

A verdict having been recovered by the defendant in the court below, the first point made by the appellant is that

the verdict is not sustained by the evidence. He produces a number of witnesses, civil engineers and others residing or formerly residing in the vicinity of section 6, who testified that they made search for the original quarter corners on the east and west sides of section 6, and were unable to discover any evidence in the way of pits, mounds, stakes or other monuments tending to show that the quarter corners had been marked by the government surveyor, some of them stating that, while there were some pits near the Rosenfelt corner, they were not of a character to stamp them as original markings, and one of them stating that he saw two pits at the Perry Harris corner which looked like they were freshly dug.

The defendant produced witness Magruder, a civil engineer, who testified that in 1916 he made a survey of the east line of section 6, and starting with the southeast corner and measuring north he found what he considered to be a government corner, near the Rosenfelt corner, and within 15 feet of the place where such corner ought to be according to the government field notes, stating that he found small rings in the earth indicating that it was an original pit, and that said corner was in line with known corners to the south; and Rosenfelt testified that the pit found by Magruder was some 9 or 10 feet south of where plaintiff's witness Finley had dug and failed to find it. Rosenfelt testified that he saw a mound and two pits at about the place where Magruder dug. And with reference to the west quarter corner defendant produced Perry Harris, the original locator on the northeast quarter of section 1, who testified that in 1886, at the time of his location, he saw a couple of pits which were shown to him by a Mr. Fairfield, county surveyor, as the southeast corner of his quarter, and that he broke the ground within about 50 or 60 feet of the corner, leaving that amount for a section-line road. Perry Harris further testified about having seen the township corner on the north township line, and in locating his land claimed to that corner. Magruder also claims to have found a well-defined pit

mark at the Perry Harris quarter corner.

It would unduly extend this opinion to refer more specifically to the testimony upon the question of the east and west quarter corners, but from what has been referred to it would seem that there was enough dispute in the evidence to make it a question for the jury.

In view of the fact that the evidence of defendant's witnesses tends to establish the fact that evidence existed upon the ground of the original establishment of the quarter corners as claimed by him, and the fact that such corners conform approximately to the notes of the original surveys as to course and distance, and the location of roads and fences, we would not be justified in saying that the finding of the jury is not warranted, especially as there is no evidence on the part of the plaintiff that such corners were actually located at different points; evidence for plaintiff merely attacking the authenticity of the corners claimed by defendant, and to the effect that no quarter corners could be found.

If the evidence of defendant's witnesses as to the existence of the Rosenfelt and Perry Harris corners were not sufficient to support the verdict, then we have the situation that the plaintiff's witnesses do not attempt to fix the actual location of the disputed quarter corner at any other place, and the only evidence in the case, therefore, is the field notes which state that the section lines were drawn straight and quarter corners fixed at 40 chains, and the case is brought precisely within the rule established in *State v. Ball,* 90 Neb. 307, in which it is held: "Where the monuments which mark corners of the original survey are lost or obliterated and their original location cannot be established by other evidence, and the field notes returned by the government surveyor show that he established an interior section corner on a straight line between the exterior lines of the township and determined its location by courses and distances, the notes are to be accepted as presumptively correct, and can only be overcome by clear and satisfactory evidence that the

corner was established at a point other than as thus described." See, also, *Harris v. Harms,* 105 Neb. 375.

It is only where no corners were located by the government surveyors, or it is impossible to ascertain with any degree of certainty the point where the government surveyor has located the corner, that the quarter corner may be fixed midway between the known section corners. *Harris v. Harms, supra.* But in this case, as is elsewhere demonstrated, the location of the quarter corners as fixed by the government surveyor may be definitely established.

A great mass of evidence is in the record as to the correct location of the northwest corner of the township; whether at the conceded corner in the south township line or at the point to the northeast thereof as above described in the north township line; both corners showing evidence of being original. The writer is convinced that the northwest corner of the township was originally located in the north township line, for the reasons: (1) It is in almost an exact north and south line with undisputed corners from the south township line; (2) in proper position according to course and distance; (3) original marks are well established; (4) it is on the line taken for the subdivision of township 23. On the other hand, the south township corner is 530 feet in excess of 6 miles from the northeast township corner, and, moreover, is about 600 feet south of a true east and west line drawn from the northeast township corner. The probable explanation of the existence of this double corner is that suggested in the very clear and logical report of Surveyor Mathews at pages 350 to 355 of the bill of exceptions. But this question is of no practical importance if, as the verdict indicates, the quarter corners are established as claimed by defendant; the increased shortage of acreage in the north half of the section resulting from acceptance of the south township line, in such case, would be charged to the north tier of 40's, and could not be distributed throughout the section.

Complaint is made of instruction No. 6, given by the

court below, that it gives undue prominence to the field notes of the government survey, and comments on the weight of the evidence, and appellant in his brief quotes part of such instruction as follows: "And in this connection as to the nature of the evidence and the weight to be given it, you are instructed that, by the law of this state, field notes and plats of the original government survey are competent evidence in ascertaining where monuments are located, in case a government corner is destroyed or the place where it was originally placed cannot be found or the location of original corner is in dispute." But the government surveys are, as a matter of law, the best evidence; and, if the boundaries of land are clearly established thereby, other evidence is superfluous and may be excluded; the best evidence is the corners actually fixed upon the ground by the government surveyor, in default of which the field notes and plats come next, unless satisfactory evidence is produced that the corner was actually located upon the ground at a point different from that stated in the field notes. While the words "and the weight to be given it" might more properly have been omitted, if they constitute error, it was without prejudice, especially in view of the closing sentences of the instruction:

"But monuments erected by the government surveyors to mark section corners will control the field notes, although in conflict therewith. If the monuments have been obliterated or become uncertain, but their location can be ascertained by the testimony of witnesses who know and testify to the fact, the site thus established will control."

Exception is also taken to instruction No. 9: "You are instructed that if in extending a line given as a line between two sections a corner is reached marked as a section corner at a point where the field notes say it was found by the government surveyor who subdivided the township and made and certified the field notes, such corner will govern and determine the true line, unless

it is shown that the corner was placed at a point different than that called for by the field notes."

Appellant contends that by this instruction he was compelled to show that the quarter corner had been located at a point different from that indicated by the field notes, and that, inasmuch as his claim was that the corner had never been marked upon the ground at all, the jury were, in effect, told that the place indicated by the field notes should be taken as the correct corner. Nevertheless, we think this instruction stated the law, and if its effect was all that appellant claims for it, it would not be the first time that a litigant suffered defeat because he was unable to procure the evidence necessary to prove his case. Furthermore, we think the instruction applicable to the facts, for the reason that the evidence tends to show that, from a point five miles south of the disputed township corner, a straight line produced north (V.15°25′) would reach the disputed township corner on the north township line at approximately the proper distance, and if the township corner were in dispute in this case, the evidence is ample to warrant a finding that the point so reached was the township corner as fixed by the original survey. This being so, if there was no evidence in the case other than the field notes, the quarter corner on the west side of section 6 should be located 40 chains north of the southwest corner, a point where the surveyor says in his notes, "Raised mound of earth 2 ft. high from pits 18x24x12 in. deep for quarter section corner," being approximately the point where the evidence of appellee tends to show markings upon the ground; and the subsequent adoption, acceptance or location of a different township corner than that indicated by the field notes could not operate to displace the quarter corner so established.

Complaint is made of instruction No. 17, whereby the jury were told in effect that they must choose between the line claimed by the plaintiff and that claimed by the defendant, and that there was no room for the establishment

of any other line, and counsel for appellant maintains that the jury should have been permitted, for example, to find a diagonal line drawn from the Rosenfelt corner to the reclamation corner on the west side, thus dividing the disputed acres between the parties, but we find no justification for such a claim in the evidence, and there was no error in the instruction.

Several other instructions are complained of, but we think that they have received the approval of this court in the cases of *Harris v. Harms,* and *State v. Ball, supra,* and *Knoll v. Randolph,* 3 Neb. (Unof.) 599.

In the case of *Halley v. Rosenfelt,* No. 19393 (not reported), the plaintiff succeeded in convincing the jury that the line of the reclamation survey was the true one, and that case was affirmed by this court in May, 1917, on the ground that the evidence was sufficient to support the verdict. An opposite result is reached in this case for the same reasons, but this situation may easily follow the application of the principle, so often announced by this and other courts, that the verdict of a jury will not be disturbed if sufficient evidence exists to support it.

In the case of *Speidel v. Monnich,* No. 21131 (not reported), affirmed by this court in October, 1920, involving a location of the west-quarter corner of section 6, the finding was in favor of the line contended for by the appellant, but that case involved a number of other questions which probably influenced the result. Neither of these cases, however, can be considered in determining the case at bar.

We have made a very painstaking and exhaustive search of the record and are unable to find any prejudicial error therein, and the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA ET AL., APPELLANTS, V. FARMERS STATE BANK ET AL.: CHARLES IAMS, ADMINISTRATOR, INTERVENER, APPELLEE.

FILED JULY 7, 1921. No. 21725.

Appeal: LAW OF THE CASE. A question once determined in the appellate court will not ordinarily be reexamined there on a second appeal in the same case.

APPEAL from the district court for Burt county: CHARLES A. GOSS, JUDGE. *Affirmed.*

Clarence A. Davis, Attorney General, and *J. A. Singhaus,* for appellants.

John L. Webster, contra.

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

PER CURIAM.

This is a controversy over the distribution of the funds in the hands of the receiver of the insolvent Farmers State Bank of Decatur, Nebraska. It failed when it was indebted, among others, to Frank Iams in the sum of $12,000. He filed his claim as a depositor and demanded payment out of the bank guaranty funds, but he was held to be a general creditor and not a depositor within the meaning of the state banking law. Payment out of the bank guaranty funds was not allowed. *Iams v. Farmers State Bank,* 101 Neb. 778. Later Iams intervened in the proceeding to wind up the affairs of the insolvent bank and demanded payment out of the funds derived from the assets in the hands of the receiver. The state of Nebraska, for the protection of the bank guaranty funds, and the Oakland State Bank, in behalf of itself and all other banks that contributed to the bank guaranty funds, pleaded that the funds in the hands of the receiver of the insolvent bank were insufficient to reimburse the bank guaranty funds paid to depositors and that the bank

guaranty funds were entitled to a preference over the claim of Iams, a general creditor. A fuller statement of the facts will be found in *State v. Farmers State Bank*, 103 Neb. 194. The trial court found that the bank guaranty funds and the claim of Iams were of equal rank, and on that basis prorated the funds in the hands of the receiver of the insolvent bank. The state of Nebraska and the Oakland State Bank have appealed.

Are the bank guaranty funds, out of which the depositors of the insolvent bank were paid, entitled to priority over the claim of Iams in the distribution of the funds in the hands of the receiver? This is the question presented by the appeal. In denying the preference in favor of the bank guaranty funds the trial court followed a ruling of this court on a former appeal in the same case. *State v. Farmers State Bank*, 103 Neb. 194.

While this court's ruling on the former appeal, which the trial court followed after the cause had been remanded for further proceedings, appears to be erroneous when here and now read in connection with the statute construed, it is the law of this case. A question once determined in the appellate court will not ordinarily be reexamined there on a second appeal in the same case.

AFFIRMED.

UNION NATIONAL BANK, APPELLEE, V. A. MOOMAW, APPELLANT.

FILED JULY 7, 1921. No. 21412.

1. **Bills and Notes:** ACTION BY INDORSEE: ESTOPPEL. In a suit by the indorsee of promissory notes given to a corporation in payment for shares of its capital stock for which the maker of the notes subscribed in writing, when the stock has been issued and delivered by the corporation in accordance with the subscription contract, the maker of the notes is estopped to deny their ownership by the corporation.
2. **Corporations:** NOTES: ADMISSIBILITY IN EVIDENCE. Where promissory notes payable to the order of an insurance company are

indorsed in the name of the corporation by its treasurer and by him and its president and its secretary sold to a bank, which credits the proceeds thereof to the insurance company, it is not error for the court in a suit by the bank against the maker to admit the notes in evidence without proof that the by-laws of the insurance company authorized the treasurer to execute the indorsement.

3. **Bills and Notes**: BONA FIDE HOLDER: BURDEN OF PROOF: QUESTION FOR JURY. In an action by a bank, an indorsee of promissory notes, against the maker, where defendant pleads and the evidence tends to show fraud in the inception of the notes, the burden is on plaintiff to show that it is a *bona fide* holder, and, where from the evidence reasonable minds may reach different conclusions, the question is for the jury.

4. **Witnesses**: CROSS-EXAMINATION. Where in a suit by a bank, the indorsee of promissory notes, the burden is on plaintiff to show that it is a *bona fide* holder, much latitude is allowed in the cross-examination of its cashier, he being the officer who acted for plaintiff in the purchase of the notes and the witness by whom plaintiff seeks to prove the *bona fides* of the transaction, and it is error for the trial court so to restrict the examination as to prevent a full disclosure of the knowledge of the witness as to matters material to the inquiry.

APPEAL from the district court for Scotts Bluff county: RALPH W. HOBART, JUDGE. *Reversed.*

Morrow & Morrow, for appellant.

Wright, Motherstead & York and *C. L. Kagey, contra.*

Heard before MORRISSEY, C.J., DAY, DEAN and LETTON JJ.

MORRISSEY, C.J.

Defendant appeals from a judgment entered in the district court for Scotts Bluff county.

Action was brought by plaintiff as the holder of two promissory notes in the sum of $1,000 each, given by defendant to the Globe Life Insurance Company of Salina, Kansas. One note bears date of November 9, 1917, and the other November 17, 1917. The issues as to each note are the same. After setting out a copy of each note the petition alleges: "That before maturity of the said note

and in due course of business plaintiff purchased said note from the said Globe Life Insurance Company for a valuable consideration, and said Globe Life Insurance Company duly indorsed and assigned said note, and this plaintiff became, and ever since has been and is now, the owner of said note and is entitled to the payment thereof."

The answer admitted the execution and delivery of the notes to the insurance company, but denied all other allegations in the petition. It specifically denied that the insurance company indorsed or assigned the notes to the plaintiff, but averred that one W. S. Hayslip, who was treasurer of the company, and who had made the indorsement, had no authority to indorse the name of the company on the note, and alleged that the indorsement was not the indorsement of the insurance company. It also alleged that the company received no consideration for the note. It alleges that by false and fraudulent representations defendant was induced to execute the notes for shares of capital stock in the insurance company, pleading at length a state of facts which would constitute a defense to the notes if they were in the hands of the original payee, and constituting a defense provided plaintiff did not become the owner and holder in due course. At the close of the evidence the court directed a verdict for plaintiff.

As grounds of error defendant alleges that the court erred in permitting the introduction of the notes in evidence. The basis of the assignment is found in the contention that, although the notes were made payable to the Globe Life Insurance Company, they were in fact the property of one Felix Broeker, president of the company, and that the company was not authorized by its charter to indorse commercial paper for the benefit of other parties; that the treasurer of the corporation had no authority to make the indorsement, and therefore the notes were inadmissible in evidence until plaintiff first proved that the treasurer was expressly authorized by the by-

laws or by resolution of the board of directors to make the indorsements. In support of the first contention, it is claimed that the capital stock of the insurance company, for which these notes were given, had first been sold by the company to Broeker, and he had employed a selling agency to make the sale to plaintiff and others, and that the stock actually issued was not the treasury stock of the corporation, but the stock of the individual, Broeker. The proof appears to show that Broeker had taken over a large block of stock under a contract with his own company and given his notes therefor, but the certificates of stock were still held by the company and on receipt of defendant's notes certificates of the proper denomination were issued to defendant. Defendant had signed a written subscription for stock of the insurance company; he had executed his notes payable to the order of that company; his subscription and his notes reached the company, and the company issued the stock. It is hard to perceive on what theory he may now be heard to say that these notes were not the property of the company. True, it is said in defendant's brief that there is no record in the office of the insurance company that it ever issued any stock to defendant or that it ever received the notes. On the other hand, the record before the court as a whole seems to confess the issuance of the stock, and the proof shows that the notes were in the hands of the company officers and by them delivered to plaintiff. The officers of the insurance company may have misappropriated the funds, but that would not necessarily affect the ownership of the notes. As to the sufficiency of the indorsement, even if conceded that the treasurer of the corporation was merely the servant of the board of directors, and that ordinarily he is the mere custodian of the property and funds and without power to execute commercial paper or bind the corporation by his indorsement, it will be noted that in the instant case, while the indorsement was signed by the treasurer, the transfer of the notes was made by him in conjunction with the president and secre-

tary of the corporation, and the proceeds of the notes were deposited to the credit of the corporation. To require one purchasing commercial paper from a corporation to investigate, in every instance, its charter, to ascertain the power conferred upon the officers with whom the business is transacted, might seriously disturb commercial business. It will not be disputed that if the corporation was the owner of the notes it might be proper for its officers to indorse and sell them in the ordinary course of its business, and, where the proof shows that the officers of the corporation who usually and ordinarily handle and negotiate its commercial paper write the name of the corporation on the back of the note, and, for a valid consideration moving from the purchaser to the corporation, deliver the note to the purchaser, the indorsement will be held sufficient. We therefore conclude that the court did not err in permitting the introduction of the notes in evidence.

We must now consider the question: Did plaintiff become a holder in good faith in the usual course of business, for value, and without notice of fraud in the inception of the notes? Under the pleadings and the proof made by defendant, the burden was upon plaintiff to prove the affirmative of this question. The alleged purchase of the notes was made through its cashier, Mr. Mergen, who testified to a state of facts which might be sufficient to support the instruction of the court to the jury to return a verdict for plaintiff. But, where doubt is cast upon the truth of the story and there is a dispute on any of the material issues, the trial court is not free to direct a verdict, but must submit the disputed questions of fact to the consideration of the jury.

Prior to the bringing of this suit the insurance company had become a bankrupt, and a great mass of documents, purporting to include the minutes of stockholders' and board of directors' meetings, as well as reports made by official examiners, is included in the record. From these reports and documents it appears that only a short

time before the notes in suit were executed Mr. Mergen was treasurer and director of the insurance company and associated with Mr. Broeker in the management of the company. By questions propounded to Mr. Mergen on cross-examination, when he had testified in rebuttal, defendant sought to show that at the time the insurance company was incorporated and for some time thereafter Mr. Broeker, its president, had no money, property or business of consequence; that shortly after the sale of stock in the insurance company in considerable amount Broeker acquired a chain of drug stores involving the expenditure of a large amount of capital; that he also acquired the controlling interest in the Felix Broeker Investment Company requiring capital of over $100,000; that he further acquired large interests in a real estate company and a bank; that during this time and until these notes were taken by plaintiff Broeker was using in his own business the funds of the life insurance company; and that the witness Mergen and the plaintiff bank knew of these speculations by Broeker prior to the purchase of the notes in suit. Objections were made to the questions propounded, as incompetent, irrelevant and immaterial, and the objections were sustained by the court. Defendant's offer to make the proof by the cross-examination of the witness was also excluded on like objection of plaintiff's counsel.

It is argued that, the witness being a representative of the plaintiff and an interested party, it was error to restrict his cross-examination or to deny defendant the benefit of the offered testimony, as it would tend to show the good faith of plaintiff in taking the notes and affect his credibility. Did the court err in so restricting the cross-examination? The burden was on plaintiff, after facts tending to show fraud were developed, to show that these notes were taken in good faith, and, if by the cross-examination of the witness it could be developed that he knew that the president of the company was violating his duties as an officer of the company and using its

funds for his private speculations, it might be material as bearing upon his own good faith and honest intentions at the time he claims to have purchased the notes as cashier of plaintiff bank. We cannot overlook the fact that he had just recently retired from the board of directors and resigned as treasurer of the insurance company. The record shows that the insurance company had not been honestly managed. It is difficult to believe that this witness was without knowledge of that fact, and if by reason of his former official connection with the company, his business dealings with its officers, and his knowledge of their dishonest practices, he had reason to believe that the notes had been fraudulently procured, and that the officers of the company were dishonest men and were selling the notes not for the benefit of the company, but to carry out their own private speculations, this would be a circumstance tending to show a lack of good faith in the purchase of the notes. In this connection it may be well to also point out that, although the witness Mergen testified that the bank paid a valuable consideration for the notes in suit, crediting the insurance company with the proceeds, and that later the money was withdrawn from plaintiff bank by the insurance company, an examiner for the insurance department of the state of Kansas testified at length as to his examination of the insurance company's books and said that they failed to show that the credit given to the insurance company as testified to by the witness was ever credited to the notes in suit on the books of the insurance company. The mere failure of the officers of the insurance company to make the entry on their books does not directly contradict the claim of plaintiff that the transaction was in good faith, but it is a circumstance which, in view of the relations shown to exist between plaintiff's cashier and the men who were manipulating the affairs of the insurance company, the jury might consider in weighing the testimony of the witness and in a determination of the *bona fides* of the transaction.

That the representations made by the sales agents who procured the notes were false, fraudulent and calculated to deceive defendant needs no elucidation. Defendant positively testifies that he relied on their representations and that they were the moving cause for the execution of the notes. If this is denied, the question is for the jury.

The judgment is reversed and the cause remanded.

REVERSED.

HARRY THOMPSON V. STATE OF NEBRASKA.

FILED JULY 7, 1921. No. 21799.

Homicide: INFORMATION: INSTRUCTIONS. An information charging defendant with a homicide committed in the perpetration of or attempt to perpetrate a robbery, under section 8581, Rev. St. 1913, charges only murder in the first degree, and it is error for the trial court to instruct the jury that they may find defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter.

ERROR to the district court for Stanton county: WILLIAM V. ALLEN, JUDGE. *Reversed.*

G. A. Eberly and *John A. Ehrhardt,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

Heard before MORRISSEY, C.J., DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

MORRISSEY, C.J.

Defendant Thompson prosecutes error from a conviction for manslaughter in the district court for Stanton county.

The information filed contained several counts, but, on motion of defendant to require the state to elect on which count the prosecution should proceed, the state elected to stand upon count two, which charged defendant with the murder of Dayton T. Chambers while defendant was attempting to perpetrate a robbery. The brief makes a number of assignments of error, but they are all directed

to the one point, namely, the sufficiency of the information to sustain the verdict. It is claimed that the information charged defendant with the crime of murder in the first degree only; that it did not contain a charge of manslaughter, and therefore the court erred in submitting that charge to the jury.

By way of argument it is said: No man can rightfully be convicted of an offense, even though the court has jurisdiction over his person and has a general jurisdiction of crimes, unless he is charged with the crime of which he is convicted. We are cited to the rule heretofore announced in *Morgan v. State,* 51 Neb. 672, and *Rhea v. State,* 63 Neb. 461.

In *Morgan v. State, supra,* defendant was charged with murder while attempting to commit rape, and the court held that it was proper to instruct that murder in the second degree and manslaughter were not included in that count of the information.

In *Rhea v. State, supra,* the information charged murder committed in the perpetration or attempted perpetration of a robbery, and the court reexamined *Morgan v. State, supra,* adhered to the rule there announced, and said:

"Homicide committed in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary is by section 3 of the Criminal Code declared murder in the first degree. The turpitude of the act is, in the exceptional cases mentioned in the statute, made to supply the place of deliberate and premeditated malice, while a purpose to kill is conclusively presumed from the intention which is the essence of the enumerated felonies."

The issue raised appears to be settled by the two cases heretofore cited. Under the rule the death penalty has twice been inflicted. Since its announcement several sessions of the legislature have been held, but the lawmakers have not seen fit to change it. We are bound by the rule announced, and the judgment is

REVERSED.

IOWA STATE & SAVINGS BANK ET AL., APPELLANTS, V. CITY NATIONAL BANK OF OMAHA ET AL., APPELLEES.

FILED JULY 7, 1921. No. 21189.

1. **Banks and Banking:** PURCHASE OF STOCK: VALIDITY. Where the directors of a national bank that is in failing circumstances purchase shares of its capital stock for the bank from other shareholders in violation of section 9762, U. S. Comp St. 1918, the rights of innocent holders for value not having intervened, the validity of such transaction "can be questioned only by the United States, and not by private parties." *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 251.
2. **Corporations:** ACTION OF MAJORITY STOCKHOLDERS. The action of a majority of the stockholders of a corporation must govern when such action is within its expressed or implied powers and does not violate any contract rights of the other stockholders.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Gaines, Van Orsdel & Gaines, for appellants.

John J. Sullivan and *George B. Thummel, contra.*

Heard before MORRISSEY, C.J., ALDRICH, DEAN, FLANSBURG, LETTON and ROSE, JJ.

DEAN, J.

The Iowa State & Savings Bank and the Lake Villa Trust & Savings Bank are, respectively, Iowa and Illinois corporations. The Iowa bank is the holder of 100 shares of the capital stock of the defendant City National Bank of Omaha. The Illinois bank holds 25 shares of its capital stock. Both banks hold the stock as collateral security for loans made by them to borrowers who are now insolvent, the borrowers having transferred the stock as collateral security for their respective loans. August 3, 1918, as alleged by plaintiffs, they began this action on behalf of themselves, and other stockholders of the City National Bank, asking that the court require that an accounting be had of the amount due on two certain prom-

issory notes executed by Peter F. Petersen and Ivy O'Flyng in the principal sum of $24,117.80 each, aggregating $48,235.60, and payable to the order of the defendant bank. Plaintiffs allege that the Petersen and O'Flyng notes were wrongfully canceled, and payment released, by the board of directors of the City National Bank. They ask that the court "render judgment against * * * Petersen * * * and against the said Ivy O'Flyng for the balance due" on their respective notes, and also against certain directors of the defendant City National Bank, "who have wrongfully conspired with the said parties to defeat the collection of said notes." The defendant bank contends, in substance, that the Petersen and O'Flyng notes were "a matter of bookkeeping;" that they were merely accommodation notes, and that neither the makers nor the bank were at any time liable thereon. When the hearing was concluded, the court rendered judgment in favor of defendants, dismissed the suit, and plaintiffs appealed.

Substantially these material facts appear. In 1914 the defendant City National Bank was in failing circumstances. When some of its stockholders discovered the true condition of the bank, and that it was probably on the verge of failure, they began to offer their stock for sale at a rate much below its face value. The bank officials realized that such conduct would insure its failure, and, in order that this might be prevented, they purchased some of the stock that was offered for sale by dissatisfied stockholders. It was for this purpose that the notes in suit were procured, so that from the proceeds of the sale of the notes money might be obtained with which to buy the capital stock of the bank. It is alleged the notes were subsequently redeemed.

October 15, 1915, to the end that the City National Bank might realize on its assets, pay its debts and distribute among the stockholders the assets that remained, the bank went into voluntary liquidation. At that time, as alleged by defendants, "the bank held about 400 shares

of its own capital stock, purchased by it several years prior to that time with its own money." The assets, for the most part, were sold to the State Bank of Omaha. The City National, however, retained $600,000 of its assets for the purpose of distribution among its stockholders. However, among the assets that it sold to the State Bank were included the two notes in question. Within a month or six weeks thereafter the City National, as alleged, "in recognition of the fact that it was not the owner of said notes and had given no consideration therefor, afterwards, with the consent of the State Bank of Omaha substituted its own obligation therefor, and the said notes of Petersen and O'Flyng were thereupon released, canceled and surrendered to the makers thereof. Later on, the defendant bank paid off, with its own funds, its obligations so substituted."

The facts leading up to the execution of the notes in question, as contended by defendants, are substantially these. A syndicate, as it is called in the briefs, was formed, consisting of certain of the stockholders and directors of the City National Bank. The object of this organization was, if possible, to save the failing bank. To this end they procured the execution of the two notes as accommodation notes. Subsequently the notes were placed in the City National Bank as apparent assets. It seems that neither the comptroller of the currency nor the bank examiners who were working under his direction were informed that the notes did not represent a *bona fide* transaction and that they were not in fact assets of the bank. However, when this suit was brought the defendants resisted all attempts looking toward enforced payment on the grounds herein stated, namely, that the notes were merely accommodation notes and that liability did not attach thereto.

It may be noted in passing that an agreement was entered into with Petersen and O'Flyng by certain of the directors of the defendant bank, whereby it was provided that all of the parties to the agreement should share

equally any liability that might in any contingency attach to the notes.

Plaintiffs argue that, under the facts, the defendants are estopped from defending against liability, and, in the expressed belief that the notes were a valid obligation against the makers, in October, 1917, and again in February, 1918, demanded that the City National directors begin an action on both notes to recover the full face value with accrued interest. The demand being ignored, this suit for an accounting was begun.

Plaintiffs allege generally that the affairs of the City National Bank were irregularly and unlawfully conducted, all to the financial detriment of the holders of its capital stock. Among other acts of alleged misfeasance they allege the execution of a note in the principal sum of $29,360.61, by a former director, as trustee, with the view of using the proceeds of the note in buying stock of the City National from the dissatisfied and alarmed stockholders. However, we do not find it necessary further to discuss the trustee note. The important question is whether the Petersen and O'Flyng notes were accommodation notes and whether they were at any time valid obligations against the makers.

Plaintiffs contend that the surrender of the notes by the directors was fraudulent as against them and as against the other stockholders, and that, as a result of that transaction, the value of the stock was depreciated in a sum equal to the value of the notes. They argue that such sum as they recover, if any, should become a part of the assets of the defendant bank for distribution among its creditors and stockholders. Plaintiffs argue, too, that, under the facts, defendants are estopped from defending against liability. They point out that under section 9762, U. S. Comp. St. 1918, the purchase of its own stock by a national bank is prohibited. The act, so far as applicable, follows: "No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such

security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith."

It appears in the present case, as shown by the weight of the evidence, that the rights of innocent purchasers for value have not intervened, so that, in the present state of the record, their argument is not supported by the authorities. On this point, even where fraud was charged, it has been said: "A note, executed by defendant for accommodation and without consideration to enable bank officials to conceal their defalcations from depositors and governmental inspectors, is tainted with fraud; so, the rights of no innocent purchaser for value having intervened, it cannot be enforced by the bank or its receiver, though the transaction was such that defendant must have known that the purpose of the note was to conceal the bank's financial condition." *Cutler v. Fry,* 240 Fed. 238. See, also, *Peterson v. Tillinghast,* 192 Fed. 287; *Leonard v. State Exchange Bank,* 236 Fed. 316.

It has been held that private parties cannot invoke the provisions of the national banking act, as plaintiffs in the present case have attempted to do, and that any infringement of the act in question by a national bank is a matter for the consideration of the federal government. In *Thompson v. St. Nicholas Nat. Bank,* 146 U. S. 240, at page 251, on this point it is said: "Moreover, it has been held repeatedly by this court that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties. *National Bank v. Matthews,* 98 U. S. 621; *National Bank v. Whitney,* 103 U. S. 99; *National Bank of Xenia v. Stewart,* 107 U. S. 676."

Besides this, it appears in the present case that at a meeting of the stockholders a motion was made and seconded that some action be taken by the directors to recover the amount of the canceled notes of Petersen and

O'Flyng. When the motion was put to a vote it received no votes other than those of the two stockholders who were its sponsors. It may be added that, not only does it appear that the rights of innocent persons have not intervened, but there is evidence tending to show that the cancelation and surrender of the Petersen and O'Flyng notes was ratified at a meeting of the stockholders at which approximately 85 or 90 per cent. of the capital stock of the City National Bank was represented.

In 6 Fletcher, Cyclopedia Corporations, sec. 3992, p. 6797, it is said:

"'The majority rules' is the basic rule as to the internal affairs of a corporation, so long as the acts of the corporation are within its express or implied powers. It is of no moment that the acts of the majority are unwise or inexpedient, so long as they act in good faith. When the management of a corporation is vested in the stockholders collectively as constituting the corporation, and they act at a meeting called and conducted in accordance with the charter and by-laws of the corporation, and differences of opinion arise as to the policy to be pursued, the vote of the majority must govern, where the majority act in good faith, and within the powers of the corporation, and do not violate any contract rights of the other stockholders. No principle in the law of corporations is better settled than the principle that every person who subscribes for or purchases shares in a corporation, or otherwise acquires shares therein, impliedly agrees that, upon any matter which comes within the powers expressly or impliedly conferred upon the corporation by its charter, he will be bound by the will of the majority, so long as they act in good faith, and according to law."

We have tried the case *de novo,* and, in view of the evidence, and of the federal authorities applicable thereto, we conclude that the judgment is right. It is therefore in all things

AFFIRMED.

DAY, J., not sitting.

CHARLES DERR ET AL., APPELLANTS, V. WILLIAM KIRKPATRICK, APPELLEE.

FILED JULY 7, 1921. No. 22081.

1. **Master and Servant:** WORKMEN'S COMPENSATION: ATTORNEY'S FEES. When an employer appeals to the district court from an award of the compensation commissioner and fails to reduce the amount of such award, the employee's counsel is entitled to the allowance of a reasonable attorney's fee for services in the district court. Section 3666, Rev. St. 1913, as amended, section 4, ch. 91, Laws 1919.
2. ———: ———. REVIEW. When the evidence in a case that is brought under the employers' liability act conflicts with respect to material matter, the judgment will not be disturbed if there is sufficient evidence in the record to support it. *Lincoln Gas & Electric Light Co. v. Crowley*, 104 Neb. 701.
3. **New Trial:** DISCRETION OF COURT. The granting of a new trial is largely committed to the discretion of the trial court, and unless a clear abuse has been shown this court will not interfere. *Bruner Co. v. Fidelity & Casualty Co.*, 101 Neb. 825.
4. **Master and Servant:** WORKMEN'S COMPENSATION: ATTORNEY'S FEES. Where an employer in an action brought under the employers' liability act appeals from the judgment of the district court to this court and fails to reduce the amount of the recovery, this court will, on application, allow the employee's counsel a reasonable attorney's fee. Section 3666, Rev. St. 1913, as amended, section 4, ch. 91, Laws 1919.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

J. Ralph Dykes, for appellants.

Clifford L. Rein, contra.

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG and ROSE, JJ.

DEAN, J.

This suit originated in the compensation commissioner's office, where Willaim Kirkpatrick, defendant, filed an application for an order against Charles Derr, his em-

ployer, and the Maryland Casualty Company, the employer's surety, the plaintiffs herein, to enforce continued payments of $15 a week, as compensation, theretofore paid by plaintiffs, for disabilities sustained by defendant, April 10, 1920, in the course of his employment while working for Derr in his furniture house as helper, clerk and repair man. January 12, 1921, the hearing was concluded and defendant was awarded $15 a week from December 3, 1920, to the date of the hearing. The award further provided that the payments should continue for a period of five additional weeks after the hearing and that during that period defendant should submit to medical treatment at plaintiffs' cost. It was further ordered that another hearing be had at the expiration of the five-weeks' treatment period that the commissioner might then determine the extent of defendant's disability and make such award as the facts would warrant. Both parties complied with this order. When the parties again appeared after the expiration of the five-weeks' medical treatment, the commissioner found that the disability continued and that its extent could not then be fully determined. Thereupon it was ordered that plaintiffs continue the payment of compensation at $15 a week from the date of the last payment as long as the disability remained. Plaintiffs being dissatisfied with the final award of the commissioner appealed therefrom to the district court.

The district court found that defendant's disability began April 10, 1920, and that "the duration of such disability cannot now be determined." The court thereupon rendered a judgment against plaintiffs compelling them to pay defendant $15 a week from February 3, 1921, "until said disability be ended or determined." Plaintiffs having failed to reduce the amount of the commissioner's award, the court allowed defendant $50 as an attorney fee. From the judgment so rendered plaintiffs appealed.

Kirkpatrick testified in substance: That the accident happened April 10, 1920, when under Derr's direction he went with a fellow employee to a private residence in

Lincoln to bring therefrom a base-burner stove, weighing 500 or 600 pounds, to be stored in Derr's warehouse; that the stove was in a middle room, and the two men alone carried it out through the front room, over the porch and down the steps; that on account of mud they could not use the stove truck, and had to carry the stove over the lawn and through the mud to the truck, a distance of 60 feet from the house; that they lifted the stove a foot or 18 inches to the bed of the truck, and that by carrying the stove and straining himself in lifting it up to the truck he was in some way injured and immediately became sick and faint; that when they returned he was unable to help carry the stove into the store because of his injury; that he then went home and the next day was ill, and on the following day he returned to the store, but that owing to the pains that he suffered he was unable to do any work; that he was then sent home in a truck by his employer, where he suffered pain for about five weeks, when "this ailment startd in the back" of each of his hands and persisted up to the time of the trial so that he could not then close his hands; that he has performed no work since the day of the accident and is unable to feed himself or to dress or undress himself; that he received payments as compensation in the sum of $630, and that $200 hospital bills were paid by plaintiffs; that the payments so made included the time to February 3, 1921, when further payments were refused by plaintiffs.

Mr. Turner is the man who helped Kirkpatrick to carry the base-burner from the dining room and load it on the truck. He testified that it weighed about 600 pounds. His testimony corroborates generally that of the defendant. He said: "Q. Do you know what is the usual thing for truck or teamsters to pick those things up by hand or to drag it on a truck? A. If we have got sidewalk or flooring you take a truck and haul them, but if you have nothing but ground you cannot wheel the trucks; you have simply got to pick it up and carry it. * * * Q. Now, when you got this stove out to the truck, did

you have to lift up on it any to get it into the wagon? A. Yes; had to raise it between 16 and 18 inches. Q. That is, had to pull it up in addition to carrying it to the truck? A. Yes, sir. You see, to carry a base-burner, you have got to catch hold of the stovepipe hole, and reach down and catch the ash-pan, and reach the door board, and push against one another and carry in this position. So it is a strain all through your neck, body and arms. After you get to the wagon, we had to kind of up (indicating) like this, and put it in the end. To do that, you have got to have a pretty good stomach on you or you cannot do it. * * * Q. Now, what did Mr. Kirkpatrick do as soon as you folks set that stove down on the floor of the truck? A. On the floor of the truck? Q. Yes. A. Well, he was right by the corner of the wagon and kind of leaned up against the wagon like this. 'Gosh,' he says, 'I have tore myself all to pieces.' Q. That is what he said? A. It seemed like he relaxed all over." With respect to the carrying of the stove, he further testified that "it hurt me for two or three days, my neck, * * * my wife and I, I took the truck and we drove out to see him (Kirkpatrick) and he was in bad condition, * * * Mr. Derr and I talked and said we are afraid Kirk is going to make a die of it. Mr. Derr and I were just talking in the store."

Defendant was examined by a physician about three weeks after the accident. On the part of defendant he testified that he found Kirkpatrick "suffering from violent strain with evidence of over strain of the abdominal muscles and hydrocele of the cord. Q. What history did he give you? A. Of having lifted a weight too heavy for him, and having broken down under it, having lifted a stove too heavy to carry;" and further that there was no indication of rheumatism, but that he "suspected that hydrocele of the cord was a rupture, and we watched him carefully to see whether we could handle it without an operation. I believe I threatened him with an operation for a while—finally managed without it. Somebody kept him at rest in bed and gave him things to ease the pain.

* * * Q. Now, you may state whether or not, in your professional opinion, the high increased temperature and bronchial pneumonia found there might have been aggravated by the effects of the strain in lifting that he complained of, or might have predisposed him to take such disease as that? A. I think you will find it a very common thing in medical works that lowered resistance will predispose a patient to any kind of infection anywhere in the body." The doctor further testified that he had the patient under observation for several months, and that he examined him from time to time and there was no doubt in his mind but that Kirkpatrick's condition was brought about by the excessive strain in carrying the stove. On the cross-examination he testified: "Q. How did the infection get in the hand and fingers? A. Circulating in the blood stream to the hands. * * * Q. Doctor, one more question. You said the hydrocele of cord disappeared, or had disappeared, June 17; wasn't it, you said, hydrocele of cord practically disappeared under medical treatment June 17? A. It must have been about that time. Q. Then the only condition you found at that time was this condition in the hands? Yes, sir."

Plaintiffs argue that the accident never happened. There is also some argument to the effect that defendant's condition arose from an abnormal condition of his teeth and that he was afflicted with pyorrhea. Defendant called a dentist on this point, and from his testimony it appears that the condition of his teeth was not abnormal and that there was but a trace of pyorrhea, "in the first stages," and that it was not sufficient to injuriously affect his health; that two of his large molars were decayed and removed. We conclude that plaintiffs' argument on this point is not sustained.

Only two witnesses testified on the part of plaintiffs and both were physicians. They did not examine defendant until about seven months after the accident. Plaintiffs in their brief say: "The medical testimony is conflicting." We do not find that it conflicts at all points; but, even ad-

mitting that plaintiffs' statement reflects the fact, in the present state of the record, it is not incumbent on us to discuss the evidence if there is sufficient to support the judgment. The medical testimony seems to be ample to support defendant's contention and under the rule we will not discuss it further. *Manning v. Pomerene,* 101 Neb. 127; *Miller v. Morris & Co.,* 101 Neb. 169; *Anderson v. Kiene,* 103 Neb. 773; *Lincoln Gas & Electric Light Co. v. Crowley,* 104 Neb. 701.

Plaintiffs contend that the court erred in not granting a new trial on their motion. In *Bruner Co. v. Fidelity & Casualty Co.,* 101 Neb. 825, we held: "The granting of a new trial is largely committed to the discretion of the trial court, and unless a clear abuse has been shown this court will not interfere." Abuse of discretion has not been shown. Error does not appear in the ruling.

It is argued that the district court erred in allowing defendant an attorney fee of $50 for services in that court. We do not think so, in view of the fact that the employer appealed and failed to obtain any reduction in the amount of the award. Section 3666, Rev. St. 1913, as amended, section 4, ch. 91, Laws 1919, provides that, whenever "proceedings are had before the compensation commissioner, a reasonable attorney's fee shall be allowed the employee by the court in the event the employer appeals from the award of the commissioner and fails to obtain any reduction in the amount of such award; the appellate court shall in like manner allow the plaintiff a reasonable sum as attorney's fees for the appellate proceedings." Under the act defendant's counsel is entitled to a fee of $100 for his services in this court and this amount is ordered to be paid by plaintiffs.

From the facts before us we conclude that defendant is entitled to compensation at the rate of $15 a week from the time the court found that plaintiffs ceased paying compensation, namely, from February 3, 1921. We hold, however, that the record discloses such reasonable grounds for controversy that the appeal was justified. It there-

fore follows that plaintiffs are not subject to the statutory "waiting time" penalty.

The judgment of the district court is

AFFIRMED.

ULA W. ECHOLS, APPELLEE, V. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, APPELLANT.

FILED JULY 7, 1921. No. 21279.

1. Insurance: POLICY: WAIVER OF CONDITIONS. Provisions in a contract of life insurance to the effect that the policy does not become a binding contract of insurance unless and until the first premium is paid, and that no agent of the company, or other person, has power on behalf of the company to modify the contract of insurance or to extend the time of paying any premium, are for the benefit of the company and may be waived by it.
2. ———: ———: ———. In such case, where a rule of the company permits the agent to take a note of the insured payable to himself for the first premium, the agent being held responsible to the company for the net premium, the agent becomes the debtor, and when he delivers the policy to the insured under an agreement to extend the time of paying the premium and to take the note of the insured for such premium, but no note is given for the reason that the agent had no blank forms with him at the time, and it was agreed that the agent would see insured in a few days and get the note, and the agent left the city two days thereafter without procuring the note, and before his return the insured died, such transaction will be deemed a payment of the premium as between the insured and the company.
3. ———: ———: ———. In such case, an agreement by the agent to extend the time of paying the premium will be regarded as a waiver by the company of the conditions of the contract of insurance respecting time of paying the premium, and the limitations of the power of the agents to extend the time of such payment.
4. ———: NOTICE. Notice to a general agent of a life insurance company having authority to solicit insurance, to make out and forward applications, to deliver to the assured policies when returned, and to collect and transmit premiums, will operate as notice to the company, and it will be bound by acts then done by him in respect to the business he is transacting.

5 Evidence examined, and *held* to sustain the findings of the trial court.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Montgomery, Hall & Young, for appellant.

Courtright, Sidner, Lee & Jones, contra.

Heard before MORRISSEY, C.J., DAY, DEAN and LETTON, JJ.

DAY, J.

The plaintiff recovered a judgment against the defendant upon a life insurance policy in which she was named as beneficiary. By stipulation of the parties, a jury was waived, and trial was had to the court. Defendant appeals.

It was pleaded as a defense that the first premium was never paid, and also that the policy was never delivered to and received by the insured during his continuance in good health; that these requirements were conditions precedent to the contract of insurance becoming binding and effective, and that therefore the policy never became a binding contract. The reply pleaded a waiver of the conditions of the contract requiring the first premium to be paid before the policy became effective, and alleged that credit was extended to the insured for the payment of the first premium, and that within the time of the extended credit full payment of the premium was tendered and refused. The reply also denied the allegations of the answer, and alleged that at the time the policy was delivered to and received by the insured he was in good health. A brief reference to the facts will serve to make clear the precise points in controversy.

The record shows that on October 30, 1918, Philip K. Echols, the insured, who lived at Cheyenne, Wyoming, made application to the defendant company through its local soliciting agent, Theodore Thulemeyer, for a life insurance policy in the sum of $5,000, requesting therein

that his wife, Ula W. Echols, be named as beneficiary. At the time the application was made, it was agreed between Thulemeyer and the insured that, if the company accepted the risk and issued the policy, insured could have 60 or 90 days in which to pay the first premium of $125.25, and that a note was to be given therefor. The application was made upon one of the printed forms provided by the company, and contained a recital that the insured understood the stipulations contained therein, which, in so far as they have any application to the present issues, are as follows: "The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health." And, further, "I agree that no agent or other person except the president, vice-president, a second vice-president, a secretary, or the treasurer of the company has power on behalf of the company to make, modify or discharge any contract of insurance, to extend the time for paying a premium, to waive any lapse or forfeiture, or any of the company's rights or requirements." The policy also contained a stipulation in substantially the same language as the clause last above quoted. The application and the medical examination were forwarded to the home office of the company in the city of New York, and in due course of business the application was accepted and a policy issued thereon. On November 6, 1918, the policy was mailed by the home office to its Denver, Colorado, agency for the purpose of delivery.

It appears that the company maintains a general agency at Denver, which has general charge of the business of the company originating in the states of Colorado and Wyoming. This Denver agency was in charge of O. C. Watson, who is styled "manager," and who had authority to appoint soliciting agents, collect premiums, deliver policies, and in fact conduct a branch office of the company's business within the states mentioned. The

Denver agency, however, did not pass upon applications for insurance or issue policies.

On November 13, 1918, the policy was received at the Denver agency, and by it, on the same day, mailed to Thulemeyer at Cheyenne for delivery and settlement. Owing to the absence of Thulemeyer from Cheyenne, he did not receive the policy until Saturday, November 16, at which time, at about 4 o'clock p. m., he met Echols by appointment at Thulemeyer's room, and delivered the policy. On that occasion it was agreed that an extension of time for the payment of the premium was to be given to January 2, 1919. As to what occurred at that time, Thulemeyer's testimony is as follows: "I handed him the policy, and he asked me something about the settlement, and I asked him when it would suit him best to pay for the policy, and he told me it would suit him best if he could pay for it immediately after the first of the year, and I agreed to that with the understanding that he was to give me a note, of course, which he would have done then, but I had no notes in my room, and I told him that I would fix it up with him in a few days. He asked me then if that would be all right, and I told him, sure, it would be."

On the day the policy was delivered to the insured, Thulemeyer wrote to the Denver agency that he had delivered the policy, and asked Watson whether he could handle his note. Whether he referred to his own note or Echols' note is not entirely clear. On November 18 Watson replied to Thulemeyer as follows: "With reference to policy No. 2534687, Echols, which you have delivered, please send note to me and I will advance the net premium right away."

Thulemeyer again left Cheyenne on Monday, November 18, and was absent when in the due course of mail Watson's letter should have been received. In the meantime, and before the letter was delivered to Thulemeyer, Echols died, on November 24, from a sudden attack of influenza, without having given the note for the premium. It ap-

pears that Thulemeyer and Echols were personal friends, and that Watson also was acquainted with Echols. After Echols' death, but within the time of the extended credit for the payment of the premium, payment of the premium was tendered and refused.

It also appears, although upon this point there is a little confusion in the testimony, that a rule of the company permitted its agents to accept a note in payment of the first premium. In such case, however, the note was to be taken in the name of the agent, was to be his property, and the agent was required to remit the net premium to the company. The purpose of such a rule was no doubt to enable the agents to extend credit to persons of known financial responsibility in cases where they were willing to advance to the company the net premium.

It is quite obvious that the stipulations in the application and policy, which have heretofore been quoted, and which form the basis of the defenses pleaded, are for the benefit of the company, and can be waived by it, and such waiver may be shown by conduct on the part of the company which indicates an intention to do so. It is manifest that the rule of the company permitting its agents to accept notes in their own names for the first premium, they becoming responsible to the company for the net premium, is entirely inconsistent with the provisions of the contract that the policy shall not take effect until the first premium shall have been paid, and also inconsistent with the provisions that no agent or other person except certain designated officers shall have power on behalf of the company to extend the time for paying the premiums. Under such circumstances, the court will construe the action of the company in its most favorable light to the insured, with the view of sustaining rather than defeating the contract. It is clear that the insured believed at the time the policy was delivered to him that he had a valid and effective contract of insurance, and it is equally clear that Thulemeyer intended that the policy should be effective, and that he was to advance the net premium to

the company. If a note had been given by the insured to Thulemeyer for the premium, and he had remitted the net premium to the company, it would seem that the transaction would have been within the express authority of the agent. Does the fact that no note was actually given by the insured, and the net premium was not actually sent to the company by the agent, change the situation? Under the circumstances shown here, we think not. As between Thulemeyer and the insured, the parties had agreed that a note was to be given, the amount was fixed, and the time of payment made definite. The policy was delivered with that understanding. The only reason a note was not given at the time was because the agent did not have a blank form with him. In this situation the agent said that he would see the insured in a few days and fix up the note. On the following Monday the agent was called out of the city, and before his return Echols' death occurred. The delivery to and acceptance by the insured of the policy would be a sufficient consideration to support the promise to pay the premium to Thulemeyer. The note would be merely evidence of Echols' obligation to pay and could only have been for the protection of Thulemeyer individually. This he could waive, and he did so by delivering the policy to Echols and extending the time of payment of the premium, with the assurance that it would be all right. When, therefore, Thulemeyer delivered the policy under the agreement to extend the time of payment, he himself became liable to the company for the net premium. He recognized that and wrote the letter to Watson to arrange for the payment. Watson wrote to send the note and he would advance the net premium. In doing this, Watson was acting within the general scope of his authority as manager, and his act must be regarded as binding on the company. Watson and Thulemeyer both considered the policy effective, and that the net premium was to be paid to the company by Thulemeyer. In permitting Thulemeyer to become responsible for the net premium, the company assumed no risk of

failure of payment, for it was shown that considerable sums as commissions were coming to Thulemeyer from time to time on policies previously secured by him. Under these facts we hold that the provisions of this insurance contract, that the policy does not become effective unless and until the first premium is paid, and that no agent of the company except certain designated officers has power to extend the time of paying any premium, are for the benefit of the company, and may be waived by it. And where by a rule of the company its agents are permitted to accept the note of the insured for the first premium, by taking the note in their own names, and themselves becoming responsible to the company for the net premiums, and where the agents of the company authorized to deliver policies and collect premiums deliver the policy to the insured under an agreement to extend the time of paying the premium, and to take the note of the insured for the same, but no note is given for the reason that the agent had no blank notes with him at the time, and it was further agreed that the agent would see insured in a few days and get the note, and the agent left the city two days thereafter without procuring the note, and before his return the insured died, such transactions will be considered a waiver of the provisions of the contract of insurance, and as between the insured and the company will be deemed a payment of the premium.

In addition, it will be observed that Watson was the general manager of the company's business in the states of Colorado and Wyoming, and that he had been notified by Thulemeyer that the policy had been delivered without the payment of the premium, and, inferentially at least, that an extension of time for paying the premium had been granted to the insured. This notice to Watson was in legal effect notice to the company as to what had been done. It is a general principle of agency that knowledge to the agent is knowledge to the principal, in so far as such knowledge pertains to matters within the scope of the agent's powers. Watson knew that the policy had

been delivered without restriction; that the premium had not been paid; that an extension of time of paying the premium had been given; and that Thulemeyer had become liable for the net premium; and yet he made no objection or protest. On the contrary, he acquiesced and approved of what had been done, and lent his aid to Thulemeyer to raise the amount of the net premium for remittance to the company. Watson's knowledge will be treated as the knowledge of the company, and his acts the acts of the company. After the company's agents had induced the insured to believe that he was protected by his policy, the company is estopped, after the death of the insured, to claim that the policy never became effective because the first premium had not been paid.

The principle here involved was considered in *German Ins. Co. v. Shader,* 68 Neb. 1, in an opinion by Commissioner Pound, and it was held: "Provisions in a policy of insurance that the risk shall not attach unless the premium has been actually paid are waived in case the policy is delivered upon an agreement to extend credit, and the insurer does not take advantage of such provisions, but treats the policy as in force." And, in discussing the proposition, the court said: "The general rule that an insurance company cannot take advantage of conditions in a policy whereby such policy is to be void by reason of circumstances existing at the time the policy issued, in case the facts were known to its agent at the time, has been recognized universally. More recently insurance companies have sought to avoid the consequence of this well-established rule by provisions to the effect that the conditions of the policy could be waived only by written indorsement, and by clauses in which agents are forbidden to waive any of the conditions of the policy in any other manner. Notwithstanding provisions of this type, an overwhelming majority of the state courts have continued to apply the rule that an insurance company cannot set up that a policy issued by its agent with knowledge of the facts was void when it was issued, by reason of facts

which he well knew. Including our own court, the courts of some twenty-seven states, at least, have, upon one ground or another, adhered to this doctrine in the face of these provisions as to waiver."

As bearing generally upon the questions discussed, see *Washburn v. United States Casualty Co.*, 108 Me. 429; *Berliner v. Travelers Ins. Co.*, 121 Cal. 451; *Griffith v. New York Life Ins. Co.*, 101 Cal. 627; *Home Ins. Co. v. Gilman, Exr.*, 112 Ind. 7; *Bush v. Insurance Co.*, 85 Mo. App. 155.

Appellant contends that the insured was not in good health at the time of the delivery of the policy to him on November 16, 1918. We have examined the record, and find there is some conflict as to the precise time the insured became ill, but there is ample evidence in the record to support the finding made by the trial judge that the insured was in good health at the time of the delivery of the policy, and his finding of fact upon conflicting evidence is entitled to the same weight as the finding of a jury would be given, and, under the familiar rule in force in this state, will not be disturbed unless clearly wrong.

In view of the liberal allowance made to plaintiff's attorneys in the trial court, an attorney's fee of only $100 is allowed in this court.

The judgment of the district court is

AFFIRMED.

LYDIA NOVAK, APPELLANT, V. LAFAYETTE LIFE INSURANCE COMPANY, APPELLEE.

FILED JULY 7, 1921. No. 21603.

1. **Insurance: FAILURE TO PAY PREMIUMS.** A provision in a life insurance policy, providing that it should become null and void upon failure to pay premiums when due, is not illegal, and where there is default in the payment of premiums, and no act or circumstance constituting a waiver or estoppel on the part of the company, preventing it from insisting upon a forfeiture, the contract will be enforced as it was made.

2. ———: GIVING NOTE FOR PREMIUM. Whether or not a note given for a renewal premium is taken as an absolute and unconditional payment of the premium, or whether the note is given, not as payment, but for the purpose of extending the time of payment, is a question of fact to be determined by the provisions of the note and the attending circumstances.

3. ———: ———: FORFEITURE. Where the policy provides for such a forfeiture, and the insured executes and delivers to the company a note to cover a renewal premium, which note recites that, if not paid at maturity, the insurance policy shall become null and void without act on the part of the company, and the company issues a receipt for the note, reciting that the policy shall continue in force until the maturity of the note, it is quite clear that the note was not given as an unconditional payment of the renewal premium, but as an extension of time for the payment of the premium, and a default in the payment of the note will work a forfeiture of the policy.

4. ———: ———: ———. A mere retention of the note by the company after its maturity, with no affirmative acts on the part of the company signifying an intention to enforce payment, does not result in either a waiver or an estoppel that will prevent the company from insisting upon a forfeiture.

5. ———: ———: ———. A notice to the insured that such a premium note has become due and is not paid, and an offer to allow for an arrangement for him to pay it and avoid forfeiture, without any other act on the part of the company displaying an attitude to compel its payment or to insist upon the right to enforce it, are insufficient to estop the company from claiming a forfeiture of the policy by reason of the previous default.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

Baldrige & Saxton, contra.

Heard before MORRISSEY, C.J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

FLANSBURG, J.

This was an action to recover on a life insurance policy. The lower court found that the policy had become forfeited by reason of the failure of the insured to pay a premium

note at its maturity, and took the case from the jury. Judgment was entered accordingly, and from this judgment the plaintiff appeals.

The policy provided that "failure to pay any renewal premium when due shall render this policy null and void * * * without action on the part of the company." The first year's premium on the policy had been paid and the second premium became due on October 15, 1914, and on that date, October 15, the insured executed and delivered to the company a nonnegotiable renewal premium note, which contained this provision: "This note is given for premium on policy * * * issued by the payee hereof, and if not paid at maturity said policy shall, without notice or affirmative act on the part of the company or any of its officers or agents, be null and void." The note was payable on April 15, following. Coincident with the execution and delivery of the note, a receipt was issued by the insurance company, reciting the receipt of one note "due and payable at the company's home office April 15th, 1915, for which policy, * * * issued by the LaFayette Life Insurance Company, is continued in force until the maturity of the note. Upon payment of said note on or before maturity the company's regular premium receipt will be forwarded." Insured died on September 14, after the maturity of the note, and without the note having been paid by any one.

A provision in a life insurance policy, providing that it shall become null and void upon failure to pay premiums when due, is not illegal, and where there is default in payment of premiums, and no act or circumstance, constituting a waiver or estoppel on the part of the company, preventing it from insisting upon a forfeiture, the contract will be enforced as it was made. *Dressler v. Commonwealth Life Ins. Co.*, 105 Neb. 669.

Plaintiff, however, contends that an acceptance of the note by the company constitutes an absolute payment of the renewal premium contracted for by the policy of insurance, and that the provision in the note that the policy

should become forfeited upon a failure to make payment at maturity is ineffective and does not constitute a part of the insurance contract. Whether or not such a note is taken as an absolute and unconditional payment of a premium, or whether the note is given, not as payment, but for the purpose of extending the time of payment, is a question of fact. From the terms and provisions of the note and the recital of the receipt given in exchange for it, there can be no question but that the company did not accept the note as an unconditional payment of the premium, and that an extension of time for the payment of the premium, only, was intended. In legal effect, we do not see that that arrangement differs from a mere written agreement extending the time within which the renewal premium might be paid and saving to the company its rights of a self-operative forfeiture in case the extension agreement should not be complied with.

The case of *Sharpe v. New York Life Ins. Co.*, 5 Neb. (Unof.) 278, is very similar to the case at bar. There the court held, under similar circumstances, where a note was given for the purpose of extending time for the payment of a premium and contained a provision continuing the agreement for forfeiture in case the note should not be paid at maturity, that the default in payment at maturity would work a forfeiture of the policy. Where the policy and note both contain such provisions for forfeiture in case of failure of the insured to pay the premium when due, default in payment works an automatic forfeiture of the insurance. *Houston v. Farmers & Merchants Ins. Co.* 64 Neb. 138; *Farmers & Merchants Mutual Life Ass'n v. Mason*, 65 Ind. App. 66; 25 Cyc. 826.

Plaintiff claims that the insurance company has waived the forfeiture. It is urged that the company did not return the note at its maturity, and that, by its mere retention of the note, it has shown a disposition to enforce it, and having taken such position, is estopped to deny that the policy is still in force. There are no affirmative acts, however, on the part of the company signifying an inten-

tion to enforce payment of the note. It has asserted no rights upon the note. The return of the note has never been demanded by the insured. The mere retention of the note, under such circumstances, was not indicative of an attitude on the part of the company that the policy was still in force, or that the forfeiture had been waived, or that the company would attempt a collection of the premium by an enforcement of the payment of the note. A mere retention of the note, alone, would not result in either a waiver or an estoppel. *Sharpe v. New York Life Ins. Co., supra; Farmers & Merchants Mutual Life Ass'n v. Mason, supra; Pendleton v. Knickerbocker Life Ins. Co.*, 5 Fed. 238.

The plaintiff's principal contention, however, is based upon a letter which, it is claimed, was written by the insurance company to the insured after the maturity of the note, and is dated April 21, 1915. The introduction of this letter in evidence is seriously contested by the defendant, on the ground that there was an insufficient showing that the letter was ever mailed by the company or received by the insured. But, aside from that question, we see nothing in the letter which constitutes a waiver of the forfeiture. The purported letter, addressed to insured, was as follows: "We find that you have not made payment of your note accepted as an extension of time for part of the premium under the above-numbered policy. The total amount due is shown by the following statement: If you cannot pay this amount at this time, it will be your privilege to make a partial payment of $21.92, which is the accrued interest to date, and a payment of $20 on the principal of the note, and the balance may be extended for another ninety days or until July 15th. We trust that we shall hear from you by return mail and for your convenience please find inclosed a stamped envelope."

This letter was no more than an offer to reinstate the policy on condition that the insured should make an immediate cash payment of a portion of the premium, and

arrange for payment of the balance within 90 days, or by July 15. This offer was not accepted. It was no more than a notice to the insured of the condition of his default, and of an offer to allow him to avoid its effects. Such a letter, certainly, would not mislead the insured into the belief that his policy would be continued, regardless of whether or not he should comply with the conditions set forth in the letter of the company. Furthermore, this could not, in any event, have been construed as a waiver by the company or an extension of time for payment of the premium beyond July 15, which date was the final limit for extension of time, as set forth in the letter itself. A notice to the insured that his premium note has become due and is not paid, and an offer to allow for an arrangement to pay it and avoid a forfeiture, without any other act on the part of the company displaying an attitude to compel its payment or to insist upon the right to enforce it, are insufficient to estop the company from claiming a forfeiture of the policy by reason of the previous default, and no affirmative action on its part is necessary to bring about such a forfeiture, under the circumstances that we have set forth.

In the following cases it has been held that a mere request on the part of the insurance company for the payment of a premium note which is past due is not sufficient to show that the company has waived its rights to enforce the forfeiture: *Ætna Life Ins. Co. v. Ragsdale,* 95 Va. 579; *National Life Ass'n v. Brown,* 103 Ga. 382; *Sullivan v. Connecticut Indemnity Ass'n,* 101 Ga. 809. Though it has been held in *Inter-Southern Life Ins. Co. v. Duff,* 184 Ky. 227, that, where an insurance company makes an unconditional demand for payment of such a note, it will be held to have waived the forfeiture provided by the company, we do not see in the letter here before us any unconditional demand for the payment of the note, or any attitude on the part of the company inconsistent with its right to assert a forfeiture of the policy in case its offer should not have been accepted.

For these reasons, we are of opinion that the judgment of the lower court is correct, and it is

AFFIRMED.

EDWARD V. ROBBINS V. STATE OF NEBRASKA.

FILED JULY 7, 1921. No. 21771.

1. **Rape:** CORROBORATIVE EVIDENCE. In a prosecution charging rape, other direct testimony than that of the prosecutrix, as to the particular act which constitutes the offense, is not essential to make a corroboration of her story, but corroboration may consist of the proof of such surrounding facts and circumstances as will support her testimony against the accused as to the principal fact, and as will identify the accused as the party guilty of the crime. It may consist of circumstantial evidence. The conduct and demeanor of the accused may furnish such corroboration.
2. **Criminal Law:** REFUSAL OF INSTRUCTION. Instructions examined, and *held*, no error in the refusal to give an instruction, since it was sufficiently covered by an instruction given by the court upon its own motion.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Clifford L. Rein, for plaintiff in error.

Clarence A. Davis, Attorney General, and *J. B. Barnes, contra.*

Heard before MORRISSEY, C.J., DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

FLANSBURG, J.

This was a criminal prosecution charging statutory rape. Defendant was convicted and appeals.

The principal contention is that the testimony of the prosecuting witness is not sufficiently corroborated. The prosecuting witness was a girl, 9 years of age, who lived with her parents and small brothers on a farm near Carroll, Iowa. The defendant, a man 64 years of age, and a friend of the family, had been temporarily living at this home. He was previously employed as a conductor for a

freight elevator at Armour's, in South Omaha, and prior to that time had been buying and dealing in horses. On March 8, 1920, he told the mother of the girl that he would like to take the girl to Omaha for a few days, to show her the city and buy her some clothes. He stated that he had a married niece living there, with whom he would provide that the girl should stay. The girl's testimony is that defendant took her to Omaha, and, after going to a picture show, took her to his rooms, instead of to the home of his niece, and that, on that night and on the following night, he slept with and had intercourse with her. On the second day that they were in Omaha they went to visit the defendant's niece, but the girl was not left there for the night. Defendant's testimony is that on both nights the girl insisted that she stay with him and refused to go to his niece's home. That such was the fact, the girl flatly denies. The defendant purchased for her a dress and hat and shoes; and on the third night, at about 10 p. m., immediately after entering the defendant's rooms, they were arrested. The day after the arrest the girl was subjected to a physical examination by a physician, whose testimony shows that her hymen had been recently ruptured; that her parts were bruised, congested and swollen. The defendant immediately upon his arrest, and also at the trial, stated that he had not abused the girl, and that he had not slept in the same bed with her, but had thrown a mattress upon the floor, along the side of the bed, and slept on that. The officers who entered the room and made the arrest, and to whom the defendant immediately related that he had slept on the floor, testified that there was no mattress on the floor, and that they saw none in the room, except that upon the bed. The defendant further testified that two months prior, and also two days prior, to his taking the girl to Omaha, he had come upon and seen her with her 16-year-old brother in the act of intercourse in the barn on the farm in Iowa, but that he had said nothing to either of them about it, and had not reported it to their parents.

When, however, the girl was with him at night in his room at Omaha, he said that she had talked to him of these acts and had stated that her brother was "constantly after her," and that he had then scolded her about it. The girl, on the other hand, positively denies that she had committed such acts, or that she had had any such conversation with defendant.

The mere fact, standing alone, that a mature man and a 9-year-old girl, a mere infant, incapable of making sexual appeal to any man who was not shown to be abnormal, had slept in the same room or in the same bed together, would not, in the light of no incriminating circumstances, raise any presumption of fact that intercourse had taken place, or even be corroborative of a charge, made by the girl, that such an act had been committed upon her. It is necessary that there be some evidence of an incriminating character, more than such mere opportunity to commit the crime, which, aside from the statements of the prosecuting witness, must point to its commission and to the identity of the accused as the person who has committed it.

There was, no doubt, sufficient evidence to submit to the jury the question of whether or not a crime had been committed. The testimony of the girl that she had been abused, together with a showing of her physical condition and the testimony of the physician who examined her, was enough to justify the submission of that question to the jury, but the question here presented is whether or not there is sufficient evidence, apart from the story of the girl and apart from that evidence, which goes alone to the proof of the *corpus delicti*, which will point to the defendant as the guilty party.

Other *direct* testimony than that of the prosecutrix, as to the particular act which constitutes the offense, is not essential to make a corroboration of her story, but corroboration may consist of the proof of such surrounding facts and circumstances as will support her testimony against the accused as to the principal fact, and will identify the accused as the party guilty of the crime. It

may consist of circumstantial evidence. *Nabower v. State,* 105 Neb. 848; *Kotouc v. State,* 104 Neb. 580; *Day v. State,* 102 Neb. 707; *Hammond v. State,* 39 Neb. 252.

The conduct and demeanor of the accused may furnish corroboration. The accused here procured the company of this little girl to Omaha, under the representation that she would be placed in the keeping of his married niece; this representation proved to be false. When arrested with the girl, he explained that he slept upon the floor on a mattress beside her bed; but there is direct evidence, other than the testimony of the prosecuting witness, to show that that statement was also false. It is, at least, an unreasonable story. If the accused thought of this girl only as an infant, there was no occasion for him to sleep upon the floor. If, from his viewpoint, it was an occasion when he should not sleep with her, then it was also improper for him to have the girl sleeping in his room. He testified that he had seen the girl at two different times in the act of intercourse with her brother. If that story was true, and he considered her a girl who was being and could be subjected to that abuse, it is a matter of some incriminating aspect that he should fail to reprimand her, or disclose the fact to her parents, and should, himself, immediately take her to Omaha and keep her at his sleeping quarters for two successive nights, being able to, and when he had represented that he would, leave her with his niece. If his story that he had previously seen the girl in the act of intercourse was thought by the jury to be untrue, then the story could only have been used with the purpose of serving as a shield to himself and of furnishing an explanation of the physical condition of the girl by placing the blame upon another. Furthermore, the testimony of the physician shows that at the time that the physical examination was made it appeared that the girl had been recently abused. For the full period of four days previous to this examination, the accused appears to have been the only man who could have had opportunity to commit the act.

We believe there is sufficient in the record to furnish the necessary corroboration. *Dawson v. State*, 96 Neb. 777; *Fager v. State*, 22 Neb. 332.

The defendant testified that he was impotent and that no evidence was introduced in dispute of that fact. His story, in the manner of its telling, would not inspire belief. He stated he had been injured by a locomotive engine leaving the track, and by being kicked by a horse. The details of these accidents, or the nature of the injuries sustained, are not explained, and no medical testimony was introduced. The testimony of the prosecuting witness and the corroborating circumstances, however, indicate that defendant was not impotent, and that he committed the crime charged. The issue of fact was for the jury.

Defendant further complains that the court refused to give a requested instruction on corroboration, which pointed out specifically that the prosecuting witness could not, by her own statements, corroborate herself. Though it would have been quite proper and, perhaps, advisable to have given the requested instruction, we find no error in the court's refusal to give it, since the matter of corroboration was covered by instructions given. The court instructed, in substance, that there must be testimony on behalf of the state corroborating the testimony of the prosecuting witness, and that in such corroboration, though it was not necessary to furnish, by other witnesses, direct proof that the act was committed, it would be sufficient to show by them such surrounding facts and circumstances as would support her testimony as to the principal fact, and lead to the inference of defendant's guilt.

The judgment of the lower court is therefore

AFFIRMED.