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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1921—JANUARY TERM, 1922.

VOLUME CVII

HENRY P. STODDART,
OFFICIAL REPORTER

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1921

ANNA MABEL SWEAT, ADMINISTRATRIX, APPELLEE, V. WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, APPELLANT.

FILED OCTOBER 14, 1921. No. 21677.

1. **Master and Servant:** ACTION FOR DEATH: NEGLIGENCE. Where, in an action for damages for the death of plaintiff's decedent against the director general of railroads, instituted under the federal employers' liability act, arising out of an alleged violation of the federal safety appliance act, it appears from the undisputed testimony that, while in transit, the automatic coupler to one of the defendant's cars become broken and discarded as unfit for further use, and instead of conveying said "bad-order" car to the nearest point for repair, as required under the statute, the defendant caused said car to be fastened to the car behind it by means of a chain, and, thus fastened, mingled said "bad-order" car with other commercial cars and proceeded to haul it toward its destination at a distant point in a neighboring state, *held*, said act on the part of the defendant to be negligence *per se*.

2. ———: ———: QUESTION FOR JURY: SUFFICIENCY OF EVIDENCE: ASSUMPTION OF RISK. On the claim by defendant that decedent, in being where he was and in doing what he did at the time of the happening of the accident, resulting in his death, was a mere volunteer, and not engaged in the master's service, and that it was the duty of the court to so declare as a matter of law and direct a verdict for the defendant accordingly, *held*, that under the evidence the question was one of fact properly to be submitted to the jury. This having been done, under a proper instruction, and a verdict favorable to the plaintiff returned, *held*, further, that the evidence is ample to support a finding for plaintiff in this respect; *held*, further, that, if decedent was properly

engaged in the master's service at the time and place of the accident, he did not assume the risk of danger incurred thereby, even though he had full prior knowledge of the same.

3. ———: ———: MEASURE OF DAMAGES. In an action for damages against the director general of railroads for the death of plaintiff's decedent, instituted in a state court under the federal employers' liability act, upon a finding for plaintiff, the measure of damages must be settled according to the principles of law as administered by the federal courts requiring the ascertained proceeds of the probable future earnings of decedent to be reduced to their present worth and to include in the verdict to be returned by the jury such sum only, and it is the duty of the state court to so instruct the jury. The defendant having tendered such instruction to the trial court, and the same being refused, and the court giving no other instruction upon the subject, *held* error.

4. ———: ———: EXCESSIVE DAMAGES. In view of the foregoing and in connection therewith, *held*, further, that the verdict and the judgment rendered thereon is grossly excessive, because of which a new trial must be granted.

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

Wymer Dressler, Robert D. Neely and *Paul S. Topping*, for appellant.

M. F. Harrington and *Gerald F. Harrington, contra.*

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and TROUP, District Judges.

TROUP, District Judge.

This is an action for damages against Walker D. Hines, as director general of railroads, brought by Anna Mabel Sweat, the administratrix of the estate of her deceased husband, who at the time of the accident, resulting in his death, was a freight conductor in the employ of the defendant. The action is brought under the federal employers' liability act (U. S. Comp. St. 1918, secs. 8657-8665) and involves the alleged violation of the federal safety appliance act (U. S. Comp. St. 1918, secs. 8605-8650).

The plaintiff's petition contains the usual allegations necessary to maintain the action and prays for a judgment in the sum of $100,000. The defendant admits the death of deceased at the time and place alleged, and that at the time of the accident resulting in his death he was a conductor in the general employment of the defendant, but alleges that at the time and place of the accident the deceased was a mere licensee and volunteer, that any defects which may have existed in the equipment of defendant's car were open and obvious and well known to deceased at the time, and that by reason thereof he assumed the risk of any injury arising therefrom, and denies all other allegations of plaintiff's petition, and all liability for the death of decedent, and prays a dismissal of the action. The reply denies all new matter in defendant's answer.

A trial of the case to a court and jury resulted in a verdict of $55,000. Upon motion by defendant for a new trial the court required as a condition precedent to the denial thereof a remittitur by plaintiff of $15,000 from the verdict, to which plaintiff agreed, and thereupon motion for new trial was overruled, and a judgment rendered for the plaintiff in the sum of $40,000 and costs. The defendant appeals.

The following facts may be regarded as either admitted in the record or established by the undisputed evidence: On the 27th of September, 1919, one Sprague, in the employ of the defendant, was conducting a freight train from Lusk, in the state of Wyoming, to Chadron, in the state of Nebraska. When this train reached a point near Dakota Junction, Nebraska, about 4 miles west of Chadron, the draw-bar at the west end of a car loaded with coal pulled out; the same was taken and thrown to one side on the right of way, and the coal car, thenceforth known as the "bad-order" car, was coupled to the car next in the rear, the same being a flat car loaded with lumber, by means of a chain. Apparently these two cars, the coal or "bad-order" car, and the lumber car to which it was at-

tached, were not to go to Chadron, but were destined to some point north from Dakota Junction on the Black Hills line in South Dakota. Conductor Sprague left the coal and lumber cars at Dakota Junction and came into Chadron and reported to the train dispatcher at Chadron the existence and condition of the "bad-order" car at Dakota Junction. Chadron was the nearest repair shop to Dakota Junction where the defective coupler could be repaired. On the next morning, September 28, one Gale, a freight conductor in the employ of defendant, was ordered from Chadron with a caboose and two engines to proceed to Dakota Junction, there "pick up his train" and proceed northward. In the course of making up this train and in moving or switching the "bad-order" car, the chain coupler thereon broke and was again repaired by another chain. It appears that Conductor Gale received no express orders respecting the "bad-order" car, nevertheless he included the same in his train, assigning it a place just next forward from the lumber car, and being the second car forward from the caboose, and, thus situated, fastened by a chain to the lumber car in its rear, the train proceeded northward as far as Smithwick, South Dakota, arriving there about 10:20 in the forenoon.

In the meantime the decedent, as freight conductor, was engaged in conducting a south-bound freight train from Deadwood, South Dakota, destined to Chadron, Nebraska, and arrived at Smithwick, South Dakota, at 10:10 in the forenoon of the 28th, where he had an order to await the coming of the north-bound train, which arrived ten minutes later; so that at all the times herein mentioned the defendant and the two conductors of both the north and south-bound trains were engaged in the traffic of interstate commerce. As the north-bound train pulled in on its track, the decedent and one of his brakemen stood by on the east side of the moving train, and as the "bad-order" car passed them their attention was attracted to the chain coupling between the coal and lumber cars, and they both immediately proceeded to walk northward the

short distance to where the "bad-order" car had stopped. At or about the same time the conductor of the north-bound train appeared on the opposite or west side of the chain coupling of the "bad order" car, and, for the purpose of inspecting the chain coupling or to readjust the same, or both, both conductors about simultaneously stepped in between the cars from their respective sides, and were there but about a half minute when the engineer of the north-bound train, for the purpose of placing his engine opposite the water tank, a few feet in the rear, to take water, without an order to do so, but, of course, without any knowledge that the conductors were between the cars, suddenly backed up the train, and, there being nothing to prevent the "bad-order" car from coming into immediate contact with the lumber car in the rear, it did so, and both conductors were instantly crushed to death.

In addition to these undisputed facts it must be conceded that the defendant had no lawful right to haul this "bad-order" car as it did, commingled as it was with other commercial cars. It was its duty under the statute, after discovering its defective condition, to take it at once to the nearest repair shop, which was Chadron, four miles east of Dakota Junction, where the defect occurred; but, in the event of hauling it at all, it was the duty of the defendant under the rule governing such a situation to have placed the "bad-order" car at the rear of the caboose. And, had the defendant done either, this accident could not have occurred. So that the defendant, in dealing with this "bad-order" car as it did, was guilty of negligence *per se*. And, further, if the two conductors were rightfully between the cars in pursuance of a duty to the defendant under their employment, they did not assume the risk of the danger incurred in so doing, even though they had full prior knowledge (which, of course, they had) of the defective coupling. So that the liability or non-liability of the defendant in this case depends upon the one question: Was Conductor Sweat, the deceased, justified in going between the cars at the time and under the cir-

cumstances he did, and in pursuance of a duty or obligation devolving upon him, arising out of his general course of employment with the defendant?

The defendant urgently insists that he was not, that he had his own train to look after, and that he was not called upon nor had he any business to meddle with the operation of another man's train, and that in so doing he was a pure volunteer, by reason of which no recovery can be had for the injury incurred.

The defendant itself promulgated a book of rules prescribing the duties and obligations of its various employees in the course of their employment, and distributed the same generally among its employees, one of which was furnished the deceased and was in his possession when he met his death, and from which the following was introduced in evidence:

"1152. In cases of accident to trains, storms, or other causes which may prevent the movement of trains, they will render all possible assistance in restoring normal conditions, whether coming under their particular duties or otherwise, and co-operate with other departments in the protection of the company's property."

A number of the employees of defendant in giving evidence in behalf of the plaintiff were permitted to testify, over the objection of defendant, that it was likewise the custom and practice of defendant's employees generally, when present, to assist each other in every way possible, particularly in the way of promoting traffic in the movement of trains, irrespective of whether they were of the same crew, or in the same department of service. The defendant objected to the admission of such testimony without first requiring the plaintiff to show, if she could, that the defendant had knowledge of such custom. If the rule itself did not furnish a sufficient basis for a finding of defendant's liability, providing the deceased was rightfully within its provisons, then it might have been held error for the court to have received evidence of a custom of employees without first showing that the defendant had

knowledge of the same, and in some manner expressly or impliedly sanctioned it. But if the rule itself, with the record stripped of all evidence of custom, is sufficient for the purpose stated, which we think it is, then the receipt of evidence that it was the custom or practice of employees to observe the rule by complying with its provisions, which is manifestly all the evidence amounts to, would at most be error without prejudice. So that the only question still is: Was the deceased justified in such a measure in doing what he did and being where he was, when the accident occurred, as to render the defendant liable for his death?

Donald Snyder, one of Conductor Sweat's brakemen, was the only eye-witness to the accident, present at the trial and testifying. Snyder and Conductor Sweat were together on the east side of the track as the north-bound train containing the "bad-order" car pulled in on its track, and both, attracted by the chain coupling, walked up to where the car had come to a stop, and Snyder, being present, saw all that transpired respecting the accident. He testified, in substance: Gale (the conductor hauling the "bad-order" car) stepped between the cars first, and Sweat immediately afterward; the draw-bar was out on the south end; the coal car was fastened to the lumber car with a chain; was not very tight; the pin-lifter had been broken off and was hanging down almost to the ground; saw Gale take hold of pin-lifter and give it a jerk, but didn't budge it, then Sweat took hold on east side and tore it off and handed it to Gale, who threw it on the car; first thing I heard Gale say was about taking up a link in the chain, he said he figured on taking up a link in the chain; from place Gale stood he could not pick up pin-lifter; Sweat was the only man from where he was standing; I was going in there to help, but Sweat beat me to it; at time of crash Sweat did not have his hands on anything, he was just turning his body a little; it was about one minute and a half from the time the train stopped until it backed up and the accident happened,

and Sweat had not been between the cars but about half a minute before he was killed.

Owen E. Dugan, in the service of the railroad company for 25 years, part of the time as yardman, testified that there is danger in having a loose pin-lifter in a train; it is barely possible that the pin-lifter would have got under the wheels of the hind car and put it off the track.

One Koske, a brakeman on Conductor Gale's train, being unable to attend the trial, an affidavit of the defendant's counsel declaring what Koske would testify to, were he present in court, was admitted in evidence. It was admitted that Koske would testify that, upon the arrival of their train, he and Conductor Gale got off their way-car with the necessary tools for the purpose of packing a hot box on a car forward from the "bad-order" car; that he, Koske, was just opposite the opening between the cars where Gale and Sweat were killed when the engineer gave three short whistles of the engine, signifying the intention to back the train, which Koske distinctly heard; that neither Gale nor Sweat were between said cars for any purpose in connection with repairs to said coupling, but only happened to see each other on opposite sides and came into the opening for the sole purpose of holding friendly conversation; that the "bad-order" car was properly chained up and required no repairs; that Koske was in position to hear the conversation between Gale and Sweat as they stood between the cars, and that same did not pertain to any repairs to draw-bars or other parts of the train, and that Gale did not say to Koske that they would take up a link in the chain coupling, or make any other remark to indicate intentions to make any repairs to said "bad-order" car.

Witness Snyder, whose testimony respecting the accident is above related, testified in rebuttal that, when the collision occurred, Koske was not at the opening between said cars, but was half a car length forward of the chained car, and that, when collision occurred, "I hollowed to him to pull the air, and he pulled the air on the

car ahead of this car of coal," and that he promptly did so, which, if true, indicated that he must have been at or near the forward car brake when the order was given.

The above comprises the substance of all the testimony relating to the immediate scene of the accident. At the close of the trial the court, after stating certain uncontroverted facts, instructed the jury as follows:

"On this state of facts only two questions arise in this case: First, was the deceased, Norman Edward Sweat, injured and did he die as the result of said injuries while he was an employee of the defendant and while discharging a duty which he owed to the defendant? If the plaintiff has established by a preponderance of the evidence that he was injured and died as the result of the injuries by reason and on account of the violation of the safety appliance act, and that at the time he was injured he was engaged in a duty which he owed to the defendant as an employee of defendant, then the only question remaining is the amount of damages. Now, if you shall find from the evidence that the deceased was a mere volunteer or licensee, as claimed by defendant, and that it was not his duty to be between the defective car and the lumber car, then there could be no recovery in this case. Whether he was actually engaged in the discharge of his duty as an employee of defendant at the time he was injured is a question for this jury to determine upon the evidence, and on this question the plaintiff must establish by a preponderance, which means the greater weight, of the evidence, that at the time Norman Edward Sweat was injured he was an employee of the defendant and as such employee was engaged in the proper discharge of his duties to defendant. If that has been proved by a preponderance of the evidence and to your satisfaction, then the only question left for you to consider is the amount of damage. If, however, the plaintiff has failed to establish by a preponderance of the evidence that the deceased, Norman Edward Sweat, was an employee of defendant, engaged in the proper discharge of his duties

toward defendant, but was a mere volunteer or licensee, then your verdict should be for the defendant. If the evidence be evenly balanced on that question, it will be your duty to find for the defendant. But if it be shown by a preponderance of the evidence that deceased was such employee, and that in the discharge of his duty as such employee he was injured and killed on account of the defective condition of this 'bad-order' car, then you should find for the plaintiff and award such damages as will compensate his widow and children for the loss sustained."

As before stated, the jury returned a verdict for the plaintiff. Was the instruction given by the court and above quoted a correct statement of the issue to be determined, and was a verdict for the plaintiff sustained by the evidence? We think the issue submitted to the jury by the above instruction is a correct statement of the law and the facts, and that a verdict for the plaintiff is sustained by the evidence.

The defendant insists that Sweat in going between the cars, whether for the purpose of inspecting or readjusting the coupling, or otherwise, was a mere volunteer, and for that reason no recovery can be had. We do not see how it is possible to so hold in face of the rule promulgated by the defendant hereinbefore referred to, prescribing the duties of employees in such cases. It is no answer to the apparent willingness of the deceased to assist, if assistance was needed, that he had not been invited to do so, or that the crew of the train containing the "bad-order" car was able to take care of their own trouble. The rule does not require an employee before he shall assist or offer to assist, where apparently assistance may be needed, to decline such service until he shall be specially invited, or unless he shall have first determined that no one who perhaps stands in a closer relationship to the service to be performed is available. Such an attitude on the part of an employee would be a violation of both the letter and the spirit of the rule, and would result in an utter

demoralization of the object and purpose intended to be attained thereby. The deceased, in the discharge of his duty to the defendant under the rule, was justified in offering to assist, as he did, in the inspection and readjustment of the defective coupler, and we are bound to presume, in the absence of evidence to the contrary, that what he did in that regard he did in good faith and in observance of a duty required of him by his master; and to penalize him because of his faithfulness in this respect would be both unwarranted and unjust.

In this connection what the supreme court of the United States said in *Spokane & I. E. R. Co. v. Campbell,* 241 U. S. 497, 508, is applicable here:

"It is most earnestly insisted that the findings establish that Campbell was not in the course of his employment when he was injured, and consequently that judgment could not properly be entered in his favor upon the cause of action established by the general verdict. This invokes the doctrine that, where an employee voluntarily and without necessity growing out of his work abandons the employment and steps entirely aside from the line of his duty, he suspends the relation of employer and employee and puts himself in the attitude of a stranger or a licensee. The cases cited are those where an employee intentionally has gone outside of the scope of his employment or departed from the place of duty. The present case is not of that character; for Campbell, as the jury might and presumably did find, had no thought of stepping aside from the line of his duty. From the fact that he disregarded and in effect violated the order as actually communicated to him, it of course does not necessarily follow that he did this wilfully. The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or in-

attention, or failure for some other reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence on his part, and not a departure from the course of his employment."

The court then speaks of some of the startling consequences that would ensue if held otherwise, and closes by saying: "The unsoundness of the contention is so apparent that further discussion is unnecessary."

We have examined the several cases cited by the defendant in support of its view of the present case, but, excepting three to be referred to presently, none of them, in so far as we have been able to discover, involves in any way the federal safety appliance act, nor were the courts deciding them confronted with a rule of the defendant company prescribing the duties and obligations of employees as in the case at bar, and are otherwise so dissimilar to the instant case as to be regarded without application. Nor do we believe that the application of any of the three cases referred to is sufficient to justify an extended review of the same, particularly in view of the disposition we feel compelled to make of this case on another point.

The case of *St. Louis & S. F. R. Co. v. Conarty,* 238 U. S. 243, the one, perhaps, most relied upon by defendant, involved a consideration of the safety appliance act, but was not affected by a rule of the defendant prescribing the duties of employees, etc., as in the case at bar. We think but a casual examination of this case will readily show that it can in no way affect the ruling required to be made in the instant case, particularly when read in connection with the later case of *Louisville & N. R. Co. v. Layton,* 243 U. S. 617. The same may be said of the case of *Dodge v. Great W. R. Co.,* 164 Ia. 627, wherein the plaintiff sought to invoke the provisions of the safety appliance act, but without success. The case of *Byram v. Illinois C. R. Co.,* 172 Ia. 631, did not involve the safety appliance act, but in the effort to save himself from the

charge of being a mere volunteer plaintiff sought to invoke a rule of the defendant company which, however, plainly appeared to have no application to the act plaintiff was engaged in performing when the accident happened. We are convinced that the ruling in the case at bar conflicts in no way with any principle of law decided in any of the cases above cited.

We are likewise of the opinion that upon the facts disclosed by the evidence in the present case the defendant is liable for the death of deceased. This disposes of the various other assignments of error relating to instructions given and instructions refused, pertaining to this phase of the case.

The remaining principal assignments of error are: (1) That defendant did not have a fair trial in the lower court; that the whole trial was one of emotion and not a fair and just consideration of the rights of the parties; that there was a stage setting cunningly indulged in by the friends of the plaintiff and her deceased husband in the interests of plaintiff and to the disadvantage and prejudice of the defendant, which the defendant was powerless to overcome, all of which culminated in the excessive verdict of $55,000, reduced by the court to $40,000; (2) that the verdict, even as reduced, is grossly excessive; (3) that the court erred in not instructing the jury that if they found for the plaintiff they should reduce to its present worth the financial loss which the evidence showed the plaintiff, suing for herself and next of kin, had sustained, and return a verdict for that sum only.

We think the defendant is entirely right on the last two assignments and has much just reason for complaint under the first one, and for all of which we think a new trial must be granted. The aforesaid assignments being so related to each other as they are, may be considered together. We have carefully examined the record, which discloses an account of things complained of occurring at the trial, of an unusual nature, for the most of which the trial court can scarcely be held responsible, but

which must be well known to counsel, as the same are specified in defendant's brief, and we feel compelled to say that there is in it much that merits disapproval—things which ought to have been avoided in common fairness to the defendant, but which indulged in could have but one effect, that of unjustly prejudicing the defendant and precluding it from a fair and even chance with plaintiff before the jury. In the belief, however, that they, or similar incidents, will not occur upon a retrial of the case, we do not stop to particularize further in this respect.

As before stated, we think the verdict, even as rendered, is grossly excessive, and its excess is to be accounted for largely, if not entirely, in what we believe was the court's error in refusing to instruct the jury that it was their duty to reduce the ascertained proceeds of the probable future earnings of deceased to their present worth and include in their verdict that sum only. The defendant tendered an instruction of that import, but the same was refused by the court, and it gave no instruction on the subject. That the defendant was entitled to such an instruction, and that, if tendered, it was the duty of the court to give it, is, we think, borne out by all of the federal authorities on the subject, authorities which are controlling upon the state courts on the measure of damages in actions based upon the federal employers' liability act and federal safety appliance act, as was the action in the case at bar. See *Chesapeake & O. R. Co. v. Kelly,* 241 U. S. 485; *Chesapeake & O. R. Co. v. Gainey,* 241 U. S. 494. In both of these cases the Kentucky court of appeals was reversed, and for the sole reason that the state court rejected the present worth theory and approved the verdict of the jury on which a judgment was entered representing the whole bulk sum of future earnings as payable at once. See, also, *Louisville & N. R. Co. v. Holloway,* 246 U. S. 525; *Vicksburg & M. R. Co. v. Putnam,* 118 U. S. 545; *Pierce v. Tennessee Coal, Iron & R. Co.,* 173 U. S. 1.

The plaintiff insists that when the court instructed the jury that they can award such damages only as will "compensate" the plaintiff for the loss sustained, as the court did in the case at bar, the jury's verdict must be presumed to be their estimate of what the actual and true compensation is, valued at its present worth. That is virtually what the Kentucky court of appeals said in justification of its approval of a bulk verdict. But the supreme court of the United States said "the theory is erroneous," and reversed the state court. The instructions of courts in such cases almost invariably contain the direction to the jury, in one form or another, as did the courts in the Kentucky cases above referred to, that it is their duty to award such a sum only as will fully and fairly "compensate" the dependents. But we think neither court nor lawyers, much less a jury, understand from such instruction that only a sum equivalent to the present value of the aggregate of future earnings is to be awarded. That this is the correct rule, and that any other would be unwarranted, may be illustrated by the verdict in the present case as demonstrated in defendant's brief, namely: If the $40,000, the amount of the judgment rendered in this case, were turned over in bulk to the dependents herein, by placing the same at 6 per cent. simple interest, it would yield to the dependents annually a sum equal to $360 more than they ever received from the deceased in his lifetime, and yet at the end of all their lives they would still have the $40,000 intact. This is more than the law affords. As we said before, the law in such cases pretty definitely defines and limits the elements of damage to be considered, and, except in rare cases, those damages are capable of being computed with almost mathematical certainty. This is not a case where the bars may be let down and the jury allowed to scamper into the field of wild speculation and return a verdict in any sum that may suit their fancy. The plaintiff sued for $100,000, and her counsel told the jury he "wanted the largest verdict ever returned in Dawes

county." The jury not only granted his request, but went several better, and, apparently believing there was no limit, returned a verdict for a sum greater by $15,000 than the court, and even counsel himself, believed plaintiff was entitled to receive.

Except for the somewhat unusual element of damages injected in the case, alleged to result from being deprived of a few simple ordinary domestic services the deceased may have been accustomed to perform in and about the home, an element which when measured in money value, as it must needs be, is always of a most doubtful and uncertain nature at best, except, we say, for this element alone, the evidence furnishes a basis from which the damages to be awarded can be ascertained to almost a mathematical certainty. Applying the formula for obtaining the present worth on the basis of the annuity tables prescribed in the Nebraska statute, which has been the method followed in this state for a great many years, and assuming, as the evidence shows, that deceased earned $200 a month, which is probably the apex of war-time wages, and that his personal expenses did not exceed $30 a month, so that he contributed to his family $170 a month, or $2,040 a year, and assuming, further, that he would have continued doing so throughout his whole 30 years' expectancy of life, the present worth of the entire proceeds on the ordinary 6 per cent. basis would be exactly a fraction less than $21,857.15.

We do not wish to be understood as saying that this is the exact sum, no more nor no less, which should be awarded for future earnings. It depends on the rate of interest at which the proceeds should be computed, and perhaps whether or not the interest should be computed on the system of annual rests, but what we do mean to say is that this is the principle on which the award for future earnings should be made, and, approximately speaking, the above sum cannot be far from the just amount to be awarded in this case.

If, perchance, plaintiff should claim, that we have a

right to assume that the jury found that the deceased would have outlived his expectancy and thereby increase the aggregate earnings proportionately, the answer is that there is no justification for such claim. For the jury to have done so, with 30 years intervening between decedent's death and the end of his expectancy, would be the purest speculation. Too many things are likely to intervene to shorten life, and few, if any, to lengthen it during so long a time. If it were a case where the deceased had already approached the end of his expectancy, and immediately before his death he was shown to be a person of sound and vigorous physical and mental health, there might be some justification for one to conclude that such person would outlive his expectancy a few years, but in our opinion no such theory can be indulged in where the time intervening between the death of one and the end of his life expectancy is so great as that existing in the present case.

Aside, then, from that which might properly be allowed for the loss of simple, domestic services before referred to, of the money value of which no evidence was offered, it is difficult to see how the judgment could be greater than the amount above indicated. While the domestic services referred to may be invaluable, estimated from a standpoint of sentiment and parental association, measured by a money value, as they must be, they cannot be more than inconsiderable under the evidence in the case. So that even allowing a most liberal sum for this item would still leave the judgment rendered grossly excessive.

We regret that it seems necessary to order a new trial of the case, and were it not for this item of domestic services above mentioned, the court could readily adjust the amount to be awarded with exact justice to both parties, but, because of this and the errors pointed out in the record, the judgment must be reversed and a new trial ordered.

REVERSED.

MOLLIE RATHBUN, APPELLEE, V. GLOBE INDEMNITY COMPANY, APPELLANT.

FILED OCTOBER 14, 1921. No. 21692.

1. Insurance: ACCIDENT POLICY: CONSTRUCTION. The several provisions contained in an accident insurance policy will be given a practical and rational construction, one consistent with reason and common fairness, and with a view to avoiding, rather than enforcing, a forfeiture, if the terms of the instrument will fairly and justly permit it.
2. ———: ———: ———. Where the language of a special provision in an accident insurance policy is susceptible of but one construction, and that construction inevitably leads to an unreasonable or absurd result and substantially defeats the object and purpose of the entire contract, such provision will be rejected as inoperative, and, ignoring the same, the court will look to the whole instrument and gather therefrom the manifest intention and purpose of the parties and adjudicate accordingly.
3. ———: ———: TOTAL DISABILITY. Where one insured under an accident policy received an injury to his hip through accident, from which he suffered severe pain and lameness for the first three days thereafter, when a two weeks' respite from any conscious ill effects from the injury intervened, during which time the insured attended to the most, if not all, of his professional duties as a surgeon, but at the end of which time pain and lameness reoccurred and continued with increasing severity for a period of about 2½ months, during which time the insured performed some of his professional labors, but under more or less stress of pain and discomfort, being compelled to have his assistants do many things in the course of operations upon patients that always before he had been accustomed to do himself, and at the end of which 2½ months the insured retired entirely from any attempt in the performance of any and every duty because of pain and suffering from the injury, and continued to suffer with increased severity until three months later, when he died of sarcoma, a malignant disease, involving the hip joint, which the evidence conclusively shows was the direct and immediate result of the accident sustained six months previous, the injured *held* "to be totally and continuously unable to transact all business duties from date of accident," as this language, properly construed, is employed in the policy.
4. ———: ATTORNEY'S FEES. The sum allowed plaintiff as attorney's

fees by the lower court considered, and same reduced to an amount equal to 10 per cent. of the judgment recovered, exclusive of costs, and without interest.

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

Montgomery, Hall & Young, for appellant.

Courtright, Sidner, Lee & Jones, contra.

Heard before MORRISSEY, C.J., ROSE and FLANSBURG, JJ., DICKSON and TROUP, District Judges.

TROUP, District Judge.

This is a suit by the beneficiary upon an accident insurance policy indemnifying the insured against loss from disability resulting from an accident, including loss of life, hospital and surgical expenses. The insured sustained an accident, and, it is alleged by the plaintiff, died as a direct result thereof.

The following brief history of the accident and events following may be considered established by the evidence: At about noon on a day between the 1st and the 5th of March, 1919 (no witness being able to give the exact date), Doctor Rathbun, the deceased, then a practicing physician and surgeon in the city of Fremont, Nebraska, being alone in his automobile, drove up in front of the Fremont Hospital. Upon alighting from the footboard of his car, either from a misstep or by slipping upon the ice on the pavement, he was caused to fall, striking his right hip either upon the pavement in the street or the curb close by. For a moment he lay where he had fallen, then arose and, slightly limping, entered the hospital. For the next two or three days he suffered severe pain in his right hip; the pain then subsided, and for a period of two weeks it was such that he gave it little or no attention. At the end of two weeks the pain and lameness returned, causing much inconvenience when moving from a sitting to a standing posture. This was followed by pains in the rectum on the right side of the pelvis. From

that time on he continued to suffer increasing pain and lameness, submitting himself to a rectal examination, both by Fremont and Omaha surgeons, but without a discovery of the trouble, and, growing worse, he retired to his bed for two weeks, at which time another examination was made and revealed a tender swelling or mass in the region of the hip, which gave the patient much pain. In company with another physician he went to Mayo Brothers and submitted himself to examination and treatment, but returned unimproved, and soon thereafter became decidedly worse. Upon another examination by local surgeons the tender mass before mentioned had increased four or five times in size and was extremely tender. The patient was then taken to Doctors Oxnard and Percy, of Chicago, and was again operated upon, this time by an entrance into the abdominal cavity and down deep into the hip, where was readily located this tender mass, pronounced malignant in nature; removing this and properly preparing the parts, radium was applied by a radium specialist. At the end of two weeks the patient returned to Omaha, where he underwent further X-ray treatment, and after spending a week at his home in Fremont he returned to Omaha and the Clarkson Hospital, where he lingered until his death, September 5, 1919. A post-mortem examination made by Doctor Johnson, of the University of Nebraska, and witnessed by some of the leading surgeons of Omaha, revealed malignant growths along the sinus, a complete disintegration and destruction of the bony floor or bottom of the articular cavity of the head and neck of the hip bone, and other like conditions of malignant disease, which all the physicians and surgeons present pronounced sarcoma; the same being the direct result of the injury to his hip received by his fall in March, 1919.

These facts, among others, are in substance set forth in plaintiff's petition, wherein it is further alleged that the deceased was totally and continuously unable to transact all business duties of his profession from the date of the

accident until his death, although for a time he undertook to do, and occasionally did, some surgical work until the month of June, 1919; that plaintiff made proper proofs of death of the insured and the cause thereof, and demanded payment of all disability claimed by the plaintiff, amounting to $8,242.90, composed of the following items alleged to be due and payable under the various provisions of the policy: Hospital expense, $125; disability from March 1 to September 5 at $25 a week, $617.90; and for loss of life, $7,500; totaling $8,242.90, together with a reasonable attorney's fee.

The defendant, in its answer, admits the issuance of the policy to deceased, notice of the death of the insured occurring on September 5, 1919, from sarcoma, but denies all other allegations in plaintiff's petition and any and all liability under the policy.

By agreement of parties the case was tried to the court without a jury. The only testimony at the trial was that adduced on behalf of the plaintiff. The defendant cross-examined plaintiff's witnesses, but otherwise offered no evidence. Upon submission of the case the court found for the plaintiff for the full amount prayed for, with interest and costs, together with an attorney's fee, with interest thereon, and rendered judgment accordingly. The defendant appeals.

Several errors are relied upon by the defendant for either the reversal or modification of the judgment of the court below, and, first, because it is established by the evidence that the insured died of sarcoma, a disease, which was the direct result of the bodily injury sustained by the fall of the deceased in March, 1919, and that under special provision A of the policy no recovery for death or disability can be had in such case. Special provision A, in so far as it applies to the instant case, is as follows:

"This policy does not cover * * * loss resulting from bodily injury caused or contributed to, directly or indirectly, by disease, or *vice versa.*"

The *"vice versa"* provision, as interpreted by the defendant company, and we presume correctly, is as follows:

"This policy does not cover * * * loss resulting from disease caused or contributed to, directly or indirectly, by bodily injury."

It is urgently insisted by the defendant that the evidence establishes all that is claimed for it, as above stated, that the language of the above quoted provisions of the policy is perfectly plain and unambiguous, and must be held to mean exactly what they say, and that, if so construed, plaintiff cannot recover for the disability or death of the insured. We must agree with the defendant that the evidence conclusively shows that the insured died of sarcoma, a disease, and that the disease from which he died was the direct result of the bodily injury sustained from the accident occurring to him in March; but we are not able to agree that the provisions of the policy above quoted forbid a recovery for the disability and death of the insured in this instance. We will, however, cordially agree with counsel for defendant in their argument that, in approaching the construction of an insurance policy, the court should have in mind the same general principles which obtain in the construction of any other contract, in so far as that the language employed should be given its plain, natural and ordinary meaning, and not be twisted into an unnatural or exceptional meaning merely to avoid a forfeiture, and that, when such construction is demanded by the plain and unequivocal terms of the instrument, the courts, of course, should have the moral courage to so construe it, regardless of the consequences. But this rule, of course, presupposes the nonexistence of two very important factors in the equation: First, that such construction will not end in an unreasonable or absurd result; and, second, that it will not defeat the manifest intention of the parties and the very object and purpose they had in entering into the contract at all. If the construction indicated will inevitably lead to either one or both of the results above stated, then such construc-

tion will be avoided, and, if the provision to be construed will admit of no other construction than the one leading to and ending in such result, the provision itself will be rejected as inoperative, and, ignoring the special provision, the court will look to the whole instrument, and, if possible, in justice to all parties concerned, gather therefrom the real and evident intention and purpose of the parties in respect to the particular question involved, and thus enforce or decline to enforce the contract accordingly. This much would seem to result from the very necessities of the situation. See on this subject 13 C. J. 521, secs. 482-486, and cases cited, *L'Engle v. Scottish Union & Nat. Fire Ins. Co.*, 48 Fla. 82, *Merrill v. Bell*, 14 Miss. 730, and *Stockton v. Turner*, 7 J. J. Marsh. (Ky.) *192.

Let us consider the effect of this *"vice versa"* provision in the light of the evidence in the case before us. One of the medical witnesses testifying for plaintiff defined the term "disease" as "any abnormality of the body resulting in a disturbance of the function or functions of the particular part affected; any general disturbance of the general functions of the body; a cut finger would be a disease." While it seems to the writer that the definition thus given is somewhat extreme and almost too comprehensive in its scope, yet the defendant has not seen fit to controvert it, nor are we prepared now to say that it is not sustained, in a substantial measure, by the standard medical authorities and leading lexicographers, as well as by decisions of some of the courts. See *Mutual Life Ins. Co. v. Simpson*, 88 Tex. 333.

Assuming, then, that the definition as above given is acceptable to the defendant and applicable to the term in question, as used in its policy, then, except accidents which result in instant, or almost instant, death, we can scarcely conceive of a case arising where the insured sustained a bodily injury by accident in which the insurer would not be absolutely exempt from liability for disability or death by virtue of the so-called *"vice versa"*

clause of the policy above quoted, under the interpretation insisted upon by the defendant company. We think it is fair to say that the number of persons insured who sustain an accident resulting in instant, or almost instant, death, as compared with the number insured who sustain bodily injury by accident resulting in disease, in one form or another, more or less prolonged, and yet directly traceable to the accident and in consequence of which disability, and perhaps death, follows, is certainly not greater than a ratio of 1 to 10; so that for every 1, 10 or 100 who would be entitled to recover under defendant's policy, there would be 9, 90 and 900 who could not recover a dollar for either disability or death because of this special provision referred to.

It seems to us that a theory which inevitably leads to such damaging results to the insured as would this is so unreasonable, absurd and destructive of the very object and purpose of the contract, as well as the manifest intention, or at least the supposed manifest intention and understanding of the parties who entered into it, that such a construction cannot be allowed; and, if the language of the provision is susceptible of no other construction, then that the provision itself cannot stand. We are of the opinion that in this instance there is no alternative, and that the clause in the defendant's policy known as the "*vice versa*" clause is inoperative and of no effect. But, taking another view of it, we think it must be conceded that all the authorities hold that a loss resulting from disease which is the direct and immediate result of a bodily injury sustained through accident is precisely the same as a loss resulting from the bodily injury itself. So, then, this provision will be precisely the same as though it read: "This policy does not cover * * * loss resulting from bodily injury caused or contributed to, directly or indirectly, by bodily injury"—which of course is a palpable absurdity.

If this disposition of the provision in question is the inevitable result of a just consideration of the same, the

defendant company has less reason to complain from the fact that it did not express in words in its policy the interpretation it expected to place upon the words *"vice versa."* This much at least the company should have done in fairness to the assured, so that he might at least have had the opportunity to read its interpretation as expressed in exact words, and thus act with knowledge in that regard. This the company did not do, but at best left it to conjecture, so far as the assured is concerned, as to what interpretation should be given to this phrase. So that, even in this view, the insured would be justified in believing that no interpretation would be given this phrase that would, except by a rare chance, wholly defeat the sole purpose and object of the contract.

But, as before stated, eliminating the provision in question does not necessarily affect the validity and operation of the contract as a whole, but the whole instrument may be examined to determine, if possible, the real intention of the parties to the contract and the object and purpose they had in entering into it. Such an examination of the policy introduced in evidence readily discloses ample provisions whereby the defendant company undertakes to indemnify the insured against loss caused by bodily injury sustained through accidental means, including loss of life, and inasmuch as the defendant frankly admits that the evidence conclusively shows that the insured died from sarcoma, a malignant disease, which disease was the direct and immediate result of a bodily injury sustained by the insured through the accident alleged, this is all that is necessary to establish the defendant's liability, so far as the point now under consideration is concerned.

In this view of the case, it becomes unnecessary to inquire what facts and circumstances are necessary to exist in order that the disease of which the insured died will be held to be the result of a bodily injury sustained through accident. If authorities upon that point were necessary, they may be found in *Ward v. Ætna Life Ins.*

Co., 82 Neb. 506, and *Delaney v. Modern Accident Club*, 121 Ia. 528, and cases therein cited.

The second assignment of error is that the court erred in allowing the item of $7,500 for the death of the insured, because claimant may not recover therefor for the reason that death did not occur within 90 days from date of accident. The provision of the policy sought to be invoked reads:

"Section 1 (a). If such injury, within 90 days from date of accident, irrespective of disability, causes the insured to sustain a loss enumerated in this section, the company will pay the sum specified for such loss as follows: For loss of life, $7,500."

The plaintiff, however, disclaims any attempt to recover under the above provision, admitting that the insured did not die within 90 days from date of accident, but relies wholly upon subdivision (d) of the same section, which reads as follows:

"(d) If such injury, from date of accident, causes the insured to be totally and continuously unable to transact all business duties and, during the period of such disability and within 208 weeks, results in a loss enumerated in this section, the company will pay the sum specified for such loss and in addition, until the loss occurs, indemnity at the rate per week of $25."

We are of the opinion that if claimant shows herself entitled to recover under subdivision (d), if that subdivision stood alone, then she may recover under said subdivision, notwithstanding more than 90 days had elapsed from the date of accident to the date of death, the limitation in subdivision (a), for the reason that subdivision (d) imposes new and additional conditions precedent to a recovery not contained in subdivision (a). Passing over the defendant's second assignment, we come then to the consideration of subdivision (d), as above quoted, which is involved in the defendant's third assignment of error.

The defendant claims the court erred in holding that

the insured was totally and continuously unable to perform all of his business duties from date of accident, about March 1, 1919, until his death, September 5 of the same year, and that it is impossible to correctly so hold under the uncontradicted evidence in the case.

A proper solution of the controversy on this point, therefore, must depend upon determining, under the facts and circumstances disclosed by the evidence, when one insured sustaining an injury through accident may be said to be rendered "totally and continuously unable to perform all of his business duties from date of accident." The evidence upon this point shows that, prior to the injury in question, Doctor Rathbun had enjoyed excellent physical and mental health and was unusually active and industrious in the practice of his profession of surgery; that for the first few days following the injury he suffered much pain, but at the end of which time the pain subsided for the space of about two weeks, the doctor, in the meantime, continuing the practice of his profession as before, performing various operations coming to him, both of major and minor character, in the city, as also in surrounding towns and country, but at the end of that time, upon the pain and lameness returning, the doctor, although endeavoring to continue much of his work, was compelled to do so under more or less stress and discomfort by reason of his injured hip, and as his pain and discomfiture increased his professional labors gradually decreased until the month of June, 1919, when he left his office and never returned, and from which time he grew worse until his death, September 5 of the same year.

Of course, this provision of the contract, as all other parts thereof, must be given a practical and rational construction—one consistent with reason and common fairness, and with a view to avoiding a forfeiture, rather than enforcing one, if the terms of the instrument will fairly and justly permit it.

It appears from the evidence that after the first three days of severe pains there was an intermission of about

two weeks in which the doctor suffered but little or no inconvenience from the injury, and during which time he was able to, and did, perform his professional duties much the same as before the accident, but at the end of which time the pains and lameness returned and increased in severity to the end. Passing for the present the two weeks intermission, and coming to the time when pain and lameness reoccurred, the detailed evidence of Doctor Buchanan, who was with him every day after the 22d of March, and who, with one Doctor Painter, was closely associated with Doctor Rathbun, shows that whatever professional duties Doctor Rathbun undertook from that time on he did with difficulty and much discomfort to himself; he would sit while in the performance of some part of an operation, a thing he was never known to do before; he would ask his associates to do many things in and about the operation that always before he was accustomed to do himself, at which time he would "go off and sit down or lie down," also a thing he had never been known to do before; and that, in the opinion of Doctor Buchanan, Doctor Rathbun, during this period, was not in a fit condition, either physically or mentally, to perform a surgical operation, notwithstanding the operations performed during that period for the most part proved successful.

Now, shall it be said that because Doctor Rathbun performed some professional duties after his injury, under the stressful conditions it is shown he did perform them, and which conditions continued to increase until they culminated in his death, a recovery for his death shall be wholly defeated by this "total disability" clause in the policy? We think not. As was said in the case of *Fidelity & Casualty Co. v. Joiner,* 178 S. W. (Tex. Civ. App.) 806:

"We agree it conclusively appeared, as claimed, that the assured after he suffered the injuries performed duties pertaining to his occupation, but we do not agree that his doing so established as a matter of law that he

was not 'totally disabled' within the meaning of those words as used in the policy. It not infrequently happens that one suffering from injuries to his person performs duties pertaining to his occupation which he is wholly unable, in the reasonable and proper sense of those words so used, to perform; and that, as a consequence, because he was unable to do same, he suffers death or an aggravation of his injuries. In a case in which such a result follows the performance of the duty, the performance thereof, instead of establishing that the assured was able to perform it, it seems to us, would establish the contrary. We think therefore that to construe the language in the policy what appellant contends it means would be unreasonable."

Surely the defendant will not contend that it is entitled to an absolutely literal construction of the clause in question, and that the performance, by the insured, of anything whatsoever in the line of his business, or professional duties, no matter how trivial, or under what circumstances it may have been performed, would bar a recovery. Such a claim would be unreasonable, yes, even absurd. To illustrate: Suppose Doctor Rathbun had been confined to his bed unable to rise therefrom because of severe pains and lameness he was suffering from the injury, yet under these conditions he might still be able to consult with and prescribe for patients, and even perhaps have dressed a wound, and that he had done so, would the defendant or any one say that for that reason he was not a subject of "total disability," under a proper and reasonable construction of these words as employed in the policy? We think no one could contend for a thing so unreasonable. To do so would be equivalent to a claim that "the defendant would be liable in no case unless, by the accident, the insured should lose his life or his reason." *Thayer v. Standard Life & Accident Ins. Co.*, 68 N. H. 577.

We think the evidence shows that the conditions under which the insured undertook to prosecute his professional

duties after the latter part of March were much the same in character as those suggested in the illustration, which he might have done in bed, although perhaps not so extreme. Except for the part the doctor took in actual operations, what he might have done in bed he undertook to do upon his feet and while sitting down at a time when under all probability he ought to have been in bed. Should the insured be penalized because, in total ignorance of the serious character of the injury he had received, he undertook to perform, as best he could, under distressing conditions, some of his professional duties, when he might reasonably not have attempted to do any work at all, and thus, without question, have held the insurer liable for loss from disability? Upon this point what the appellate court of Indiana said in the case of *American Liability Co. v. Bowman,* 114 N. E. 992 (65 Ind. App. 109), is apt:

"Under an accident policy providing for indemnity for total disability during the period that the insured was totally and continuously from the day of the accident disabled and prevented from performing every duty pertaining to any business or occupation as a necessary result of the injury received, an injured workman can recover for the entire period in which he was, as a matter of fact, totally disabled, though he returned to work for a short time after the accident, when he was in such a condition that he could perform only part of his duties and he might reasonably not have attempted to do any work, since a construction of the policy which would defeat recovery because of a *bona fide* attempt to work would tend to penalize such an attempt and encourage fraud and imposition on the company by remaining away from work when able to perform it."

For further illustrations upon this point, as well as to the construction the courts have given to the words "every" duty and "all" business duties, and to the phrase "any and every" kind of business, and other similar words and phrases frequently contained in accident insurance

policies, see *Metropolitan Casualty Ins. Co. v. Cato,* 113 Miss. 283; *Commonwealth Bonding & Casualty Ins. Co. v. Bryant,* 185 S. W. (Tex. Civ. App.) 979; *Gross v. Commercial Casualty Ins. Co.,* 90 N. J. Law, 594; *National Life & Accident Ins. Co. v. O'Brien's Exrx.,* 155 Ky. 498; *North American Accident Ins. Co. v. Miller,* 193 S. W. (Tex. Civ. App.) 750.

Recurring now to the two weeks' intermission in which the insured suffered but little or no pain, and consequently but little or no interruption in the prosecution of his ordinary professional labors, between the first three days of severe pain and the end of the two weeks, when pain and lameness returned, it is claimed by the defendant that this fact itself conclusively shows that the insured was not "continuously unable to transact all business duties from date of accident," and that the plaintiff is therefore not entitled to recover for the death loss under the provision above quoted. But, again, we feel compelled to hold, under the authorities above cited and others to be cited hereafter, that neither can this point be sustained.

We think it may be said to be a matter of common knowledge that in a great many, perhaps in a large majority of, instances in which bodily injuries are received, the real nature and extent of said injuries do not reveal themselves until a greater or less time in the future and after the first pains from the hurt shall have passed away. The injured part often lies dormant for an indefinite period, with but little or no consciousness of its existence by the person injured, although from the very moment of the accident, perhaps, the processes of nature may be busily engaged in developing what may have seemed to be but a slight hurt into a most serious and perhaps fatal injury. In such a case it cannot be said that the injury is not continuous and from the date of the accident, nor can it fairly or justly be said that the disability is not continuous and from date of the accident, because the injured party enjoys a brief respite from pain

and suffering, only to be endured to a greater degree when perverted nature again asserts itself. Occurring then under the circumstances stated, to hold that a brief respite from the conscious ill effects of an injury during which respite the insured was able to transact the most, if not all, of his ordinary business should bar recovery, seems to us neither reasonable nor just. It is the undisputed evidence that at the end of two weeks the injury to the insured grew worse and worse until it culminated in his death five months later. All of the medical witnesses testified that the insured died of sarcoma, a malignant disease, and that the disease had its origin in the injury sustained, and that it was a gradual development from the date of injury to the date of death.

In the case of *Order of United Commercial Travelers v. Barnes,* 72 Kan. 293, "immediately" was the word employed in the policy, instead of "date of accident" in the case at bar. It must be admitted that the former term bears as strong, or even stronger, significance as to the time of beginning than does the latter, and yet in that case the court held: "The word 'immediately', as applied to the language of the indemnity contract stated in the first paragraph of this syllabus is not synonomous with 'instantly,' 'at once,' and 'without delay.' A disability is immediate, within the meaning of such contracts, when it follows directly from accidental hurt, within such time as the processes of nature consume in bringing the person affected to a state of total incapacity to prosecute every kind of business pertaining to his occupation." In the opinion the court said (p. 305): "If the conditions of the contract can be extended so that the word 'immediately' does not mean 'instantaneously,' 'at once,' and 'without delay' (as all courts agree), then a greater stretch of the conditions cannot be said to be unreasonable in allowing for the period that nature halts before inflicting penalties for her violated laws. In such cases the disability is immediate, within the meaning of the

policy." See, also, *Continental Casualty Co. v. Matthis*, 150 Ky. 477.

The defendant has cited a variety of cases in which the words "all," "each" and "every" and other similar terms have been construed, but we think in most instances in a different class of cases than the instant one and under different circumstances than those existing in the case at bar. It likewise cites some in which the terms of the policy have been construed more strictly against the insured, but we think the rules we have applied in this case, supported as they are by the authorities herein cited, are less technical and more consonant with reason and practical justice than are those applied in the cases cited by defendant. For the reasons given, therefore, we think the defendant's third assignment of error should be overruled.

Another complaint of defendant is that the court allowed an item of $125 for hospital expense, without any proof thereof. Hospital indemnity was one of the items provided for in the policy, and plaintiff made proof of the fact that the insured was actually confined in a hospital for the full time for which charge was made, but did not prove actual payment therefor or that a debt was actually incurred thereby. The provisions in the policy did not require either of these as a prerequisite to indemnity. And, as it is proved that the insured actually occupied a place in a hospital for the required time, an obligation on his part, or on the part of his estate, to make reasonable compensation therefor will be presumed; and, as the policy fixes what the compensation to the insured shall be, that is sufficient to require payment of this item by the defendant.

The court rendered judgment for plaintiff in the sum of $8,659 and costs of suit, to which was added an attorney's fee in the sum of $1,167.67, to be taxed as part of the costs, and the same to bear interest at 7 per cent. per annum from date of allowance. The defendant complains of the amount allowed as attorney's fees as ex-

cessive, and that the court erred in holding that the same should draw interest. As was stated in the early part of this opinion, the defendant offered no direct testimony in its own behalf, but contented itself with the cross-examination of plaintiff's witnesses, and there was but little or no controversy upon the facts. It is claimed by counsel for plaintiff, however, that he was not aware that defendant would take this course until he had prepared for a serious contest. However, without disparagement of counsel's ability or belittling the importance or amount of labor bestowed by him in the case, we are of the opinion that in justice to all concerned this amount might well be reduced to a sum equivalent to 10 per cent. of the judgment recovered, or $865.90. See *Bruner Co. v. Fidelity & Casualty Co.*, 101 Neb. 825. The court below allowed interest on this item, but we are of the opinion that no interest should be allowed. An additional sum of $150 will be allowed the plaintiff for attorney's fees in this court.

The judgment of the lower court, modified as above indicated, will therefore be affirmed.

AFFIRMED AS MODIFIED.

FLANSBURG, J., dissenting.

It seems to me there can be no recovery in any event in this case, for the reason that the policy provides that there shall be no liability unless the injury shall, *from the date of the accident,* cause the insured to be totally and continuously unable to transact all business duties. The fact here was that for a period of two weeks after the injury the insured was about his business as usual. It was not the original injury, standing alone, which produced and brought about the death of the insured. It was the cancer resulting from, and no doubt brought on by, the original injury.

As to the question of the proximate cause of death, the injury may be considered to have been that proximate cause, since, through that injury and the processes of nature following it, death resulted; but, in order to de-

termine whether or not that resulting death, even though it may be held to have been proximately caused by the original injury, is covered by the policy, we must look alone to the terms and limitations contained in the policy itself.

It is quite clear that the insured was not totally and continuously, from the date of the accident, disabled. From all outward manifestations, the cancer did not have its inception or begin its growth for two weeks, or even a longer period, after the accident had been sustained. It is entirely legitimate that the company should limit its liability, in case of death, to those occasions where death results within a given period from the date of accident, such as a 90-day period, or where death results from an accident which continuously and totally disables the insured. Such provisions are reasonable. Where liability is confined to death resulting from such accidental injuries, some proof is furnished, by the fact of continuous and total disability immediately following and continuing from the date of the accident, that the accident was, itself, the cause of death, and that death was not due to some new and later intervening or contributing cause. The company may desire to write a policy to cover those deaths only which in such manner appear to be more directly connected with the accident, and this it is entirely free to do.

It seems to me, under this provision alone, and more especially when considered in the light of the clause providing that the company should not be liable where death was contributed to by disease, that the loss in this case is not covered, and that the beneficiary is not entitled to a judgment.

NELLIE E. SHEEAN, ADMINISTRATRIX, APPELLEE, V. WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, APPELLANT.

FILED OCTOBER 14, 1921. No. 21734.

1. **Master and Servant:** ACTION FOR DEATH: QUESTIONS FOR JURY. Where, in an action for damages against the director general of railroads, for the death of plaintiff's decedent, caused by the alleged negligent maintenance of defendant's roadbed and track, the evidence as to negligence and the proximate cause of the accident is sharply conflicting, although the defendant's testimony may strongly tend to overcome that of the plaintiff, yet if the evidence upon these issues, taken as a whole, is such as from which different minds may honestly draw different inferences and conclusions, and the testimony is sufficient to sustain a verdict for the plaintiff, if one be found in her favor, the situation presents one proper to be submitted to a jury.

2. ———: ———: SUFFICIENCY OF EVIDENCE. Evidence upon the issues referred to examined, and *held* proper to submit the same to the jury; *held*, further, that the evidence upon the same is sufficient to sustain a verdict for the plaintiff if submitted to the jury on proper instructions.

3. **Quaere.** Where, in an action for damages against the director general of railroads for the death of plaintiff's decedent, caused by the alleged negligent maintenance of defendant's roadbed and track, wherein it appeared that the engine which the decedent was operating became derailed, the train wrecked, and the decedent killed, the court submitted the question of negligence to the jury by an instruction, perhaps otherwise proper, but containing the statement, "You are not confined to the statements of witnesses alone, *but you are at liberty to consider what occurred* (italics ours)," *held* probable error, but not definitely decided for reasons stated in the opinion.

4. **Master and Servant:** ACTION FOR DEATH: ASSUMPTION OF RISK: QUESTION FOR JURY. The defendant, interposing the defense of assumption of risk, introduced evidence strongly tending to establish the same. *Held*, nevertheless, it was one of the questions, among other things, proper to be submitted to the jury, which was done by a proper instruction on the subject.

5. ———: ———: MEASURE OF DAMAGES. In an action for damages against the director general of railroads for the death of plaintiff's decedent, instituted in a state court under the federal em-

ployers' liability act, upon a finding for plaintiff, the measure of damages must be settled according to the principles of law as administered by the federal courts requiring the ascertained proceeds of the probable future earnings of decedent to be reduced to their present worth and to include in the verdict to be rendered by the jury such sum only, and it is the duty of the state court to so instruct the jury. The defendant having tendered such instruction to the trial court, and the court having refused the same, and giving no instruction upon the subject, *held* error. *Sweat v. Hines, ante*, p. 1.

6. ———: ———: EXCESSIVE DAMAGES. In view of the foregoing and in connection therewith, *held*, further, that the verdict and the judgment rendered thereon is grossly excessive, because of which a new trial must be granted.

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

Wymer, Dressler, Robert D. Neely and *Paul S. Topping*, for appellant.

Earl McDowell and *M. F. Harrington, contra.*

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and TROUP, District Judges.

TROUP, District Judge.

This is an action for damages against the director general of railroads, brought by Nellie E. Sheean, administratrix of the estate of her deceased husband, who, at the time of the accident resulting in his death, was a locomotive engineer in the employ of defendant. The action is brought under the federal employers' liability act (U. S. Comp. St. 1918, secs. 8657-8665), and charges the accident to have occurred while both the defendant and the deceased were engaged in the traffic of interstate commerce. The particular provision of the federal employers' liability act involved in the present suit is that contained in section 1 of the act (U. S. Comp. St. 1918, sec. 8657), which provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while he is

employed by such carrier, or, in case of the death of such employee, to his or her personal representative, "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

The part of plaintiff's petition relied upon to maintain her action under said provision is, in substance, as follows:

That at said time (June 7, 1919) the defendant unlawfully and negligently kept and maintained the said railroad track, including the roadbed, rails, ties, spikes, and all parts thereof, a short distance to the west of the station of Stroud, in the state of Wyoming, in a loose, dangerous and negligent condition, and in a condition where it was dangerous for said Sheean, or any other employee of defendant, to operate a locomotive engine over said track; and that, on said day and while so employed, said Sheean, while operating a locomotive for and in behalf of defendant and aiding and assisting in carrying on said business of interstate commerce by him as an employee, ran said locomotive over said track, and by reason of the aforesaid unlawful, negligent and unsafe condition of said track, roadbed, ties, rails, and spikes, the said locomotive was derailed and overturned, and said Sheean was crushed and scalded in all parts of his body, whereof he suffered great torture and anguish and as the result thereof died on the 12th of June, 1919.

The defendant's answer admits that, at the time and place alleged in plaintiff's petition, the deceased received injuries by the derailment of the engine which he was operating, while in the employ of the defendant and while both were engaged in interstate commerce, and from which injuries the deceased died on the date alleged, but denies each and every other allegation in plaintiff's petition.

"Further answering, the defendant alleges that the said Thomas S. Sheean had been an engineer in the defendant's employ for a long time prior to said date; that he had operated an engine as engineer over said railroad track on which said accident occurred for a long time and was familiar with the condition of said track and all parts thereof; that said Thomas S. Sheean had complete control of the engine he was operating and with full power to regulate the speed thereof, and defendant alleges that the said Thomas S. Sheean assumed the risk of said engine becoming derailed by reason of the speed at which he was operating same over said track."

The reply of the plaintiff is a general denial.

The two questions in dispute under the issues thus raised are, therefore: (1) Did the defendant negligently maintain its track or roadbed at the time and place alleged in a condition substantially as charged in plaintiff's petition? and (2), in any event, did the deceased assume the risk in operating his engine over the same?

The plaintiff introduced the testimony of a number of witnesses tending to support the allegations of her petition in respect to the condition of defendant's track and roadbed, and, on the other hand, defendant introduced the testimony of a number of witnesses tending to show that defendant's track and roadbed at the time and place in question was in a sound and normal condition, that defendant was free from negligence, and that the accident was one of those happening from an unknown cause, for which the defendant is not liable, and further that the deceased assumed the risk of whatever danger there was incurred, and that for either one or both reasons the defendant was entitled to a directed verdict in its favor. The court denied the request for a directed verdict and submitted the issues to the jury under certain instructions. We think there was no error in submitting the case to the jury. The train (passenger) which met with the accident was traveling westward at the rate of about 35 or 40 miles an hour, when the undisputed evidence

shows that *something* caused the south or left-hand side of the engine to be tilted up so that the flanges of the drive wheels got upon the top or ball of the south rail, and thus rode for a distance of about 26 feet, when the south drive wheels of the engine dropped off the rail entirely on the south side of the rail, tearing up the track for a distance of 50 or 60 feet, when the engine finally plunged into the ditch on the south side of the track and the disaster followed. The engineer was pinioned under some parts of the engine and the escaping steam so scalded him that he died five days thereafter. The tender and at least one car were entirely upset, and two or three other cars partially derailed. There was no evidence that the wheels, flanges, or any other parts of the engine or the running gear of any of the cars comprising the train, or the rails were defective in any way.

The plaintiff called four witnesses to testify as to the condition of the track and roadbed at the point in question, and to circumstances surrounding the accident—one a lawyer and passenger, another in the railway mail service, upon the wrecked train, another a contractor, but in what business is not disclosed, and the fourth a locomotive engineer in the employ of the defendant company, and brother-in-law of deceased. The last two were not present at the happening of the accident, but arrived soon thereafter. All of these witnesses testified that they had examined the track and roadbed immediately after and in the immediate vicinity of the accident, and east of where the track had been torn up by the wreck, and testified generally that some of the ties were rotten, some split, some spikes gone, others loose, one of four bolts to a certain fish plate missing, another loose, earth ballast only composed the roadbed, some ties were "hollow," that is, holes underneath them so that the track and ties were low in spots on both sides, and that there was a slight curve in the track at point of accident. In addition to the foregoing, the locomotive engineer, witness, testified that the surface of the rails was not level, that it was low

in spots for three or four rails on each side, an estimate of two inches of depression, that the low places were not directly opposite each other; that he had been running an engine for 28 years and knew the effect of the action of a locomotive running over a roadbed in that condition, and stated that: "When you hit a low spot in the rail the engine will swing over that way. * * * It has a tendency to raise the other side of the engine up off the rail, and then when it goes back, if it runs into a hole on the other side, it will go over that much farther. * * * It will spread the track where the ties are bad and the spikes are poor, and it has a tendency to raise the flange up higher than the rail, and leave the track."

On the other hand, eight witnesses called by the defendant, testified to the condition of the track at the point in question, all of them in the employ of the defendant—one roadmaster and trackman for 44 years, another division superintendent of 39 years experience, another roadmaster over that part of the road where the wreck occurred, another a civil engineer, and the others as follows: A machinist, boiler foreman, roundhouse foreman, and baggageman on the wrecked train. The majority, if not all of these witnesses, testified that they had examined the track and roadbed in the vicinity of the accident, particularly east of that part torn up by the wreck, with considerable care, and state generally that there is no curve in the track at the point of accident, but, on the contrary, it is perfectly straight, and is so for more than 2,000 feet either way from said point; that there were no rotten ties or displaced spikes or bolts; that the roadbed was dry, sound, and in good usable order as other parts of the road. In addition to the above testimony, two of the witnesses, the division superintendent and the assistant civil engineer, testified that they tested the level of said track with a spirit level and guaged the width thereof for a distance of eight rails east of the point of accident; that the track was in perfect guage except one spot where it was one-half inch wide, which was insignificant in prac-

tical railroading; that the spirit level showed the north rail uniformly low, varying from one-fourth to seven-eighths of an inch, and two low points on opposite sides of three-eighths inch each. Asked as to whether a spot out of level seven-eighths of an inch would affect the safety of the track, the witness answered: "No, sir—well, that would depend on circumstances. If you had just one spot that was seven-eighths, one short spot, an engine running at high speed would drop into that and out quick, of course that might throw the engine all right, but it wouldn't be dangerous at reasonable speed." The witness also testified, however, that seven-eighths of an inch out of level is not an unusual thing in practical railroading. They also testified that, if an engine passing over a rail was to spring down two or three inches and then spring back again, it would leave evidence of such action on the roadbed, which could be detected upon examination, and that no such evidence was detected. The division superintendent also testified that after a careful examination he was unable to ascertain what caused the wreck, and that it was his opinion that no man could tell the cause. It was also in evidence that on the same day, prior to the wreck, seven trains—two passengers and five freight trains—passed over the same piece of road in perfect safety, one passenger train running at the rate of 43 miles an hour.

The defendant urgently contends that upon the whole evidence on this branch of the case, the substance of which is given above, the plaintiff has failed to establish any negligence on the part of defendant, or that the negligence attempted to be established was the cause of the accident; and, unable itself to account for the derailment or to offer any explanation of how the accident occurred, it insists that it is merely one of such accidents as are constantly occurring in railroad history, notwithstanding the exercise of great care.

It may be admitted that the defendant's evidence tends strongly to support the reasonably sound condition of its

road, and yet we are of the opinion that the evidence of the plaintiff tending to show the contrary, together with some evidence given on the part of defendant, as to some impairment of defendant's track at the point in question, and the admission by the witness that such impairment might be instrumental in causing a wreck, affords a sufficient justification to submit this disputed question to the jury for its determination, and, that having been done, that there is sufficient evidence to sustain the finding of the jury that defendant's track at the point in question was negligently maintained.

The plaintiff was not bound to establish negligence to an absolute certainty; it is sufficient if the evidence furnishes a reasonable basis for satisfying the jury that the defendant was guilty of negligence as alleged. Neither is it necessary, nor always possible, to establish with absolute certainty the connection of cause and effect between the negligent act or condition and the accident and injury that follows. It is likewise sufficient in this particular if the evidence furnishes a reasonable basis for satisfying the minds of the jury that the negligent condition complained of was the proximate and operating cause of the accident. *Orth v. St. Paul, M. & M. R. Co.*, 47 Minn. 384; *Olson v. Great Northern R. Co.*, 68 Minn. 155. And when it is admitted by the defendant that the north rail was low in spots from one-fourth to seven-eighths of an inch, and plaintiff's witnesses testify it was low about two inches, and that the effect of such condition would be to cause the engine to tilt down on the north side and up on the south side, and the south drive wheels were elevated, by some means, so that the flanges rode the top or ball of the rail for a distance of 26 feet, then dropped off entirely and the disaster followed, it is not an unwarranted deduction to account for the accident in the way suggested, particularly so when no other explanation is afforded. The condition of defendant's road, the alleged negligence of defendant in respect thereto, and the cause of the accident in connection there-

with, were all matters in dispute, and the evidence in relation to them is such from which fair-minded men may draw different inferences and conclusions. It was therefore proper to submit these questions to a jury under proper instructions.

The defendant further complains, however, that the court erred in its instruction to the jury in this respect. The court's instruction upon this branch of the case is as follows:

"Under the act of congress under which this suit is being prosecuted, it was the duty of the defendant to exercise due care and caution to have the railroad at and about the place where the engine operated by Sheean was derailed, in a condition that was reasonably safe. And you are to determine from all of the evidence whether that was the condition of this railroad. As to whether this track was maintained in proper condition, or negligently maintained and used, is a question for you to determine under the entire evidence in the case. Negligence is the doing of something which a railroad corporation of ordinary prudence would not do under the conditions, or the failure to do that which a railway corporation of ordinary prudence would do under the circumstances. And it is for you to determine from all the evidence whether this railroad was kept and maintained negligently or not. The plaintiff is required to prove by a preponderance of the evidence that it was negligently maintained. This you will determine upon all the evidence. You will determine it from all the facts and circumstances in the case. You are not confined to the statements of witnesses alone, *but you are at liberty to consider what occurred* (italics ours), and all the facts and circumstances that will aid you in arriving at the truth, and which will enable you to say whether the injuries sustained by Sheean were due to the negligence of the defendant in the matter of the roadbed in question."

That part of the instruction in italics forms the ground of defendant's complaint. The defendant claims that this

is equivalent to instructing the jury that it may consider the mere happening of an accident as evidence of defendant's negligence, and after due consideration we confess we are unable to distinguish any material difference between the two propositions. We think it must be conceded that it would have been error for the court to have instructed the jury that it was at liberty to consider the mere happening of the accident itself as evidence of defendant's negligence, and yet we think that is what the court's instruction amounts to. In addition to the statements of the witnesses as to the facts and circumstances surrounding the accident, we are unable to perceive what there is left to consider as having "occurred," except the mere happening of the accident or wreck itself, and that plaintiff's decedent was killed. The court, of course, might properly enough have told the jury that, in addition to the positive facts established by the evidence, it would be at liberty to consider all reasonable inferences naturally and logically deducible therefrom, but that is not what the court said, nor do we think that what the court did say is equivalent thereto. There are two reasons why that part of the court's instruction referred to may be specially objectionable in the present case. First, because the evidence between plaintiff and defendant on the question of negligence was close and nearly evenly divided, and a finding for the defendant on that point would have ample evidence in the record to sustain it; and, second, because, generally speaking, under the rule obtaining in the federal courts, which is controlling in this case, the doctrine of *res ipsa loquitur* does not apply in actions between employer and employee.

We are strongly inclined to the opinion that the error complained of is sufficiently grave of itself to require a reversal of the case; but, inasmuch as there must be a new trial ordered for another reason, we pass the point at this time without further consideration, except to suggest that upon a retrial that part of the court's instruction referred to be eliminated.

One of the chief defenses in the case was that plaintiff's decedent assumed the risk of whatever danger there was incurred in running his engine over defendant's road, and defendant claims that the evidence conclusively shows that decedent was familiar with all the conditions of the road generally, including the point in question, and fully understood and appreciated the whole situation and conditions as they actually were, so that it was the duty of the court to have instructed the jury to that effect, and that therefore, as a matter of law, plaintiff could not recover. While there is a strong tendency to the belief, from the evidence, that defendant may be right on this point, yet we feel constrained to hold, nevertheless, that this is one of the questions, among others, that was proper to submit to the jury for its determination. The court recognized that the assumption of risk was a proper defense and submitted the question fully by a separate instruction which we think stated the law correctly as applicable to the facts in the case, and to which the defendant made no specific objection, except that the verdict is contrary thereto.

The next and last assignments of error are that the verdict as returned by the jury, and on which judgment was entered by the court, is greatly excessive, and for the failure of the court to instruct the jury that, if it found for the plaintiff, it should reduce the aggregate of the anticipated earnings of decedent, as shown by the evidence, to their present worth, and as to that element of damages include in the verdict that sum only. The defendant tendered an instruction of that import, which was refused by the court, and the court gave no other instruction on the subject. We think the defendant is right on both propositions, and, considering them together, we must hold that the court erred in refusing to instruct as suggested, and because of which a new trial must be granted.

This point in the present case is identical with a corresponding point in the case of *Sweat v. Hines, ante,* p. 1,

and must be subject to the same ruling, and to which case we refer for a more extended discussion of the subject. As was held in the *Sweat* case, this is one of the class of cases (actions brought under the federal employers' liability act) in which, among other things, the proper measure of damages to be awarded for ascertained future earnings must be settled according to general principles of law administered by the federal courts. The supreme court of the United States seem to have definitely decided that in such cases the sum to be awarded for the anticipated earnings of a decedent must be the present worth only of such earnings; that it is the duty of state courts to so direct the jury; and the court first mentioned twice reversed the Kentucky court of appeals for no other reason than that the state court failed to comply with the rule of the federal courts in that respect. See *Chesapeake & O. R. Co. v. Kelly,* 241 U. S. 485; *Chesapeake & O. R. Co. v. Gainey,* 241 U. S. 494.

We do not assume to prescribe definitely just how the present worth in such cases shall be ascertained. That depends somewhat upon at what rate of interest the proceeds should be computed, and possibly whether or not the interest shall be computed on the system of annual rests. The formula, however, suggested in the *Sweat* case is one that has long been in vogue in this state, and we are of the belief that a result thus obtained cannot be far from the just amount to be awarded. In the present case the evidence shows that the earnings of decedent, at the apex of war time wages, and without any deduction for loss of time, was $2,604 a year, less personal expenses of $834; leaving a net balance for distribution to dependents of $1,770 a year. For 16 years, the life expectancy of decedent, the total amount of earnings available to dependents would be $28,320. Applying the formula suggested in the *Sweat* case, the present worth of the above sum would be a fraction less than $14,449, or computed on the basis of 15 years, the life expectancy of the plaintiff, the present worth would be a fraction less than

$13,973.68. The verdict and judgment in the case is for $28,500. In addition to the sum claimed for future earnings the plaintiff asked damages for pain and suffering of decedent in the sum of $10,000. The deceased died on the fifth day after the accident, a part of which time, the evidence shows, he was not conscious. This would give plaintiff the sum of $14,051 on the basis of decedent's expectancy, or $14,526.32 on the basis of plaintiff's expectancy for pain and suffering alone, or allowing the full five days of consciousness, a fraction over $2,810 a day on the first basis, and a fraction over $2,905 a day on the latter basis, either one of which we think must be conceded is excessive.

We have not overlooked the fact that plaintiff also injected into this case a claim for damages for loss of a few simple domestic services, which it is claimed decedent was accustomed to perform in and about the home, such as mowing the lawn, or watering the trees occasionally, but as to the money value of which no evidence was offered. As we said in the *Sweat* case, while these little domestic services might be invaluable estimated from a standpoint of sentiment and personal association, measured by a money value, as they must be, they cannot be more than inconsiderable. So that this item could not materially change the result above stated.

We regret that a new trial is necessary, but we see no way to avoid it. The judgment of the lower court is therefore reversed and a new trial granted.

REVERSED.

MERCHANTS NATIONAL BANK OF OMAHA, APPELLEE, V. AMERICAN EAGLE TIRE COMPANY ET AL.: PEDER SKRIVER ET AL., APPELLANTS.

FILED NOVEMBER 17, 1921. No. 21686.

Appeal: ISSUES. "It is the settled law of this state that a cause is to be tried in the appellate court upon the same issues that were presented in the court from which the appeal was taken, with the

exception of new matter arising after the first trial." *Cobbey v. Buchanan*, 48 Neb. 391.

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

Carl E. Herring and *Carl T. Self*, for appellants.

I. J. Dunn, contra.

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., BROWN and ELDRED, District Judges.

MORRISSEY, C.J.

Plaintiff brought this action in the municipal court of Omaha against the American Eagle Tire Company, a corporation, H. L. Buckles, Rose Buckles, Peder Skriver and W. R. Thomas, on a promissory note executed by defendants and payable to plaintiff. The petition is not set out at length in the transcript, but it appears that the note was for the principal sum of $1,000 and that $50 had been paid thereon. No defense was tendered by any defendant except Peder Skriver and W. R. Thomas, who filed the following answer:

"Comes now the defendants Peder Skriver and W. R. Thomas, and for their separate answer to the plaintiff's petition filed herein denies each and every allegation therein contained, not specifically admitted or denied.

"That said note is wholly without consideration as to these answering defendants, and that the said plaintiff and its representatives were so notified and knew that said note was without consideration as to these defendants, and that these defendants notified said plaintiff that said note was without consideration, and if any consideration was given any one on said note with the consent or for or in behalf of these answering defendants, and if any payment was made on said note, it was made without the consent or knowledge of these answering defendants, and that said note was procured by connivance and fraud by the plaintiff, and its officers and employees and Harry Buckles, in that by their false and fraudulent representa-

tions to these answering defendants they procured the names of these defendants upon said note, and that said note was without consideration to these defendants, that the said Harry Buckles signed said note as H. L. Buckles and is one of the defendants herein."

Trial was had and a judgment entered for plaintiff. Defendants Skriver and Thomas prosecuted an appeal to the district court, where they filed an answer differing but little from the one set out above. To this answer plaintiff filed a motion to make more definite and certain. The motion was sustained by the court and defendants filed an amended answer. A motion to strike certain parts thereof was then filed by plaintiff; but, before the court had ruled upon the motion, defendants filed a second amended answer. A motion to strike parts of this answer was filed by plaintiff, and sustained by the court. At this point in the proceedings defendants procured other counsel and a third amended answer was filed. This answer admitted the corporate entity of plaintiff as a national bank; that the promissory note in suit contained the genuine signatures of the defendants; but every other allegation in the petition was denied. The answer then makes certain affirmative allegations, which defendants summarize in their reply brief as defenses, to wit:

"(1) The defendants Skriver and Thomas signed the note in question as accommodation makers. (2) The consideration inducing such signatures failed before the note had been discounted by the bank. Skriver and Thomas did not owe the bank anything. (3) The bank was promptly notified of the revocation of these signatures. (4) The bank did not set up any contract liability as a reason for not accepting such revocation, and none such exists in the pleadings, or anywhere else except in the imagination of counsel for the appellee. What the bank did was to give Skriver and Thomas, as alleged in the answer, a silly reason that he could not revoke his signature because he was not an officer of the tire company,

but they refused. (5) The answer further alleges that the bank discounted the paper, relying upon the financial ability of the other signers to this note."

This summary of what the answer contains is used in preference to setting out at length the allegations of the answer, because of the brevity of the summary. Plaintiff by motion moved to strike all that portion of the answer which is summarized in defendants' brief. The motion is based upon three grounds. One, however, is all we deem it necessary to mention, namely: "The allegations seek to present an issue of defense not pleaded below." The court sustained the motion. Defendants did not plead further, and judgment was entered in favor of plaintiff against the answering defendants for the face of the note and interest due. Defendants appeal.

The real question presented is: Did that part of the answer stricken by the court set up a defense not pleaded in the municipal court? This necessitates, first, a consideration of the answer pleaded in the municipal court. It may be conceded, we think, that the answer in the municipal court contains a general denial, but we can find no other defense or issue tendered by the language used. The answer says that the note was without consideration to the answering defendants, but it does not allege that it was without consideration to their codefendants, the joint makers. It says that notice was given to plaintiff that the note was without consideration as to them, but it does not specify in what form or manner the notice was given or that it was given before plaintiff had paid over the face of the note on the faith and credit thereof. It undertakes to allege that the note was procured by fraud of plaintiff, but states no fact or circumstance constituting the fraud. The allegations amount to a mere expression of opinion, or conclusion, of the answering defendants. Thus, we think it clear upon the face of the answer that the only defense it tendered was a general denial. Taking defendants' own interpretation of the matter set up in the third amended answer,

which was stricken on motion of plaintiff, we find that this matter raised an issue not presented in the court below, and, the issue being raised, it was the duty of the court to order it stricken. "It is the settled law of this state that a cause is to be tried in the appellate court upon the same issues that were presented in the court from which the appeal was taken, with the exception of new matter arising after the first trial." *Cobbey v. Buchanan,* 48 Neb. 391.

The new matter contained in the third amended answer did not arise after the trial in the municipal court. The district court did not err, and the judgment is

AFFIRMED.

EARL S. MURRAY ET AL., APPELLANTS, V. EMIL NELSON ET AL., APPELLEES.

FILED NOVEMBER 17, 1921. No. 22063.

1 **Statutes:** VALIDITY: COUNTY SEAT ELECTION. Where a statute provides a full and complete method of holding an election to relocate a county seat, and, by way of proviso, it contains the words: "That the question of relocation and division of any county within the state shall not be again submitted to the electors for the period of ten years from and after the date of any such election, held subsequent to the passage of this act"—no other reference being made in the body of the act to a "division of any county," *held,* that the words referring to the division of a county do not bring the act within the inhibition of section 11, art. III of the Constitution of 1875, providing that "no bill shall contain more than one subject."

2. ———: ———: TITLE. Where a bill deals with but a single subject, which is clearly expressed in its title, it will not be held to violate that clause of section 11, art. III of the Constitution of 1875, which provides that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title," even though the title when read independently of the act may seem double.

3. ———: ———. Chapter 169, Laws 1917, *held* not to be amendatory in its nature, but to be a complete and independent act.

4. **Constitutional Law:** MOTIVES OF LEGISLATORS. The motives which

impelled a member of the legislature to vote for the enactment of a law cannot be made the subject of judicial inquiry for the purpose of invalidating or preventing the operation of the law.

5. Counties: COUNTY SEAT ELECTION: SUFFICIENCY OF BALLOTS. In an election held under the provisions of chapter 169, Laws 1917, the petition for the election prayed that the question of the removal of the county seat "to the city of Franklin" be submitted to a vote of the electors of the county. On the ballot was printed merely the name Franklin and the name Bloomington, the then county seat. There was within the county a township named Franklin, in which was situated the city of that name. *Held* that, under the facts, the county board, upon finding that the requisite number of votes had been cast in favor of Franklin, properly declared the city of Franklin the county seat.

APPEAL from the district court for Franklin county. WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

George W. Prather, George Losey, I. E. Montgomery and *J. E. Willits,* for appellants.

C. C. Flansburg and *C. R. Stasenka, contra.*

Heard before MORRISSEY, C.J., LETTON, ROSE, ALDRICH, DEAN and DAY, JJ.

MORRISSEY, C.J.

Plaintiffs, as citizens and taxpayers of Bloomington, Franklin county, brought this action against defendants, who are the officers of Franklin county, to restrain them from transferring their offices with the books and records of the county from Bloomington, which had theretofore been the county seat, to Franklin, which at an election held October 26, 1920, to relocate the county seat, had received more than three-fifths of the vote cast; that being the minimum number required by statute for a relocation of a county seat. The usual proceedings were had upon the canvass of the vote. Franklin was declared the county seat and the transfer of the records of the county was ordered. On the trial of this cause there was a finding in favor of defendants, and from the judgment entered plaintiffs appeal.

A number of assignments of error are made, but the controlling question is the validity or invalidity of chapter 169, Laws 1917, under which the election was held. It is the contention of appellants that this statute is unconstitutional; that there was no authority in law for holding the election, and, therefore, any order based thereon is void. First, it is said that the act is in conflict with section 11, art. III of the Constitution of 1875, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed."

The title of the act in question reads as follows: "An act providing a way whereby the county seat of any county within the state of Nebraska may be changed or relocated; *and whereby any county in the state may be divided;* to provide for the calling and holding of an election therefor; to fix the number of qualified electors required upon a petition, to authorize the calling of such election and to fix the number of votes required to change or relocate such county seat; to prohibit the calling of such an election oftener than once in ten years, and to repeal sections 939, 940, 941, 942, 943, 944, 945, 946, and 947, of the Revised Statutes of 1913, and to provide penalties for the violation of this act."

Appellants claim that two subjects are embraced in the title. First, the relocation of county seats; second, the division of counties. The act sets out at length the necessary steps to be taken to call an election and to secure the relocation of a county seat, but the only reference to a division of a county is found in section 2, where in the nature of a proviso it contains the words: "That the question of relocation *and division of any county within the state* shall not be again submitted to the electors for the period of ten years from and after the date of any such election, held subsequent to the passage of this act."

While, as said, the act provides a full and complete

method of holding an election for the relocation of a county seat, we look in vain for any provision under which an election may be held for the purpose of dividing a county. The words, "and division of any county within the state," bear no relation to any language that has gone before. As they occur in the act they are meaningless—surplusage. If we concede that the division of counties is a subject so distinct and separate from that of relocating county seats that both may not be embraced within the terms of a single act, nevertheless we have a situation where there is legislation on only the one subject, to wit, the relocation of county seats. No method is provided for the division of any county. So far as the language, "and division of any county within the state," found in the body of the act, is concerned, it may be entirely disregarded.

It is further urged, however, that the title of an act is a part thereof, and that the inhibition of the Constitution applies with equal force to the language of the title and to the language of the act, and that because the title proclaims the purpose of the act to be "a way whereby the county seat of any county within the state of Nebraska may be changed or relocated; and whereby any county in the state may be divided;" there are two subjects treated, and the whole act must fall. In *White v. City of Lincoln*, 5 Neb. 505, it is said that the object of the provision of the Constitution relied upon by appellant "is to prevent surreptitious legislation." Having in mind, then, the purpose of this provision, may it be said that its purpose is thwarted by the title we are considering? Clearly not. The first and most prominent statement in the title challenges the attention of the legislator to the relocation of county seats, the only subject that is afterwards effectually dealt with in the act. The clause in the title, "whereby any county in the state may be divided," in no way beclouds the issue. As is well said in *Van Horn v. State*, 46 Neb. 62, 72: "The title must clearly express the subject, but provided the bill itself contains but one sub-

ject, and this subject is clearly expressed in the title, it matters not although the title, read independently of the bill, may seem double. We, therefore, look to the bill itself to ascertain whether or not it contains more than one subject, and, having ascertained that it contains but one, then we look to the title to see if that subject is clearly expressed therein. If so, the constitutional provision we are here discussing is not violated." This language applies with peculiar force to the question we are discussing. The title does not fall within the inhibition of the Constitution.

Appellant makes the further claim that the act is amendatory in its nature, and that it is unconstitutional because it does not contain in its title the sections amended. An inspection of the act shows that it is not amendatory; that it is complete in itself. It sets up an independent method of relocating county seats and repeals all former statutes dealing with the subject treated.

In connection with the subjects just discussed, it is argued by appellants that the so-called provision for the division of counties was an inducement to members of the legislature to support the act, and the evidence of members of the legislature who supported the act upon its passage is offered in support of this contention. It is well established that the motives which impelled the legislature to enact a law cannot be made a subject of judicial inquiry for the purpose of invalidating or preventing the full operation of the law. The evidence offered was clearly incompetent.

Further criticism is made of the act under which the election was held, and complaint is made of the form of the ballot, because the names of only two contesting cities, under the provisions of the act, may appear thereon. It is said that printed upon the ballot was the word "Franklin," and not "The city of Franklin;" that within the county there is a city named Franklin, and also a township named Franklin; and that the order of the county board complained of declares the city of Franklin

to be the county seat, although the ballot is silent as between the city and the township. It appears that the city of Franklin is situated within the township of Franklin. Section 1 provides for the submission to a vote of "the question of the removal of the county seat to the one city, town, village or place named in the petition." No mention is made of a township, but, perhaps, it might fall within the term "place" as used in the act. However, the evidence introduced by appellants shows that the petition presented to the county board requested that an election be called to submit the question of the removal of the county seat "to the city of Franklin."

In *State v. Dinsmore,* 5 Neb. 145, it is held: "Where the intention of the voter is clearly ascertainable from the ballot, with the aid of extrinsic facts of a public nature connected with the election, the law will require his vote to be counted."

In the instant case, if doubt existed as to whether the city of Franklin or the township of Franklin was the contender for the county seat, an inspection of the petition which formed the basis for the election would have set the matter at rest. The assignment of error is not tenable.

It is also argued that all the constitutional formalities were not observed in the passage of the act through the legislature; and that the election was void because certain citizens of the county distributed a circular stating that, in the event of the removal of the county seat from Bloomington to Franklin, they would not ask that a new courthouse be erected within two years from the date of the election, or that more than $100,000 be appropriated for the purpose, and that they had procured certain contracts from owners of buildings whereby the owners offered to supply suitable temporary office facilities to the county at a cost of not to exceed $100 a month until a new courthouse could be built. These assignments have been considered, but do not require discussion.

No error is found in the judgment of the district court, and it is

AFFIRMED.

MAYHALL & NEIBLE, APPELLEE, V. CHICAGO, BURLINTON & QUINCY RAILROAD COMPANY, APPELLEE: UNION STOCK YARDS COMPANY, APPELLANT: WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, APPELLEE.

FILED NOVEMBER 17, 1921. No. 21620.

1. **Appeal**: MISJOINDER. A complaint that there has been a misjoinder of parties defendant should be called to the attention of the district court before trial, and it is too late to raise this objection for the first time in the appellate court.
2. **Carriers**: FAILURE TO DELIVER SHIPMENT: NEGLIGENCE. Under the Carmack amendment to the interstate commerce act (34 U. S. St. at Large, ch. 3591, p. 584), in order to recover against an initial carrier for loss or damage to an interstate shipment, it is unnecessary to establish negligence on its part.
3. ———: ———: INSTRUCTIONS. In an action against the initial and a connecting carrier for damages for failure to deliver cattle shipped, the court instructed the jury that the liability of the defendants "is not a joint liability," and in other instructions suggested or implied that a verdict for the plaintiff against all of the defendants was proper. *Held* that, under the pleadings and the evidence, the first instruction was correct, and that the latter was inconsistent with it. *Held*, further, that the error was prejudicial to the defendant, whose liability was not established by the proofs, and against whom a judgment was rendered.
4. ———: COSTS: ATTORNEY'S FEES. It is a prerequisite to the allowance of an attorney's fee under the provisions of section 6063, Rev. St. 1913, as amended by chapter 134, Laws 1919, that the requirements of said section with reference to the presentation of the claim to the carrier accompanied by bill of lading, etc., within the time specified, be observed.

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

Brown, Baxter & Van Dusen, for appellant.

Byron Clark, Jesse L. Root, J. W. Weingarten, Brogan, Ellick & Raymond and *Douglas F. Smith, contra.*

Heard before MORRISSEY, C.J., LETTON, DAY, DEAN, ROSE, FLANSBURG and ALDRICH, JJ.

LETTON, J.

This action is brought to recover damages for failure to deliver certain cattle. The petition alleges that on the 13th day of January, 1919, plaintiff delivered to the defendant, the Union Stock Yards Company, at South Omaha, about 35 head of cattle for transportation to Edinburg, Indiana, to be delivered there to plaintiff; that it took possession of cattle and undertook to deliver them to the Chicago, Burlington & Quincy Railroad Company; that it delivered a car into which the cattle had been loaded to said last-named defendant, and plaintiff paid the last-named defendant the charges for transportation of the live stock to Edinburg. It is charged that the cattle delivered by plaintiff at Omaha were never delivered, but wholly different cattle greatly inferior in weight and quality were delivered at Edinburg, to the damage of plaintiff in the sum of $928.24.

The answer of the director general of railroads alleges, in substance, that the lines of the Chicago, Burlington & Quincy Railroad Company connect with the railroad of the Union Stock Yards Company at Omaha; that this defendant instituted an agent at the premises of the Union Stock Yards Company, who attended to making the necessary records pertaining to forwarding the live stock before the same were actually received; that live stock shipped from the stock yards was usually received by the Union Stock Yards Company, loaded upon cars and delivered to this defendant after being loaded; that the shipper, upon being advised by the Stock Yards Company of the car number and initials of the car into which cattle had been loaded, informed this defendant, which issued live stock contracts for such shipment; that defendant received the consignment of cattle which had been loaded

into a certain car and transported the cattle in said car to Edinburg, Indiana, which were the same cattle it received from the Union Stock Yards Company.

The answer of the Stock Yards Company, in substance, admits that on January 13, 1919, it received from plaintiff 35 head of cattle; that it loaded said cattle into cars furnished by the Chicago, Burlington & Quincy Railroad Company, and delivered the same the same day to said codefendant; that it had no contract with regard to the cattle with plaintiff, and received no consideration for their transportation.

Plaintiff recovered judgment against both defendants for $921.91. Each defendant filed a separate motion for a new trial, which was overruled. The Stock Yards Company appealed. The director general joined in the appeal, and also has taken a cross-appeal against the Stock Yards Company. The defendants will be designated hereinafter as the Stock Yards Company and the railroad company.

The principal argument made by the Stock Yards Company is that there can be no joint judgment against the defendants when no joint liability on their part is shown, and particularly where the pleadings admit one defendant to have been without fault, and where joint negligence is shown to have been an actual impossibility, and also that, where as between joint defendants one is ultimately liable, a joint judgment is erroneous, because it fails to determine all the issues, and, being a bar to any further proceedings between two defendants, results in a denial of justice. No objection of any kind was made before the trial of misjoinder of defendants, nor any instruction requested by either defendant on this point. After judgment the question was not referred to in the motion for a new trial, and, in fact, it is first raised in the briefs of the appellant in this court. Plaintiff argues therefore that the defect, if any, was waived. While a misjoinder of causes of action is ground for demurrer, a misjoinder of plaintiffs, or of defendants, is not, and it is only where

there is a defect of parties that a demurrer may be filed. *Roose v. Perkins,* 9 Neb. 304, 310; *Davey v. Dakota County,* 19 Neb. 721; *Lancaster County v. Rush,* 35 Neb. 119; *Engel v. Dado,* 66 Neb. 400.

The usual remedy for misjoinder, in the absence of express provision, is by a motion to strike out, or by demurrer for failure to state facts sufficient to constitute a cause of action. This procedure was open to each of the defendants. If either of them had desired to object on this ground, the objection should have been called to the attention of the court before the trial. It is too late after all the time and expenses incurred in producing testimony and after judgment to raise this objection for the first time in the appellate court. Cases holding to the same effect under like Code provisions are: *Kucera v. Kucera,* 86 Wis. 416; *Wunderlich v. Chicago & N. W. R. Co.,* 93 Wis. 132; *Bensieck v. Cook,* 110 Mo. 173; *Dunn v. Hannibal & St. J. R. Co.,* 68 Mo. 268; *Brownson v. Gifford,* 8 How. Pr. (N. Y.) 389; *Barnes v. Blake,* 13 N. Y. Supp. 77; *Boston Baseball Ass'n v. Brooklyn Baseball Club,* 75 N. Y. Supp. 1076.

In *Culbertson Irrigating & Water Power Co. v. Wildman,* 45 Neb. 663, Wildman sued Jones and Bond and the Culbertson Irrigating & Water Power Company, jointly. The answer of the company was a general denial. Jones and Bond made default. A trial was had on the issues between the plaintiff and the company. Judgment was entered against all of the defendants. In this court it was argued that the company could not be jointly liable with Jones and Bond. The court said, speaking by Irvine, C.: "We cannot find that this objection was raised in any manner in the district court. If the petition stated a cause of action against the company and the proof established it, no question of misjoinder having been raised, the company cannot now be heard to complain of the misjoinder. Jones and Bond made default, they do not complain of the judgment against them, and the company cannot do so."

With respect to the Stock Yards Company, the petition alleges and the answer of that defendant admits the delivery of the cattle to it for loading and delivery to the railroad company, and delivery of "said car of cattle" to that company. The evidence in its behalf tends to prove that it is a common carrier of cattle in car-loads from the pens to the tracks of connecting railroads, and that it loaded the cattle and transported the car containing them, by its own locomotive, over its own tracks, to the line of the connecting carrier. *State v. Union Stock Yards Co.*, 81 Neb. 67. This at common law would absolve the Stock Yards Company from liability, since, if it safely delivered the cattle to the railroad company, and the railroad company accepted the same, and undertook their transportation and delivery, no cause of action arises against the Stock Yards Company, it having performed its whole duty in the premises. But, under the Carmack amendment to the interstate commerce act, which, although it is said not to be relied upon by plaintiff, is the law of the land, a shipper is accorded the right to bring an action against the initial carrier, in an interstate shipment, for loss occurring upon the lines of a connecting carrier; the law preserving to the initial carrier its right to hold the connecting carrier liable for damages occurring upon its line. To entitle the shipper to recover against the initial carrier it is unnecessary to establish negligence on its part. The Stock Yards Company has therefore no good ground for complaint against the judgment which has been rendered against it in this case, unless by the recovery of such judgment it is prevented or estopped in some manner from recovering over against the director general if it can establish that the loss or mistake occurred while the cattle were in process of transportation over defendant's line of railroad.

The district court after instructing the jury that, if it found that "the identical cattle were delivered to the railroad company at South Omaha, and it delivered the identical cattle to the plaintiff at Edinburg then the

railroad company is not liable to plaintiff, and your verdict must be for the railroad company," instructed the jury by instruction No. 11 as follows: "The liability of the defendants herein *is not a joint liability,* and, as you have been above instructed, you may, if the proof is sufficient under these instructions, find one of the defendants liable and not the other." Instruction No. 13 is in part as follows: "Should you find for the plaintiff and *against all of the defendants* your verdict will be a joint one for the plaintiff, specifying the amount of damages to which you find it entitled."

Under the evidence in this case instruction No. 11 is a correct statement of the law, since no joint tort has been established, but instruction No. 13 and others using like expressions clearly suggest to the jury that they may find for the plaintiff and against all of the defendants. Under the evidence presented it is difficult to determine where the change of cattle occurred, and when the jury were absolved from the effort of attempting the solution of so difficult a problem, the natural tendency was to follow the course requiring the slightest mental exertion, and adopt the suggestion that a verdict might be returned against both defendants. These instructions are inconsistent and incompatible with each other, and must inevitably have misled the jury. Since the liability of the Stock Yards Company is established, it would serve no good or useful purpose to reverse the judgment against it. The error in the instructions, however, prejudicially affected the director general, since it practically invited a joint verdict. The plaintiff is clearly entitled to a recovery for the loss of his cattle. Since the facts as to where the mistake occurred are, or are presumed to be, peculiarly within the knowledge of the carriers, he ought not, while they are ascertaining which is to blame, be deprived of the recovery which the law allows him against the initial carrier. The judgment against the defendant director general is vacated and set aside, without prejudice, however, to the right of the Stock Yards

Company to recover over against it in these proceedings, or in any proper action, if it establishes that the loss and damage occurred through the negligence or default of the director general.

The allowance of attorney's fee is objected to by each defendant. It is only necessary to consider the allowance of the fee as against the Stock Yards Company. Chapter 191, Laws 1919, does not apply, since the claim is for more than $300. There is no proof in the record that a claim accompanied by the bill of lading or a shipping receipt was ever presented to the Stock Yards Company at any time before the bringing of the action. Under the statute (Rev. St. 1913, sec. 6063 as amended by chapter 134, Laws 1919), this is a condition precedent to the imposing of an attorney's fee as costs. The judgment in this respect is erroneous, and must be modified by the disallowance of the sum allowed as attorney's fee. The costs incurred by the defendant director general in both courts must be taxed to plaintiff, and the costs in this court on the appeal of the Stock Yards Company must also be taxed to plaintiff, since it secured substantial relief by the setting aside of the judgment for $200 as attorney's fee.

The judgment of the district court is therefore affirmed in part and reversed in part.

JUDGMENT ACCORDINGLY.

DUNDY COUNTY IRRIGATION COMPANY, APPELLANT, V. GEORGE W. MORRIS, APPELLEE.

FILED NOVEMBER 17, 1921. No. 21728.

1. **Waters: IRRIGATION: RIGHTS OF OWNERS OF LAND.** The owner of land through which an irrigation ditch or canal is constructed under the provisions of subdivision 2, sec. 13, art. II, ch. 68, Laws 1889, is entitled to the use of the water for irrigation purposes upon payment of "the usual and customary rates" for the use of the water.

2 ———: ———: ———. "The owner or operator of any works for

the storage, carriage or diversion of water except irrigation districts must deliver all water legally appropriated to the parties entitled to the use of the water for beneficial purposes, at a reasonable rate, to be fixed by the state railway commission, according to the law in such cases relating to common carriers." Rev. St. 1913, sec. 3454.

3. **Evidence** examined, and *held* not to show any title in defendant to an interest in the ditch or canal of the plaintiff.

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

R. D. Druliner, J. F. Cordeal, Lambe & Butler and *Walter D. James,* for appellant.

Bernard McNeny, J. S. Gilham and *Hines & Hines, contra.*

Heard before LETTON, DAY and DEAN, JJ., SEARS and WESTOVER, District Judges.

LETTON, J.

This action is brought to procure an injunction against the defendant from cutting or destroying the embankment of plaintiff's irrigation ditch, or taking or appropriating any water therefrom. The plaintiff alleges that defendant has no water right, and that defendant's land is not among the lands to be watered by the appropriation for the ditch. The answer is very lengthy and perhaps a little inconsistent in some of its allegations. It denies that the land of defendant is not included in the appropriation, and avers that defendant has an equal right to water with any other owner; that the owner of the land, when the ditch was excavated, was one of the original stockholders of plaintiff; that in 1917 defendant became the owner of the land; that he succeeded by purchase to the rights of Freeman Scott, who was an original stockholder; that it is a mutual irrigation company; that the affairs of the corporation are conducted irregularly, and that he has been allowed to take water and has contributed work and labor in the reparation of the ditch and

dam. He prays that he may be recognized as the owner of three shares of stock; that his land be decreed to be part of the land for which the waters are appropriated, and he be entitled to use the same on the same terms as other stockholders.

The plaintiff corporation obtained its appropriation of water under the statute of 1889 (Laws 1889, ch. 68). Soon after the enactment of the irrigation law of 1895 (Laws 1895, ch. 69) a claim was filed for the company by L. Morse, its president, with the state board of irrigation, describing the point of diversion and the land which it was the intention that the ditch or canal should supply water to irrigate. Section 20, township 1, range 38, is included in this description. The claim alleged that the work of excavation and construction was begun on the 25th day of January, 1891, and the work completed in 1891, and that the water was turned into the ditch on or before July 25, 1891; that there were 75 acres of crops irrigated in 1891, and that it was estimated there would be 700 acres irrigated during 1895.

At the hearing before the state board it was shown that the main canal was completed in 1891, with an extension of 2½ miles in 1892. Afterwards, in compliance with an order of the board, dated March 1, 1896, the irrigation company filed a statement in writing of the sections and quarter sections of land for which water is claimed. In this list the "S.½ of sec. 20, T. 1, R. 38" is described. The board found that the appropriation dated from November 22, 1890, "that the said ditch covers and reclaims the following described lands, viz., * * * S.½ of sec. 20 * * * all in T. 1, N. R. 38, * * * W. 6th P. M." and allowed the appropriation for 45 cubic feet per second of time, and extended the time for completion of applying the water to a beneficial use to September 1, 1898. In 1900 a paper marked "Proof of Appropriation" was filed in the office of the state board upon a form furnished by that body. In answer to the printed question, "give legal subdivision of land, and the acreage in

each subdivision to which water was actually and usefully applied on or before Sept. 1, 1898," appears the following:

"S.E. 20-T.1-R.38 $\frac{140}{190}$? acres"

It is upon this defect in the proof that the claim that the land was not included in the appropriation is based. No certificate of appropriation was ever issued by the board.

The evidence convinces us that the land owned by defendant is a part of the land for which the appropriation of water was obtained. The mere fact that, apparently by mistake, the description was omitted from the paper filed in 1900, and that no certificate of appropriation was ever issued, is not material. The appropriation for the ditch had been completed before the law of 1895 went into effect; hence it was a vested right. No action has ever been taken by the state board under section 3402, Rev. St. 1913, or in any manner to forfeit the right to any of the water included in the appropriation. Plaintiff cannot claim the water under its original appropriation and at the same time refuse to have it applied to a beneficial use on the lands for which it was appropriated.

At the time the appropriation was made there was no statute in effect providing for the organization of mutual irrigation companies. The by-laws provide that water may be sold. The litigants agree that the corporation is a mutual irrigation company, but this concession does not establish the status of the corporation. Apparently it was organized under the general statutes. It is shown that now there are only a few individuals claiming to be stockholders, keeping up the ditch and taking water, but the corporate organization seems to be still in existence and assessments of money or of work are made to maintain the system. The by-laws of the plaintiff company are in evidence, but they do not specify the quantity of water to which each shareholder is entitled. They provide that each person entitled to water rights shall fur-

nish on the ground lumber for construction of boxes to convey water from ditch to laterals; that the overseer has the exclusive control of the headgate; that, if there shall be an insufficient quantity of water in the ditch, then the water shall be prorated among those having water rights; that each stockholder shall be entitled to as many votes as the books show he owns shares; and that the executive board shall be authorized to sell water to the village of Benkelman; also that "all water rights now belonging to said corporation and unsold may be sold by said executive board at a price not less than $500 each."

Coming now to a consideration of defendant's position, he claims that he is a shareholder in the corporation, and that he is entitled to the use of the water upon the payment of a mere maintenance charge, or the contribution of work and labor for reparation and maintenance to the same proportionate extent as other shareholders. If he is possessed of an interest in the corporation as a shareholder or the owner of a water right, there is no doubt his contention must be sustained. The question is presented whether he has shown that he has become and is now the owner of an interest in the ditch. He has produced no competent evidence of such ownership. It appears that Freeman Scott owned three shares. Defendant testifies that after Scott's death, and before this action was begun, he purchased these shares from a daughter of Mr. Scott; but the shares are not in evidence. On the other hand, one of the officers of plaintiff testifies that, though Scott was an original stockholder, he never kept up his assessments, and that his stock was canceled. Furthermore, there is no proof that the daughter from whom defendant alleges he purchased the stock had any title to them or any right to sell the same. We conclude, therefore, that defendant has failed to establish the ownership of any right or interest in the ditch other than that of a landowner for whose land an appropriation has been obtained by a ditch company, viz., he has the right to be

furnished water from the ditch in his proper proportion, in time of scarcity, to that of other irrigators, upon the payment of a reasonable and fair rate of compensation for the same, and this in the case of such a corporation is more than a mere maintenance charge. Rev. St. 1913, sec. 3454.

Defendant asserts some rights under subdivision 1, sec. 13, art. II, ch. 68, Laws 1889, under which the appropriation was made, which provides: "First. All persons through whose lands such ditch or canal runs are entitled to the use of the waters thereof in the order of their location along the line of said ditch or canal"—and argues that section 3374, Rev. St. 1913, preserves those rights, since it provides that "Nothing in this chapter contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the fourth day of April, 1895." He seems to have overlooked the proviso to the second subdivision of section 13, *supra,* which is as follows in part: *"Provided,* that the owners or cultivators of such lands pay the usual and customary rates for the use of said water"—and also to have overlooked the further provisions in sections 12 and 13 as to the distribution of water.

The lack of evidence upon some material points due to the nonproduction of the best evidence on the part of the litigants, owing no doubt largely to the long lapse of time from the organization of the plaintiff company, and the death or removal of those who originally applied water to the lands, has rendered this a somewhat perplexing case to decide, and many difficult questions are suggested, but, not being material to the main issue, are not decided.

The judgment of the district court is reversed and the cause remanded, with instructions to allow an injunction restraining the defendant from interfering with the ditch, or from using any water taken from the canal or laterals of the plaintiff, unless and until he pays, or contracts to pay, to the plaintiff a reasonable compensation

for such water as he is entitled to and desires furnished to his land from plaintiff's canal or ditch, or until he acquires or establishes his title to a water right in the ditch.

REVERSED.

THEODORE R. DAVIS ET AL., APPELLEES, V. RUBY L. DAVIS, APPELLANT.

FILED NOVEMBER 17, 1921. No. 21668.

1. **Remainders:** SUIT TO QUIET TITLE. Under the statutes of Nebraska remaindermen may maintain a suit to quiet title before the termination of the life estate.
2. **Wills:** CONSTRUCTION: REMAINDERS. The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder, if the meaning of the testator is obscure in this respect.
3. ———: ———: ———. A will devising a life estate to the wife of testator, his property at her death to be divided equally among his four children, and providing, in case of the death of one or more of them without heirs, that his property shall descend in equal shares to the survivors, construed to devise a vested remainder to the children living at the death of testator.
4. **Descent:** WIDOWS. For the purposes of the Nebraska statutes of descent a widow may be an heir of her deceased husband.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Reversed, with directions.*

Byron Clark, Jesse L. Root and *W. A. Robertson,* for appellant.

W. T. Thompson, Grant G. Martin and *C. A. Rawls, contra.*

Heard before MORRISSEY, C.J., ROSE, LETTON, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

ROSE, J.

This is a suit to construe a will and to quiet in plain-

tiffs title to their interests in devised lands consisting of several tracts in Cass county. The part of the will in controversy reads:

"I give and bequeath to my wife Barbara Davis, all of my property, both personal and real, wherever found, during her lifetime, and at her death my property is to be divided equal between my four children, Theodore R. Davis, son; Daisey R. Schroeder, formerly Daisey R. Davis; Reine L. Poore, formerly Reine L. Davis, my two daughters, and Philip S. Davis, son. In case one or more of my children should die without heirs, then and in that case my property is to descend in equal shares to my surviving children."

John H. Davis was the testator. His will was executed June 4, 1902, and he died March 16, 1907. The will was probated April 12, 1907. All of the children are living except Philip S. Davis. The son Theodore R. Davis was married in 1902, but is childless. Both daughters were married and have children. The son Philip S. Davis was married September 2, 1916, and died intestate and childless November 17, 1919, after the death of his father. The widow of testator is still living. The three living children of testator are the plaintiffs and claim title to all of the devised lands, subject to the life estate of their mother. An action in this form before the termination of the life estate is authorized by statute. Rev. St. 1913, secs. 6266, 6268; *Hobson v. Huxtable,* 79 Neb. 334.

Ruby L. Davis, widow of testator's deceased son, is one of the defendants, and, subject to the life estate mentioned, claims an undivided one-eighth interest in the devised lands, being one-half of the one-fourth share of her deceased husband under the will of his father. She claims this as an heir of her husband and she prays for a decree quieting her title as against plaintiffs. Testator's widow is the only other defendant. She disclaims any interest in the devised lands except her life estate. From a decree granting to plaintiffs the equitable relief sought by them, defendant Ruby L. Davis has appealed.

To sustain the decree that Ruby L. Davis, widow of the deceased son of testator, has no interest in the devised lands, and that as against her the title of plaintiffs is quieted in them, they argue the following propositions: At the death of testator no indefeasible estate vested in any of his four children named in the will; their estate is a base or determinable fee in each, passing by executory devise to the survivors of any dying without heirs; testator's son, Philip S. Davis, died without heirs within the meaning of the will, and therefore his widow, Ruby L. Davis, has no interest in the devised lands.

On the other hand, it is contended by Ruby L. Davis that the decree is erroneous because, as it is argued, the will devised two estates, both vesting at the death of testator; one being the life estate of testator's widow, and the other the vested remainder with an undivided fourth to each of testator's four children, all living when the will was probated. In this connection it is further argued that the widow of testator's deceased son is an heir of the latter within the meaning of the will and of the statutes of descent.

In discussing the questions presented, both sides have invoked the wisdom of sages and each of the divergent views seems to be supported by precedents cited, but the difficult task of determining the intention of the testator remains.

The terms, "base or determinable fee," "executory devise," "vested remainder," "estate in remainder," and "contingent remainder," when used in construing wills and in describing interests in devised property, are defined in *Wilkins v. Rowan,* p. 180, *post,* and the repeating of the definitions here is unnecessary.

For the purposes of the will testator divided his property into two estates. One was the life estate which he willed to his wife. It is definitely described and it vested in the widow of the testator upon his death, though that event was not specifically mentioned in the will as the date for the vesting of her title. After the devising of

the life estate, the definite estate known in law as the "remainder" was subject to testamentary action, and it is clear that in some form it was intended for the four children in equal shares, if living.

Following the devise of the life estate to the wife of testator, the provision that "at her death my property is to be divided equal between my four children" does not necessarily mean that the two estates shall not vest at the same time or that the remainder shall not vest until the death of testator's wife. When the entire will is considered, the phrase "at her death" may fairly be construed to refer to the time when the enjoyment of the estate in remainder begins. There are precedents and sound reasons for this interpretation. The will was made in contemplation of death. Testator meant to dispose of all of his property by will, and did not mean to allow any part of it to descend to his children under the statutes of descent. He included it all in the provisions of his will. His devises were in a form to make the changing of his will unnecessary in the event of his surviving any of his children. Having provided for the vesting of the life estate at the death of testator, provision for the vesting of the remainder in his children at the same time would be a natural wish under ordinary circumstances. He did not say that the estate in remainder shall be divided among his children at his wife's death, but he did say that his "property" shall then be thus divided. Such a division of the "property" cannot be made at an earlier date or before the termination of the life estate. The concluding sentence of the provisions quoted follows:

"In case one or more of my children should die without heirs, then and in that case my property is to descend in equal shares to my surviving children."

The expression, "die without heirs," should be construed to refer to the death of a devisee during the life of testator. The policy of the law is to favor the early vesting of estates. The inference of a vested remainder is stronger than the inference of a contingent remainder,

if the meaning of testator is obscure. Testator obviously meant to leave all of his children on the same footing at the time of his death. He did not, therefore, contemplate a contingency in which a child having heirs would have no interest in the devised property, if such child should die after the death of testator and before the death of the latter's widow, and that the heirs of another child dying a few days later, after the death of testator's widow, would share in the estate. A vested remainder would avoid such a discrimination.

The expression, "die without heirs," was originally written "die without children," but before the will was executed the word "children" was partially erased, and over the partial erasure the word "heirs" was inserted in the handwriting of W. H. Pool, the draftsman.

Considering the entire will from the standpoint of the testator in connection with the surrounding circumstances, the conclusion is that Philip S. Davis acquired at the death of his father an undivided one-fourth of a vested remainder in the devised lands, and that one-half of his interest, or an undivided one-eighth of the estate in remainder, descended to Ruby L. Davis under the statutes of Nebraska as the widow and the heir of her deceased husband. Each of the cases cited from this court by plaintiffs to sustain a contrary view seems to have some feature distinguishing it from the present case.

The judgment of the district court is reversed, with an instruction to grant to defendant Ruby L. Davis the equitable relief sought in her answer.

REVERSED.

BEE PUBLISHING COMPANY V. STATE OF NEBRASKA. VICTOR ROSEWATER V. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1921. Nos. 21314, 21315.

1. **Contempt:** REMITTANCE OF FINE. The editor in chief of a metropolitan daily newspaper, owned by a defendant corporation, was joined with the corporation in a contempt proceeding, both being

charged with having caused the publication of an article that tended to obstruct the due administration of justice in a suit then pending and undetermined in the district court. Both defendants were found guilty. It appearing that a fine of $1,000 was imposed upon the corporate owner of the newspaper, and that the editor had no knowledge of the objectionable article until after its publication, and the fact that this is his first offense, *held*, to be such mitigating circumstances as to justify a remittance of the fine imposed upon the editor.

2. ———: AFFIRMANCE. The corporate owner of a metropolitan newspaper published an article respecting a criminal prosecution, then pending in the district court and undetermined, which took sides as between the state and the defendant. The article declared the innocence of the accused and indulged in violent comment respecting the evidence. Derogatory statements were made with respect to the credibility of the state's witnesses. The newspaper was published in the county seat and had an extensive circulation throughout the state and in the city and county of its domicile, the vicinity from which the jurors in the case should be drawn. *Held*, that in a proceeding for contempt the court did not err in imposing a fine upon the publishing company.

3. ———: PROCEEDINGS CRIMINAL IN NATURE. "Proceedings for contempt of court are, in this state, in their nature criminal, and governed by the strict rules applicable to prosecutions by indictment; hence presumption and intendments will not in such cases be indulged in order to sustain judgment of conviction." *Beckett v. State*, 49 Neb. 210.

4. Constitutional Law: FREEDOM TO WRITE: QUALIFICATION. The freedom that is guaranteed by the Constitution to freely write and publish on all subjects is qualified by the provision that imposes responsibility for the abuse of that freedom.

5. Contempt: FREEDOM OF THE PRESS: COURTS. The right of the courts to impose punishment for contempt, arising from an abuse of the freedom of the press, as relating to causes pending in court and undetermined, is universally recognized.

6. ———: ———: ———. The law will not suffer punishment to be imposed for a free expression of such criticism as a person or a publisher may entertain for the decisions of the courts.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed in part, and affirmed in part.*

Rosewater, Cotner & Peasinger and *W. J. Connell*, for

plaintiffs in error.

Clarence A. Davis, Attorney General, Abel V. Shotwell, County Attorney, and *C. L. Dort, contra.*

Heard before MORRISSEY, C.J., DEAN, FLANSBURG and LETTON, JJ.

DEAN, J.

On November 11, 1919, the Bee Publishing Company, a corporation, Victor Rosewater, and John H. Moore, defendants, were jointly informed against by the county attorney for Douglas county, under section 8236, Rev. St. 1913, and charged with a wilful attempt to obstruct the proceedings and hinder the due administration of justice in a suit, then lately pending and undetermined, by the publication of a certain article in the Omaha Sunday Bee, November 9, 1919. Moore was acquitted, but the Bee Publishing Company and Rosewater were both found guilty of contempt and were each separately fined $1,000 and costs. They have brought the case here for review.

The exhibits and the evidence tend to show that the facts out of which this suit arose, and which form the basis of the newspaper story in question, are substantially these:

On the afternoon and night of Sunday, September 28, 1919, the Douglas county courthouse in Omaha was beset by a riotously assembled mob made up of several thousand persons who came together for the unconcealed purpose of lynching an inmate of the jail, who was suspected of having made an attempt to commit a heinous offense against a defenseless woman. The mob overpowered the police force and other of the city officials, all of whom were assisted by many law-abiding citizens, but to no avail, in an endeavor to restore order. The object of the mob's fury was seized and lynched, the courthouse was fired and in large part destroyed, and with it most of its contents, before the mob dispersed. Within a short time after the fire, namely, November 6, 1919, John H. Moore, a Bee reporter, was indicted by a grand jury specially called by the district court to inquire into the facts lead-

ing up to and connected with the riot and the fire. The indictment charged Moore with conspiring with others to commit arson. Two boys, named Morris and Thorpe, were suspected of being implicated in the riot and were arrested. While under arrest they testified before the grand jury and informed that body that they saw Moore, on the afternoon of the riot, leading a gang of boys to the courthouse, carrying gasoline and oils for the purpose of aiding in the conflagration. It was mainly on this evidence that the indictment against Moore was based.

Subsequently, and while the Moore case, pursuant to the indictment, was pending and undetermined in the district court, Morris and Thorpe furnished affidavits which in effect stated that their testimony before the grand jury with respect to Moore was false, and that it was obtained by coercion and intimidation practiced upon them, while under arrest, by certain members of the Omaha police force, and by promise of immunity from prosecution. The article that is set out in the information and that appears as an exhibit in the Omaha Bee of Sunday, November 9, 1919, and other like exhibits, purport to give an account of some of the circumstances attending the fire and the alleged unfair methods under which the testimony that implicated Moore was obtained. The article, or newspaper story in question, covers about two columns of the newspaper exhibit of Sunday, November 9, and about six pages of legal cap in the information. It is too extended to be fully reproduced in this opinion.

The following headlines that precede the article that is incorporated in the information are in large display type:

"Boys Disclose the Frame-up—Promised Freedom by Police—Captain Haze Offered Liberty to Prisoners for False Testimony Before Grand Jury, They Declare in Affidavits—Rotten Police Methods Laid Bare by Youths—Admit They Never Saw Bee Man They Testified Against Until After Case Had Been Framed by Detectives." The excerpts in ordinary brevier type follow:

"Captain of Police Henry P. Haze 'framed up' the

malicious and false testimony submitted to the grand jury upon which J. Harry Moore, reporter for the Bee, was indicted Friday, on a charge of conspiracy to commit arson in connection with the riot of September 28th. This statement was made to a reporter for the Bee, in the county jail yesterday by Ernest Morris and Harold Thorpe, confessed members of the mob, upon whose evidence the indictment against the reporter was returned. Both Morris and Thorpe made affidavits to the effect that Haze prevailed upon them to perjure themselves in order to convict Moore, whose investigations as a newspaper man have resulted in sensational and startling revelations against the Omaha police department, upon a promise that they would not be required to serve their full sentences in jail for rioting. * * * They were told they would be released from jail as soon as the reporter had been tried and sent to the penitentiary. When the boys told Captain Haze they never had laid their eyes on the Bee reporter, the policeman replied that he would arrange it so they could see the man."

The article goes on to say that the boys changed their minds, and that Morris informed a reporter that after they got to thinking about it in jail they agreed they "did not want to be a party to a frame-up on an innocent man," and decided to "expose Captain Haze and the other detective." The writer of the article then observed that the other witness who testified against reporter Moore before the grand jury was a notorious bootlegger and a former policeman. Then follow the affidavits of Morris and Thorpe, that were printed as a part of the objectionable article, that purport to substantiate the foregoing statements, and many other statements of like import that appear in the article in question. Besides the foregoing excerpts, the article elsewhere, as it appears in the information, proceeds to vilify the police department generally, and the police officers who testified before the grand jury, and who would of necessity be witnesses at the coming trial against Moore in the district court. It

proceeds to say that whether the police commissioner or the chief of police "had a hand in the frame-up on the reporter (Moore) Morris and Thorpe were unable to say." Continuing, the article observed that the commissioner always approved of Captain Haze's methods, and that the chief of police was known to have offered to promote a certain police officer if he succeeded in "getting" the Bee reporter.

Taylor Kennerly was the managing editor of the Bee when the objectionable article was published, and as the head of the editorial department he directed the news policy of the paper. He said that Rosewater never gave him any orders with respect to his work, and if he, the witness, was absent the city editor or the news editor determined what articles should appear. He testified that as a general proposition a communication or a reporter's story, before publication, was edited by either one of six or seven men called copy readers, day editors, night editors, or telegraph editors.

It plainly appears that the article seriously reflected upon the integrity of the witnesses who appeared before the grand jury and who would in all probability testify in the district court. It took sides as between the state and the defendant, and opinions in respect of the merits were expressed. Violent comment was indulged in respecting the evidence, and the innocence of the accused was declared. Upon its face it is apparent that a bold attempt was made to mold public opinion favorable to Moore in advance of his trial, the Bee having an extensive circulation, not only throughout the state, but in the city and in Douglas county as well, the vicinity from which the jurors would be drawn and before whom Moore would be subsequently tried. Clearly an inflammatory harangue, in the locality where the trial was to be had, so worded, would tend to hinder the due administration of justice. That a publication so worded and so circulated, under the circumstances that prevailed at the place of its publication, constitutes constructive contempt of court is well

settled. 6 R. C. L. p. 508, sec. 20, p. 509, sec. 21.

The state contends that Victor Rosewater, as editor in chief of the Omaha Bee, was properly chargeable with knowledge of the matter that appeared in its columns, and that the fact that he did not know of the existence of the objectionable article until after its publication should not relieve him of liability therefor. In the absence of mitigating circumstances there is merit in the argument. In the exercise of the police power it has frequently been held permissible to inflict punishment upon a person for the commission of an unlawful act by his agent, even though the principal was unaware that the act was being committed, and in some instances punishment has been imposed when the agent has been expressly directed to refrain from the commission of the proscribed act. An illustration, now less familiar than formerly, is seen in the cases wherein licensed vendors of intoxicating liquors were convicted for the unlawful sale of intoxicating liquors on Sunday, or to minors, or to intoxicated persons, notwithstanding the fact that the unlawful act was committed by the owner's barkeeper and without the knowledge of his employer and in disregard of his express instructions. *Lehman v. District of Columbia,* 19 App. D. C. 217; *State v. Gilmore,* 80 Vt. 514, 16 L. R. A. n. s. 786, and note. *Robinson Cadillac Motor Car Co. v. Ratekin,* 104 Neb. 369, is a civil case involving the forfeiture of an innocent mortgagee's interest in an automobile wherein substantially the same principle is involved.

As affecting Rosewater's connection with the article upon which the prosecution is based, the findings of the court read in part: "With reference to Mr. Victor Rosewater, I have had some difficulty in arriving at a conclusion. It is true that punishment of this defendant is of a somewhat vicarious nature. It is shown by the evidence, to my satisfaction, that he had no actual connection with the writing or the publication of the offensive article." The court, however, in its findings made some reference to an editorial that appeared in the Bee of

Monday, November 10, that contained a somewhat caustic reference to the police department and the subject generally that was discussed in the paper of the day before, and concluded that it was written by Mr. Rosewater. From a perusal of that editorial the court found: "I am forced to the conclusion, in view of the editorial following the article in question, * * * that, notwithstanding he (Rosewater) had no knowledge of the terms of the article that was printed, it (the article complained of) would have met with his approval if it had been submitted to him." The court thereupon, and apparently on that presumption, found Mr. Victor Rosewater guilty of contempt.

Section 8236, Rev. St. 1913, is the act under which the present proceeding is brought. It provides: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: * * * Fourth, any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts."

In proceedings for constructive contempt of court in this state we are committed to the proposition that the strict rules of construction obtain that are applicable under criminal prosecutions. Defendants cite *Hawes v. State,* 46 Neb. 149, and *Beckett v. State,* 49 Neb. 210. In the *Hawes* case, in an opinion by Justice Post, it is said: "Presumptions and intendments will not be indulged in order to sustain convictions for contempt of court." The rule there announced was reaffirmed in the *Beckett* case, to which was added the observation that proceedings for contempt of court are in their nature criminal, and governed by the strict rules applicable to prosecutions by indictment. To the same effect is *Hydock v. State,* 59 Neb. 296. See 3 Ency. of Evi. 443, sec. 6.

In view of the citations on this point the argument that suggests itself is, in effect, that Mr. Rosewater cannot properly be held to suffer a vicarious punishment for an

offense that the court found he did not commit, and that it cannot properly be presumed, without proof, that the objectionable article, in the language of the court's findings, "would have met with his approval if it had been submitted to him." But, in view of our conclusion with respect to the penalty that was imposed on Mr. Rosewater, we do not now find it necessary to decide that question. However, it may be observed that lack of knowledge of the existence of an offending article until after its publication has been held to mitigate the severity of a merited punishment, but that such lack of knowledge would not justify the owner in its publication. *People v. Stapleton,* 18 Colo. 568; *Ex parte Nelson,* 251 Mo. 63.

Aside from the fact that Mr. Rosewater did not know the article was in existence until after its appearance, we find a mitigating circumstance in that this is his first offense. Another circumstance in mitigation of his punishment, that may properly be considered here, arises from the fact that his codefendant, the corporate owner of the Bee Publishing Company, was fined $1,000, a penalty that must be permitted to stand. For this we have a precedent in a former decision by this court. *State v. Rosewater,* 60 Neb. 438. The conclusion is that as to the defendant Rosewater the judgment must be vacated.

The freedom that is guaranteed by the Constitution to freely write and publish on all subjects is qualified by the provision that imposes responsibility for the abuse of that freedom. In the present case license has been mistaken for liberty, and, under the alluring guise of a plea for the freedom of the press, it is contended that no offense was committed. From any viewpoint the powerful influence of the press in the affairs of modern civilization is always and everywhere recognized. But when it clearly appears that an attempt is made to use that powerful agency to nullify a lawful exercise of the functions of the judiciary, as those functions relate to a cause then presently pending and undetermined, the hand of punitive justice may properly be applied. Needless to say, it is

not our purpose to interfere with the freedom of the press. We clearly recognize that the law will not suffer punishment to be imposed for a free expression of such criticism as a person or a publisher may entertain for the court's decisions. *State v. Shepherd,* 177 Mo. 205; *Ex parte Barry,* 85 Cal. 603; *Field v. Thornell,* 106 Ia. 7; 13 C. J. p. 34, sec. 44, p. 37, sec. 45. We reaffirm the language of Sullivan, J., as aptly expressive of our view: "Our decisions and all our official actions are public property, and the press and the people have the undoubted right to comment on them and criticise and censure them as they see fit. Judicial officers, like other public servants, must answer for their official actions before the chancery of public opinion; they must make good their claims to popular esteem by excellence and virtue, by faithful and efficient service and by righteous conduct." *State v. Bee Publishing Co.,* 60 Neb. 282, at page 296.

Another feature may be noticed. The verification of the charge by the prosecuting attorney closes with the statement: "The facts set forth in said information are true to the best of my knowledge and belief." Defendants argue that, unless the complaint is verified positively, the court is without jurisdiction. The argument is not tenable. They cited *Herdman v. State,* 54 Neb 626, and *Belangee v. State,* 97 Neb. 184. But in those cases the court did not, as in the present case, order the county attorney to institute the prosecution. It may be noted, however, that the charge in the information, in the present case, is set forth in positive and direct terms. In some cases, in this and other states, this has been held to overcome the defendants' somewhat technical objection. *Emery v. State,* 78 Neb. 547.

The judgment of the district court with respect to the fine imposed upon Rosewater is vacated. With respect to the fine imposed upon the Bee Publishing Company the judgment is affirmed.

REVERSED IN PART, AND AFFIRMED IN PART.

DAY, J., not sitting.

JOHN O. GREUSEL, APPELLEE, V. CHARLES T. PAYNE, APPELLANT.

FILED NOVEMBER 17, 1921. No. 21335.

1. **Appeal in Equity:** TRIAL DE NOVO. When an action in equity is appealed, it is the duty of this court to try the issues *de novo* and to reach an independent conclusion without reference to the findings of the district court. Rev. St. 1913, sec. 8198. But when the evidence on material issues so conflicts that it cannot be reconciled, "this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite." *Shafer v. Beatrice State Bank*, 99 Neb. 317.
2. **Trusts:** PARTNERSHIP: TRANSACTIONS IN LANDS. When two or more persons agree orally to buy and to deal generally in land, each of the parties contributing equally to the purchase price, and when the title to the land so acquired has, by agreement, been placed in the name of one of the parties, a trust relation is thereby created and the trustee holding the title can be required to account in equity to his associates for the profits arising from the transactions.
3. **Statute of Frauds:** TRANSACTIONS IN LANDS: PAROL CONTRACT. When two or more persons orally agree to furnish the money to buy real estate to sell again and to share the profits and the losses arising from the joint enterprise, such agreement does not come within the inhibition of the statute of frauds and need not be in writing. Rev. St. 1913, ch. 25, secs. 2621-2652.

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

Fawcett & Mockett, F. V. Robinson and *A. L. Chase*, for appellant.

Bruce Fullerton and *Reese & Stout, contra.*

Heard before MORRISSEY, C.J., LETTON, DEAN and DAY, JJ.

DEAN, J.

This is a suit in equity for an accounting. In 1914 plaintiff and R. J. Miller, under the firm name of Miller

& Greusel, were engaged in the real estate business in Lincoln. It is alleged by plaintiff that, in the same year, the defendant became associated with himself and Miller, under an oral agreement of partnership, for the purpose of buying and selling real estate, mortgage securities, and the like. When, some time thereafter, plaintiff sought to effect a settlement with defendant, for his share of the profits in the business venture, he denied the existence of a partnership or that he was at all liable to plaintiff in any sum for any of the profits or the proceeds of any of the property in which plaintiff claimed the right to share. Defendant also asserted exclusive ownership of all real estate and all securities, approximating $20,000 in value, that are in controversy here and in which plaintiff contends that he owns a partnership interest. Upon defendant's refusal to account to plaintiff he began this action and recovered a judgment for $4,450.20, from which defendant appealed.

The weight of the evidence clearly establishes plaintiff's contention that an oral partnership agreement was entered into by the plaintiff, the defendant and Miller and that it carried on a successful and profitable real estate business. It appears that, under the agreement, defendant was to have as his share one-half of the net profits arising out of the business and that plaintiff and Miller were each to have one-fourth of the profits as their share, and that the losses, if any, were to be borne by the partners in the same *pro rata* proportion. It was shown that defendant was to collect all rents, interest and income, and account to the partners therefor, the parties having agreed that the real estate and mortgage securities and the like should be taken in defendant's name, for convenience in making transfers of the property. In case of a sale or exchange of such properties defendant was to make the necessary conveyances, or assignments, as the case might require, to the respective grantees or purchasers. It may be noted that the interest of Miller is not involved here, he having effected a settlement with

defendant before this suit was begun.

Apparently to finance the new business venture, plaintiff and defendant and Miller, in May, 1914, borrowed $4,400 from a bank, for which they gave their joint and several note signed as individuals. With the money so obtained they purchased a 160-acre tract of land in Seward county and shortly thereafter exchanged the land for a Lincoln garage. Soon afterward the garage was exchanged for land in Scotts Bluff county and, as representing the difference in value, the partnership received a $2,000 mortgage on the garage. Later the Scotts Bluff land was exchanged for a 160-acre tract of land in Merrick county, and for the difference in value between the two properties the partnership received a $5,000 mortgage on certain Lincoln city property. A stock of merchandise, that was acquired by the partnership, was exchanged for a ten-acre orchard near Lincoln, upon which there was a $700 mortgage, and, to the end that a payment might be made on the property, an additional sum of $500 was borrowed from the same bank where the $4,400 was obtained, the three men again jointly executing a new note, which is in evidence, but in the principal sum of $4,990.20. It appears that all over $4,400, in the renewal note, represented unpaid interest and also the $500 newly borrowed. A second mortgage of $300 on the Hartley orchard was paid off and plaintiff paid to defendant $77.67 as his share of the mortgage obligation including interest. It appears that plaintiff and defendant from time to time each contributed money for partnership expenses and in payment of interest and the like. A course of partnership dealing is shown by six or seven checks that were drawn by plaintiff to defendant's order and collected by him and by him applied on partnership business. The check for $77.67, which represents plaintiff's one-fourth part of the $300 mortgage obligation, has already been noticed. Another check is for $33.80, payable to defendant, to apply on interest on the $4,400 note. Another is for $54.80 for the examina-

tion of an abstract of title to the garage property. A check for $50 is for plaintiff's one-fourth part of the $200 earnest money that was paid on the Seward county farm. Another for $30.84 represented one-fourth of the difference between the income and the expenses on one of the city properties that came into the hands of the partnership. A check for $5 by Greusel paid the water rent on the O street garage. Another for $22.74 represented plaintiff's payment of one-fourth of the interest that became due on the loan on the Merrick county land. This check was made payable by plaintiff to the owner of the loan or to his agent.

It plainly appears that the Hartley orchard of ten acres, of the net value of $3,300, and the Merrick county quarter-section, of the net value of $12,500, were converted by defendant to his own use. He deeded the Merrick county land to his daughter, and the Hartley orchard was deeded to another, and in exchange therefor he took deeds to real estate that were executed in blank. Among other transactions it was shown that defendant collected the garage mortgage, which with interest amounted to $2,120. He collected also the mortgage on other Lincoln city property, amounting to $5,600, including interest, or a total of $7,720 that belonged to the partnership. With this money defendant paid $5,719.15 in satisfaction of the partnership debt to the bank. Of the interest charge on the principal debt, as hereinbefore noted, plaintiff had theretofore paid $33.80 to defendant to apply thereon. So that, after deducting the $33.80 so paid by plaintiff, there remained in the hands of defendant $2,000.85 of partnership funds that, with other property belonging to the partnership, was converted by him to his own use, amounting to $17,800.85 in all.

Defendant denied generally all of the material evidence introduced on plaintiff's part. He denied that he entered into any contract of partnership with plaintiff either alone or in connection with Miller. He said that some time in May, 1914, Miller personally, and not as a

member of the firm of Miller & Greusel, solicited his aid in handling the Seward county tract of land and the Lincoln garage, and that in pursuance of an arrangement then entered into between them he undertook with Miller alone to handle both properties. F. M. Davis was a party to the exchange of the Scotts Bluff land for the Lincoln garage, in which one of the mortgages taken in an exchange of property was involved. He testified that defendant told him that Greusel and Miller were both "interested in it (the mortgage) the same as he was," and that plaintiff, defendant and Miller together owned the Lincoln garage. Defendant admitted that plaintiff went in a car with him and Miller to the bank and there joined with them in signing the first note of $4,400, and that when it became necessary to borrow more money and to renew the note plaintiff again went to the bank with them and again signed the renewal note for $4,990.20. He testified that he was surprised when plaintiff signed the note, but that he did not tell him so, nor any other person, and that so far as he knew he signed it voluntarily or perhaps at the behest of Miller. It appears that on April 8, 1916, the $4,990.20 note was again renewed and that defendant alone signed it. But it also appears that he paid the note, so renewed in his own name and which was in fact an indebtedness of the partnership, out of a part of the proceeds of the sale of the two mortgages that the partnership owned, all as hereinbefore noted.

The conclusion is that the record discloses a continuous course of partnership dealing. It is clear that defendant did not account to plaintiff for his share of the partnership profits nor for the proceeds arising from the sale or exchange or transfer of the properties that he disposed of.

Defendant argues that the agreement, even if established, "is within the statute of frauds (Rev. St. 1913, sec. 2623), and void, unless in writing." He cites *Norton v. Brink*, 75 Neb. 566, on rehearing, 575. That case does

not seem to be in point. In that case there was a parol agreement between two persons to buy a tract of land together. One of the parties furnished all of the purchase price and took the title in his own name, the other agreeing to pay one-half of the purchase price on demand. It was there held that a partnership was not created and that a resulting trust did not arise in favor of one who contributed nothing to the payment of the purchase price. Clearly that is not the case before us. It is perfectly clear that plaintiff, defendant and Miller together borrowed and were jointly liable for the money that was used to purchase the property upon which the business enterprise was based and from which subsequent profits were realized and property was accumulated.

The rule is well stated in *Bear v. Koenigstein*, 16 Neb. 65. It was there held that, where three persons orally agreed to buy a tract of land and each of them contributed one-third of the purchase price and each was to have an undivided one-third of the land so purchased, a trust resulted in favor of two of the contributing persons against the third person, in whose name the title was taken. See, also, *Rice v. Parrott*, 76 Neb. 501, on rehearing, 505. This question has been passed on in other states. In *Speyer v. Desjardins*, 144 Ill. 641, the court held: "It is well settled that an oral contract by two or more persons to purchase real estate for their joint benefit is within the statute of frauds, but an agreement for a partnership for the purpose of dealing and trading in lands for profit is not within the statute, and the fact of the existence of the partnership and the extent of each partner's interest may be shown by parol evidence." Judge Cooley, in construing a statute (How. St. sec. 6181) similar to section 2625, Rev. St. 1913, observed that the inhibition against the enforcement of a verbal contract "for the sale of any lands, or any interest in lands," contemplates a transaction between vendor and vendee as principals. *Carr v. Leavitt*, 54 Mich. 540. The

subject is discussed in *Fountain v. Menard,* 53 Minn. 443, and in 20 R. C. L. 862, sec. 72.

We have tried the case *de novo,* and the conclusion is that plaintiff and defendant were members of a partnership wherein each partner furnished an equal amount of the capital and as partners bought, exchanged and dealt generally in real estate and mortgage securities. It seems clear that defendant did not account to plaintiff for his share of the partnership property that was acquired by the partnership and that was placed in his hands.

In the present case, as in all cases of this character, the district court had the advantage, that is denied a reviewing court, of seeing, hearing and observing the manner of the witnesses. Nevertheless the law requires that, when an action in equity is appealed, it is the duty of this court to try the issues *de novo* and to reach an independent conclusion without reference to the findings of the district court. Rev. St. 1913, sec. 8198. But when the evidence on material issues so conflicts that it cannot be reconciled, "this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite." *Shafer v. Beatrice State Bank,* 99 Neb. 317; *Gaunt v. Smith,* 103 Neb. 506.

When two or more persons agree orally to buy and deal generally in land, each of the parties contributing equally to the purchase price, and the title to the land so acquired has, by agreement, been placed in the name of one of the parties, a trust relation arises and the trustee can be required to account in equity to the others for the profits arising from the transactions. The rule is that in such case the agreement does not come within the inhibition of the statute of frauds and need not be in writing. Rev. St. 1913, secs. 2621-2652.

The judgment is

AFFIRMED.

LESLIE S. FIELDS V. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1921. No. 21867.

1. **Criminal Law**: ABORTION: ADMISSIBILITY OF LETTER. In a prosecution for committing an abortion upon a woman who subsequently died as a result of the operation, it is not error to receive in evidence a letter, written by decedent to a coconspirator the day before the operation, and six days before her death, which contains statements that evidence a conspiracy between herself and the addressee and the defendant, the statements in the letter being competent and relevant to the facts connected with the commission of the offense and being clearly a part of the *res gestae*, nor is it error to permit the jury to take such letter when it retires to deliberate upon its verdict.
2. ———: JURY: RIGHT TO EXHIBITS. "The modern practice, both in civil and criminal cases, is to send to the jury room all instruments, articles and documents, other than depositions, which have been received in evidence, and which will, in the opinion of the trial judge, aid the jury in their deliberations." *Russell v. State*, 66 Neb. 497.
3. ———: ———: ———: DISCRETION OF COURT. "In the absence of statutory direction it is, in a great measure, left to the sound discretion of the court as to what papers, books or other matters of evidence, or instructions, the jury will be permitted to carry with them to their room upon retiring to consider of their verdict." *Langworthy v. Connelly*, 14 Neb. 340.
4. ———: CONSPIRACY. "When a conspiracy is once shown to exist by the requisite *quantum* of proof, the acts and declarations of each of the conspirators, in furtherance of the common design, are the acts and declarations of all." *Lamb v. State*, 69 Neb. 212.
5. **Abortion**: AFFIRMANCE. The record examined, and *held* that the verdict is supported by the evidence; and *held* that the court did not err in denying an application for a new trial.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Matthew Gering, B. N. Robertson, A. L. Sutton and *A. S. Ritchie*, for plaintiff in error.

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

Heard before MORRISSEY, C.J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

DEAN, J.

Leslie S. Fields, a practicing physician, was informed against jointly with Mrs. Minnie Deyo and charged with having produced an abortion upon the person of Ruth Ayer, an unmarried woman. The information charges that the offense was committed August 3, 1920, and that Miss Ayer died August 8, 1920, as a result of the operation. Defendant was granted a separate trial, and was convicted and sentenced to serve an indeterminate term of not less than one nor more than ten years in the penitentiary. From the sentence so imposed he prosecutes error.

On the part of the state Dr. Strickland testified that in the evening of August 3, 1920, he administered an anæsthetic at the home of Mrs. Deyo to Ruth Ayer at defendant's request, and that the only persons present besides himself were Dr. Fields, the patient, and Mrs. Deyo. He said that Fields then "proceeded to do a curettement" with the same instruments that are used in performing an abortion. He stated that so far as he could observe the patient was normal at the time of the operation, and that he saw no blood until after it was performed. August 5, at about 6 in the evening, Dr. Fields again operated on Ruth Ayer at the Deyo home, and he again, at his request, administered an anæsthetic with the same persons present as before. On the day that the inquest was held over the remains of decedent, Strickland said he had a conversation with Fields, and that Fields told him he would like to have him "forget about the Tuesday operation and testify about Thursday only." Just before he testified at the coroner's inquest, in answer to an inquiry, he told Fields that he "didn't think he had a leg to stand on," to which Fields replied: "'What are you going to say?' I says, 'I won't say any more than what I really have to.' I don't remember whether he asked me about

the Tuesday operation then or not, but he evidently understood that, because he says, 'My God, don't do it.'"

The offices of defendant and of Dr. Nettie Gerish are located in the same building and on the same floor. She testified that Miss Ayer came to her office Tuesday, August 3, a few minutes before the noon hour, and, upon examination, she discovered pregnancy that was about four months advanced, but that she was in all respects normal and in no need of an abortion.

Watson Alexander, aged 19, was employed in a Hayes Center store. Miss Ayer was the assistant postmistress in the same town. They were engaged to be married. Watson admitted that he caused her unfortunate condition. He was informed against as having been implicated in the alleged crime, but he waived his privilege and testified. He said they were acquainted about four years and discovered that she was pregnant in May, 1920. In July they came to Omaha together to have an abortion performed. They called on a doctor in the Bee building, whose name he did not recall, who refused to perform the operation and advised them to marry, but subsequently the doctor said "there was somebody in the building that had done such things," and his office was in room 410 or 412. It seems that they then returned to their respective homes, at Hayes Center, with the intention on Watson's part that they would marry, but Ruth for financial and other reasons refused. Soon thereafter it was arranged that Ruth should go to Omaha alone to have the operation performed, and on August 2, 1920, he gave her $110 and took her to McCook, where she took the train for Omaha about 10 that night. Subsequently he sent $70 to her at Omaha. He identified a letter addressed to him at Hayes Center, and also the envelope, both being in Ruth Ayer's handwriting. He said he received the letter at Hayes Center August 5, about 3 in the afternoon. The letter, dated August 3, 1920, was received in evidence over defendant's objection and was read to the jury. The envelope bears this postmark, "Aug

3 7 P M 1920 Nebr." The letter and the envelope will be presently noted more in detail. The witness said he did not remember seeing Dr. Fields in July. A page from the register of the Wellington Inn and a room card purport to show that Ruth Ayer of Hayes Center, Nebraska, arrived at the hotel as a guest August 3, and that she left the same day.

Defendant testified that in the latter part of June or early in July, 1920, a young man and a young woman, who said they were engaged to be married, came to his office and told him that they feared she was pregnant; that upon examination he discovered pregnancy, and they then expressed a desire "to be rid of the oncoming offspring;" that he told them to marry; that they were not in his office to exceed 20 minutes, and left without making an appointment for a further examination or for any purpose; that he did not learn their names nor make a charge for the examination; that when Miss Ayer came to his office in August, 1920, he did not recognize her as having called on him in July, but that subsequently, at about the time of the operation, there was something about her appearance that caused him to believe her to be the same person. He denied that he was at Mrs. Deyo's house, as testified by Dr. Strickland, on the night of Tuesday, August 3, but said he was there the evening of August 5 and performed a curettement upon decedent. He said that Miss Ayer came to his office August 4, late in the afternoon, and that, upon examination, he discovered an incomplete abortion, a condition for which the authorities "advise a curettement." From his office he took her in his car to Minnie Deyo's house at 2704 North Sixty-fourth street, and on the evening of the next day, namely August 5, he said he performed the curettement operation upon deceased, and that Dr. Strickland administered the anæsthetic pursuant to appointment, that she did not readily yield to the anæsthetic and he attributed this difficulty to the loss of blood before she came to his office. Defendant denied having performed the operation

August 3, and denied that, in the operation performed Thursday, August 5, he used an instrument for dilation, as Dr. Strickland testified, because, as he said, dilation was not necessary. He denied too that he told Strickland to forget the operation of August 3 and to confine his testimony to the event of August 5. It may be added that he denied all of the state's material evidence. Defendant introduced testimony with respect to his whereabouts on the evening of August 3, 1920, which, if true, would have established an alibi that would have been an impregnable shield of defense. It is evident that the jury did not accept the statements of the witnesses with respect to the alleged alibi.

The objection to the introduction of Ruth Ayer's letter is the feature of the case that defendant's counsel stress the most. They contend that but for the letter it is doubtful if their client would have been convicted. They complain that not only was the letter read to the jury, but the court permitted it to be taken to the jury room as an exhibit while the jury were deliberating upon the verdict. A copy of the letter, written on a letter sheet of the Wellington Inn, follows:

"Fireproofed with Automatic Sprinklers
"On Direct Car Lines from All Stations
"The New Wellington Inn Restful Rooms
"Reasonable Rates
"Farnam at Eighteenth Omaha F. J. Ramey, Manager
"Aug. 3, 1920.

"My dearest Watson: Oh if you were only here with me Kid I went to that fellow 'Dr. Fields' 412 instead of 410 and waited and waited he didn't come. So there was a lady doctor on same floor so I went to her. Kid she said it was at least 4 or 5 months along and there absolutely could be nothing done, and she said get married etc. I started down stairs kid I just thot I'd wire you and then we'd just get married. But I finally mustered up coureage and went to try this 'Dr. Fields.' He just kinda examined and said it wouldn't be much danger and

could be done. Kid it will take about a week and kid first he said three hundred. That was awful but I told him we would pay it but we just couldn't pay all at once. Then he didn't know whether to do it or not. But finally said. He'd come down to two hundred if we could pay it. So listen dear I paid $150 down. *Now Watson get* at least the $50 and send at once. And listen Watson I haven't any left you see so if you could borrow oh say $75. That would be $25 for me. We'll make it all right if we both just work. Kid its terrible but its a way out. Oh Watson dear if you were just here with me. Kid I'm *afraid.* He's going to take me out to a nurses home he called it, and do it in the morning. I'm so scared Kid what if it would be an awful 'I mean bad place', and I couldn't get away. I'm up in a room and oh I just imagine every thing. Kid listen may-be I won't be able to write this week but I will if I'm possibly able. But then after this week if you don't hear from me, Kid you'll *find* me won't you ? ? ? I just had to write but may-be they won't notice in the P. O. and then don't mail my letter thru the P. O. Hand it to the mail man if you get the chance. Kid send the $50 if you can't send another *cent.* Get it out of store or any place. I don't know how to tell you to send it. Just the way you think best. I can't write mama or any one else yet so if any thing comes up, I'm in Omaha is all I know to tell them and fix up something else. I'm working or something *you know.* Don't let any one see my address cause they might know. I told my right name and from H. C. Kid this Dr. doctored old man Lugar. Well dearest I'm going thru it all and then we can be happy and have our *whole* lives to pay it. Your own 'goin' to be brave girl Ruth. Send letter and money to *me* 2704 N*th* 64*th* St. Omaha Nebr. Oh I do *love* you Watson and am not going to be *scared.* Don't let Elsie know you heard from me if you can help it. Oh yes see if there is any mail there for me and *you get it* and send it to that address. With all my love Ruth."

This inscription is on the envelope: "Aug 3 7 P M 1920

Nebr (two two-cent stamps canceled) Watson Alexander, Hayes Center, Nebr."

In connection with the letter exhibit it may here be observed that defendant on the cross-examination testified: "Q. Do you know where she (Ruth Ayer) got the information when she wrote on August 3d, she was going to be taken to 2704 North 64th street? A. I do not. * * * Q. When she came to your office on August 4th, did she tell you she knew anything about Mrs. Deyo? A. She did not. Q. And you knew at that time she didn't know it, didn't you? A. Yes, sir." Doubtless the jury concluded that Ruth Ayer's statement in the letter under date of August 3, respecting Mrs. Deyo's address, together with the postmark of that date, outweighed the spoken word of defendant.

Counsel argue that the letter is incompetent. They say it does not show a conspiracy and that it is not a part of the *res gestae*. It is further argued that, even if error was not committed in permitting it to be read to the jury, it was prejudicially erroneous to permit the jury to take it to the jury room as an exhibit. They contend that the letter is in the nature of a dying declaration or a deposition. It does not appear, however, that the court especially emphasized the letter exhibit as evidence. It was not handed to the jury by the court with the instructions, when the case was first submitted after argument, nor until after it had deliberated about 22 hours, when the jury's express request that it be permitted to take it to the jury room was granted.

From a strictly legal viewpoint the letter lacks the solemnity of a deposition and it lacks much of being a dying declaration. A considerable portion of it is devoted to expressions of solicitude lest she and her lover should be unable to meet defendant's demand for more money. But in the buoyancy of youth she said: "We'll make it all right if we both just work. Kid its terrible but its a way out." The letter briefly refers to the ordeal that was just before her, but it closes with a cheerful

view of the happy future that awaited both of them: "Well dearest I'm going thru it all and then we can be happy and have our *whole* lives to pay it. Your own 'goin' to be brave girl Ruth." Dying declarations do not find expression in the language of Ruth Ayer's letter.

It will be presumed that the jury was composed of reasonable men. A juror may have been in doubt as to whether his memory with respect to certain material statements in the letter was correct, and, if so, it follows that, after reading it, he would then stand more firmly for conviction, or for acquittal, as the material statements, or lack of such statements, might seem to him to indicate. The rule is salutary, and obviously it is as important for the protection of the innocent as for the conviction of the guilty. Clearly Miss Ayer's letter to Watson shows a conspiracy to do the unlawful act with which defendant is charged and in which the proof tends to show he participated.

The letter of the decedent upon its face bears the imprint of verity. It does not contain an expression that suggests fabrication or invention. It is free from the infirmity of memory or the doubt of sincerity. The suspicion, or even the suggestion, of self-interest is absent that so often attends the spoken word of a witness who purports to repeat the language of a person since deceased. The conclusion is that the letter is a part of the *res gestae,* and that the court did not err in admitting the letter in evidence nor in granting the request of the jury to take it, as one of the exhibits, upon retiring to the jury room.

Russell v. State, 66 Neb. 497, is in point. Chief Justice Sullivan in writing the opinion of the court said: "The modern practice, as we understand it, both in civil and criminal cases, is to send to the jury room all instruments, articles and documents, other than depositions, which have been received in evidence, and which will, in the opinion of the trial judge, aid the jury in their deliberations. 12 Ency. Pl. & Pr. 591; 2 Thompson, Trials (2d

ed.) sec. 2575. In *Langworthy v. Connelly,* 14 Neb. 340, Mr. Justice Cobb, after a careful examination of numerous cases, reached the conclusion that 'in the absence of statutory direction it is, in a great measure, left to the sound discretion of the court as to what papers, books or other matters of evidence, or instructions, the jury will be permitted to carry with them to their room upon retiring to consider of their verdict.' "

In *Lamb v. State,* 69 Neb. 212, we said: "When a conspiracy is once shown to exist by the requisite *quantum* of proof, the acts and declarations of each of the conspirators, in furtherance of the common design, are the acts and declarations of all." See *Clark v. State,* 102 Neb 728; *Neal v. State,* 104 Neb. 56; *Katleman v. State,* 104 Neb. 62.

In *State v. Crofford,* 133 Ia. 478, it is said: "The victim of an abortion may be a conspirator to commit the act although not generally regarded as an accomplice; and where conspiracy on her part is shown her declarations in furtherance of the design, in case of her resulting death, are admissible against her coconspirators on trial for the substantive crime."

In *Solander v. People,* 2 Colo. 48, the court declared: "A woman may conspire with others to procure miscarriage of her own person, and, the conspiracy being shown, her acts and declarations in furtherance of the common design are evidence against others engaged with her in the criminal act."

In *Johnson v. People,* 33 Colo. 224, where defendant was prosecuted for murder, resulting from an abortion alleged to have been committed by him, this was said: "Where deceased sought the services of defendant and voluntarily submitted to the operation, the declarations of deceased made to her husband soon after and closely attendant upon the attempt to produce the abortion, to the effect that defendant had operated upon her and produced a miscarriage, was admissible in evidence."

In *People v. Atwood,* 188 Mich. 36, the court say:

"Where the people had proved that deceased was pregnant, that an abortion had been committed, and that it caused her death, and where the relations of respondent and deceased supported an inference that he knew her condition, that she would not have an operation performed without his knowledge, and that he was cognizant of the crime, evidence that on the night she left her home and remained away she seemed in good health and spirits, and said that she was going to meet respondent, was admissible as verbal acts accompanying her going away, and whether they truthfully explained her conduct and purpose was for the jury."

To the same effect is *State v. Power,* 24 Wash. 34, where the defendant was prosecuted for causing death by producing a miscarriage. *State v. Dickinson,* 41 Wis. 299; *State v. Howard,* 32 Vt. 380; 22 C. J. 458, secs. 547, 548.

In criminal prosecutions it is held generally that the declaration of a conspirator may be shown against another conspirator unless the act was done or the declaration was made at a time when the conspiracy was not in existence, or was not in furtherance of the common design. Whether the act or the declaration was in furtherance of the purpose of the conspiracy is for the jury to determine. 16 C. J. p. 665, sec. 1330, p. 666, sec. 1331; *Neal v. State,* 104 Neb. 56.

In discussing the rule of *res gestae* this has been said: "The range of events included by the term *res gestae* varies according to the circumstances of each particular case. The principle upon which these declarations are admitted is their spontaneous and undesigned character and their explanatory or illustrative value in conjunction with the main event. It is impossible to lay down any general rule upon the question of what declarations do or do not constitute a part of the *res gestae.*" Underhill, Law of Evidence, sec. 56.

Defendant says that, when the jury were returned to the jury box after being out almost a day and a night, the

court made some observations that were in effect instructions. The court reporter was not present and the only record with respect to what the court may have said is contained in the joint affidavit of counsel. Granting that the affidavit reflects what was said, the observations cannot be called instructions. It would be absurd to hold that a district judge should be compelled to sit upon the bench like an automaton. The remarks were general in their nature and prejudicial error was not thereby committed.

Defendant's application for a new trial on the ground of newly discovered evidence was properly denied. The affidavits of the respective parties on this feature of the case are conflicting, but the court did not err in denying the motion.

Other alleged errors are assigned in defendant's brief. We have examined all of them, but do not find it necessary to discuss them here, more than to observe that they do not present reversible error.

The judgment is

AFFIRMED.

DANIEL D. MALCOLM, APPELLEE, V. EVANGELICAL LUTHERAN HOSPITAL ASSOCIATION, APPELLANT.

FILED NOVEMBER 17, 1921. No. 21674.

1. **Hospitals:** CAUSE OF INJURY. In respect to the causes of the alleged injury the verdict of the jury is a complete and specific answer.
2. ———: NEGLIGENCE: QUESTION FOR JURY. Whether or not the nurse was careless and negligent in administering the hypodermic injection is a question for the jury.
3. **Master and Servant:** TORTS OF SERVANT: LIABILITY. A master is responsible for the torts of a servant when he is acting within the scope of his employment.
4. **Charities:** HOSPITAL OPERATED FOR GAIN. A hospital supported and maintained and built by private subscription and the subscription of stockholders, and which declares dividends to its stock-

holders, and usually charges reasonable fees for services rendered, is not an eleemosynary institution, but one for private gain.

5. **Hospitals:** LIABILITY. A hospital incorporated and conducted for private gain is liable to patients for the negligence of nurses and other employees.

6. **Evidence:** HYPOTHETICAL QUESTIONS. It is sufficient in propounding a hypothetical question to limit the question to the statement of facts containing the idea upon which the evidence is elicited or brought out.

APPEAL from the district court for York county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Sandall & Wray, for appellant.

W. L. Kirkpatrick, contra.

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., BROWN and ELDRED, District Judges.

ALDRICH, J.

Plaintiff in this case was a young man full of vigor, enjoying much vitality, and in robust health. There was one exception to this general condition of health. He had a rupture of the groin known as hernia. October 6, 1918, he contracted with the defendant for an operation at its hospital. Appellee stayed during the night of October 6 at the hospital, and the next morning, about 30 minutes before the operation, one of the hospital nurses came to his room and inserted a hypodermic needle into his right arm at an improper place and in a careless manner, at a point near the elbow, and then administered supposedly a preparation for the anæsthetic to follow. Then it was that the appellee complained of a severe pain that extended down into his hand and fingers, saying: "Gee, she must have struck my crazy bone; my hand hurts like my crazy bone had been bumped." Appellee was then taken to the operating table, laid flat on his back, his arms were secured with a sheet and the folds of a shirt in such a position that his hands were crossed one upon the other on his breast. The anæsthetic was administered while he

was in this position and the operation for hernia performed without unusual incident.

Immediately upon his regaining consciousness appellee complained to his attendants of the pain in his hand and elbow, which still remained and absorbed and diverted his attention from other discomforts. From that moment appellee's hand was never entirely free from pain and discomfort. Appellee remained in the hospital ten days and was then discharged. About three weeks after the operation appellee's hand and arm were still troubling him. Then Dr. McKinley made an examination of the injured member and inquired thoroughly into the history of the case. The injury was traced back to the hypodermic given at the hospital. His right hand and arm became impaired and deficient in strength. This is a fair, impartial and concise statement of the facts as they exist of record.

The defendant institution is supported by subscriptions of its stockholders, and declares dividends on its stock, and charged the plaintiff a reasonable fee for his operation.

Did this hypodermic cause the injury and pain which immediately followed? It must be conceded that plaintiff was absolutely sound, with the exception of this hernia, at the time of the operation, and that the injuries complained of immediately followed the insertion of the hypodermic needle. Was the injury complained of the natural and proximate result of the hypodermic injection? As a result of this injury the hand and wrist became atrophied and lost much in strength. Taking into consideration the health and strength of the appellee, and that his deficiency or weakness dates solely from the injection of the hypodermic, and from all the evidence in the record on this subject, it is plainly apparent that the administering of the hypodermic injection by Miss Oertel, one of the nurses of the institution, caused the injury complained of. The evidence on this subject is clearly manifest on an examination of the record. The case in

many of its aspects is not unlike the case of *Murphy v. Southern Pacific Co.,* 31 Nev. 120. The testimony of the appellee himself and the attending physicians clearly prove the situation. It is patent upon the face of all the facts that the atrophied and the apparent diseased condition of the arm dated from the injection of the hypodermic needle by the nurse and this is responsible for the situation and condition of the plaintiff as we find him. *Keane v. Village of Waterford,* 130 N. Y. 188.

Another proposition presented is, was this an eleemosynary institution or one for hire. The facts are that it had stockholders who paid the market price for the stock, and paid dividends on the stock, and charged patients what it was reasonably worth for services performed. This situation and these facts take it out of the line of charitable institutions and makes it responsible for the negligence of a nurse when acting within the scope of her duties. *Wetzel v. Omaha Maternity & General Hospital Ass'n,* 96 Neb. 636. The general principle that a master is responsible for the torts of a servant in the scope of his employment applies here. A hospital incorporated and conducted for private gain is liable to patients for the negligence of nurses and other employees. In the instant case we have a nurse administering a hypodermic injection in an unskilful, careless and negligent way. All this appears from the evidence in the record by a preponderance thereof. The attending physicians say that the hypodermic injection was administered at the wrong place in the arm in a negligent and careless manner. This is the finding of the jury, and we should not disturb it.

Whether or not the plaintiff's doing work delayed his getting well or caused an additional injury to his hand is purely a question for the jury, and they evidently found no bad effects from his activity. It is plainly evident from the record that there was no negligence on the part of plaintiff in his treatment during his entire illness.

In answer to the proposition that plaintiff's hypothetical questions do not properly reflect the evidence in the

case, we answer that these questions are not entitled to such a criticism. It is sufficient to say they reflect the evidence upon the point upon which testimony is sought, and on the whole cover all the questions sought to be answered by the witness, and did not mislead any one. They, and each of them, reflected the evidence in a fair way to elicit testimony upon the point sought.

The verdict is amply sustained by the evidence, and, such being the case, we are bound to follow the verdict of the jury as it is supreme in the realm of fact. All the citations made by defendant do not disprove this fact. The American jury is one of our settled institutions and is characteristic of the Anglo-Saxon race and has its full approval. The place that this hypodermic was administered, it is evident, was a mistake or a matter of misinformation. According to the evidence of the attending physicians, it was not properly administered, and negligently or ignorantly, as the case may be, administered in the wrong place in the arm.

The defendant makes severe criticism of the instructions as given by the court, beginning with instruction No. 4½ and ending his discussion with instruction No. 15. We have carefully examined and analyzed each instruction offered by the court. We find that the court in its instructions covered every proposition offered by the defendant and refused by the court. The court's instructions cover the issues of the case as well as any instructions we ever had the privilege to read. They carefully state the issues and profoundly analyze the law and make no mistake in the application of the law to the facts. The defendant in the course of the trial received the full benefit of its theory, and had all the advantages of its particular views, and got before the jury all of its material testimony, and the jury had an opportunity to consider the views and the facts held by the defendant. The plaintiff, on the other hand, fairly submitted his theories and facts and views of the issues of the case. The jury took into consideration, under the instructions

of the court, the law and its application to the facts. So it may be said that all parties had a fair opportunity to present and have tried all the issues of the case.

The verdict is amply sustained by the evidence and is just and has the approval of law. By reason of these facts, the judgment is

AFFIRMED.

JAMES P. KNEPHER, APPELLEE, V. MCKENNEY DENTISTS ET AL., APPELLANTS.

FILED NOVEMBER 17, 1921. No. 21703.

1. **Appeal:** AFFIRMANCE. Where the evidence proves the issues as tendered by the plaintiff, this court will not disturb the verdict of the jury.
2. **Evidence** examined, and *held* sufficient to support the verdict of the jury.

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

John W. Yeager, for appellants.

J. E. Von Dorn, contra.

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., BROWN and ELDRED, District Judges.

ALDRICH, J.

Plaintiff brought this action against the defendants to recover damages for personal injuries alleged to have been caused by certain dental work performed for plaintiff by the McKenney Dentists, a corporation, through the agency of one of its dentists, Dr. Robert R. Paige, also a defendant. The case was tried to a jury, resulting in a verdict and judgment in plaintiff's favor for $500. Defendants appeal.

The principal issue presented by the briefs is whether or not the evidence taken as a whole was sufficient to sustain the verdict. The opinion will be devoted in the

main to a discussion of this proposition.

It appears from the record that the plaintiff, having a small cavity in one of his lower molar teeth, went to the offices of the McKenney Dentists for treatment. He was examined and assigned to Dr. Paige, who was a duly licensed and practicing dentist in the employ of the McKenney Dentists. Dr. Paige examined plaintiff's teeth and advised that he have the tooth filled, and said that the molar immediately adjacent to the tooth of which plaintiff complained showed signs of decay and should be filled. He therefore ground out the cavities and put in the fillings. Almost immediately after the work had been done plaintiff complained to the doctor that the tooth pained him. Dr. Paige told him that many people did not lose the feeling from the effect of a filling until 6 or 8 hours afterwards. Plaintiff came back to Dr. Paige two days later, saying he could not stand the pain. At that time he called the doctor's attention to a slight swelling in his face. Dr. Paige then put on a "local application;" that is, he put medicine around the teeth and on the gum. A day or so later plaintiff came back to the office again suffering with severe pain and his face swollen more than before. Another doctor examined his teeth and reported to Dr. Paige that an abscess had started. Dr. Paige started to drill the filling out of one of the teeth. Plaintiff could not stand the drilling that day or the next. Dr. Schreiber, another doctor employed by the McKenney Dentists, took charge of the case. He cut an opening in the tooth and treated it. All the filling had not been drilled out. After a second examination he advised plaintiff to have the tooth extracted by a specialist. Plaintiff was sent to Dr. Houston, a specialist, who pulled the tooth. About twelve days later Dr. Houston pulled the other tooth. He took an X-ray of both teeth when plaintiff first called at his office and the picture is in the record. The two teeth extracted are also in the record as exhibits.

Plaintiff's own testimony as to his suffering and sleep-

less nights is, of course, uncontradicted. But there is a conflict in the testimony of the doctors when it comes to reading the X-ray pictures. Dr. Harry Foster testified that the picture shows in the second molar the filling touching on the prongs in the pulp; that in the third molar it does not touch the pulp. Other doctors called express their doubts or deny that it touches at all.

The testimony shows that the tooth pulp is very sensitive and is full of nerve tissue, and that a filling set on the pulp would cause severe pain, and, if not sterilized or the canals filled with sterilizing material, an abscess would result. Dr. Harry Foster testified that there should be, between the filling and the pulp, a nonconductor; that gutta-percha was sometimes used to cap the pulp, and that there appeared to be nothing between the pulp and the silver amalgam in the tooth in question. As a matter of fact Dr. Paige admitted that he did not cap the pulp.

We think that the jury were justified in believing the witnesses for the plaintiff, and their verdict on conflicting evidence should not be disturbed unless clearly wrong. This proposition is so axiomatic that no cases need be cited.

"The law does not require of a surgeon absolute accuracy either in his practice or his judgment. It does not hold him to the standard of infallibility, nor require of him the utmost degree of care or skill, but that in the practice of his vocation he shall exercise that degree of knowledge and skill ordinarily possessed by members of his profession." *Van Skike v. Potter,* 53 Neb. 28.

This case is cited by counsel for appellants. We admit this to be the law, but hold that a dentist or surgeon is liable for his negligent acts. Clearly it was a negligent act to set the filling on the pulp as was done in this case. This caused the soreness and finally necessitated the extractions. Omaha is Nebraska's largest city and dentists there have very extensive practices. Their standard should be high.

Appellants also object to the amount allowed in the verdict, claiming it is excessive. Taking into consideration the pain and anguish and the injury to his health testified to by plaintiff, and, what is more, the loss of two teeth, we do not think the verdict was at all excessive. It was eminently fair and just.

In view of this discussion and the entire record, the judgment is

AFFIRMED.

LOCK W. STURGEON, APPELLEE, V. EDWARD R. WILSON, APPELLANT.

FILED NOVEMBER 17, 1921. No. 21794.

Courts: APPEAL: ISSUES. When an appeal is taken from municipal court to district court, the case is to be tried in appellate court upon the issues that were presented in the court from which the appeal is taken.

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

John O. Yeiser, for appellant.

John M. Berger, contra.

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., BUTTON and COLBY, District Judges.

ALDRICH, J.

This was an action at law tried originally in the municipal court of the city of Omaha, in which Lock W. Sturgeon was plaintiff, and is appellee here, and Edward R. Wilson was defendant, and is appellant here. The case was set for trial by agreement. On August 15, 1919, plaintiff failed to appear for trial. A trial was had on the pleadings and the evidence, and the court found that the plaintiff was indebted to the defendant in the sum of $37.50, and also costs upon defendant's counterclaim, and plaintiff's claim was dismissed. On August 22, 1919,

plaintiff filed an appeal bond fixed by the court in the sum of $90. This bond was accepted and approved by the court. This ended the case in the municipal court. On September 15, 1919, the plaintiff filed in the district court for Douglas county the transcript and all original papers. On the 4th day of October, 1919, plaintiff filed in district court his petition setting forth the original allegations and claims. The defendant failed to file an answer, and on the 30th day of April, 1920, plaintiff recovered a judgment of $250. From this decision defendant appealed to this court.

Under the issues here we deduce the following proposition as found in *O'Leary v. Iskey,* 12 Neb. 136: "When an appeal is taken from the county court to the district court, the case is to be tried in the appellate court upon the issues that were presented in the court from which the appeal is taken." We find this principle enunciated in the following cases: *In re Estate of Normand,* 88 Neb. 767; *Fuller & Johnson v. Schroeder,* 20 Neb. 631; *Mallory v. Estate of Fitzgerald,* 69 Neb. 312; *Jenkins v. State,* 60 Neb. 205. In the last case it is held: "When an appeal is docketed in the district court the judgment appealed from is vacated and annulled, and the litigants are, with respect to their legal rights, where they were at the commencement of the suit." This principle is also sustained in *Huffman v. Ellis,* 52 Neb. 688. This principle has been distinctly stated in *Levi v. Fred,* 38 Neb. 564, and *Bishop v. Stevens,* 31 Neb. 786. This doctrine is upheld in section 8455, Rev. St. 1913, which is as follows: "The plaintiff in the court below shall be the plaintiff in the district court; and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court." This rule has the salutary effect of having the case tried upon its merits. Defendant failed to avail himself of the opportunity to try his case, hence this appeal is

AFFIRMED.

GEORGE W. WILSON, ADMINISTRATOR, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

FILED NOVEMBER 17, 1921. No. 21353.

1. **Railroads:** CONSIGNEE AN INVITEE. Where a person or his agent goes upon the railroad right of way for the purpose of obtaining goods consigned to him, which the railroad company has unloaded and piled upon the ground, such person is an invitee and not a trespasser, and the company owes to him the duty of exercising ordinary care not to injure him.
2. ———: LIABILITY FOR DEATH. In such case, where an engineer sees, or, by the exercise of ordinary care, should have seen, such person standing within the clearance of his train, or so close thereto as to be in a place of peril, the mere fact that such person has negligently placed himself in a place of danger does not excuse the engineer in running him down, if, in the exercise of ordinary care, a collision could have been averted.
3. ———: ———. In such case, the engineer may assume that an adult person will not remain in a place of danger, but that he will step to one side and avoid injury. This assumption, however, may not be carried beyond the point where a person of ordinary prudence would infer from appearances that the person was oblivious or heedless of the danger, and from that moment the engineer is charged with the duty of exerting all reasonable efforts to avoid a collision.
4. ———: NEGLIGENCE: QUESTION FOR JURY. Evidence examined, and *held* that the question of negligence, under the doctrine of "the last clear chance," should have been submitted to the jury.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Reversed.*

Halligan, Beatty & Halligan, for appellant.

N. H. Loomis, Edson Rich, C. A. Magaw and *T. W. Bockes, contra.*

Heard before MORRISSEY, C.J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

DAY, J.

In a former unpublished opinion by the commission, we

affirmed the judgment of the lower court. A rehearing was granted, and the case submitted to the court.

The plaintiff, as administrator of the estate of his deceased son, Joseph E. Wilson, brought this action against the defendant to recover damages for negligently causing the death of deceased. At the close of the plaintiff's testimony, on motion of the defendant, the trial court directed a verdict for defendant, and entered judgment accordingly. The plaintiff appeals, assigning as error this action of the court.

In stating his cause of action, the plaintiff relied upon a number of specifications of negligence, one of which only need be considered at this time, namely, the failure of the defendant to blow the whistle or give other warning of the approach of the passenger train. The answer of the defendant admitted that the deceased came to his death by a collision with its train; denied that it was negligent; and alleged that deceased's death was due to his own negligence. The only question presented upon the reargument on behalf of the plaintiff was whether the case should have been submitted to the jury upon the doctrine of what is frequently termed "the last clear chance." A determination of this question involves an examination of the evidence.

The record shows that on January 4, 1918, at about 2 o'clock in the afternoon, on a partially cloudy day, Joseph E. Wilson, a young man slightly over 18 years of age, was struck and instantly killed by a west-bound passenger train on defendant's road. The train, consisting of an engine and 13 coaches, was one of the fast transcontinental trains operated by the defendant, and at the time of the collision was running at approximately 40 miles an hour. The collision occurred at a point 475 feet west of the depot in the village of Willow Island. At that point the defendant maintains a double track which, for practical purposes, may be said to extend in an east and west direction. The north track was used by west-bound trains, and the south track by east-bound

trains. The view to the east from the point of the collision is unobstructed for over a mile. There was a platform extending along the north side of the tracks, and also one on the south side of the tracks, used for convenience in handling freight. The plaintiff was engaged in operating a store, and his son Joseph, the deceased, was assisting him. On the day in question the plaintiff sent his son Joseph with an automobile to get some freight, consigned to plaintiff, which had been unloaded from the car by the defendant and piled upon the depot ground about 135 feet west of the platform, and on the south side of the double track. The freight was piled in an open field, and there was no road leading to it. The surface of the ground approaching this point was very uneven, full of holes, and not safe to drive over. Joseph took the automobile and stopped it on the north side of the double track, directly north of the place where the freight was piled. He had carried a few boxes across the tracks and placed them in the automobile, and, while thus engaged, a freight train approached from the west upon the south track, blowing the whistle, ringing the bell, and otherwise making considerable noise. Joseph stopped his work and went over to the south side of his automobile, leaning his arm on the car, his face looking toward the west, watching the freight train. He continued to remain in this position until just the instant he was struck, when he turned his head slightly to the east, the train striking him on the left side of the head, resulting in instant death. The front end of the passenger train passed the front end of the freight train a little east of the depot, and the rear of the two trains cleared about 260 feet west of the point of collision. Neither of the trains were scheduled to stop at Willow Island, and did not do so on this occasion. There is no doubt under this record that the deceased was rightfully on the defendant's right of way, and in no sense could he be regarded as a trespasser. By placing the freight upon the ground at the point where it was unloaded, the de-

fendant impliedly at least invited the consignee or his agents to come and get it.

Deceased being an invitee upon the premises, the duty which the defendant owed to him was to exercise reasonable and ordinary care for his safety. It was conceded upon the oral argument, as it must be under the facts shown, that the deceased was negligent in placing himself in a position so close to the rails as to be within the clearance of the train. This, however, would not necessarily relieve the defendant from liability for negligently injuring him.

It is contended on behalf of the defendant that the deceased was in a place of safety, and that he moved into a place of danger just at the instant he was struck by the passing train; that at the time he moved into a place of danger it was then impossible for the defendant to do any act to avert the accident. There is testimony which tends to show that the automobile was standing ten feet distant from the north rail of the defendant's north track. It was stated in argument that the overhang of the engine was two feet and eight inches, and it was contended that if the deceased was leaning against the south side of the automobile, and had remained there, he would not have been injured. But there is also testimony from which the jury might have inferred that the deceased was within the clearance of the train from the time he took the position of leaning against the south side of his automobile. One of the witnesses testified, in speaking of the position of the automobile, that in his judgment it would just clear the train. There is testimony that the deceased did not move from his position except to turn his head slightly toward the east just at the instant he was struck. The fact that he was struck without moving the position of his body, coupled with the additional fact that the door of the automobile was wrenched, the fender dented, and the windshield broken, clearly made it a question for the jury to determine whether deceased was in a position of peril.

Upon the issue as to whether the whistle was blown, a number of witnesses testified that they did not hear any whistle on the passenger train. Negative testimony of this character is not usually regarded as sufficient proof that the circumstances sought to be established did not occur, but upon this issue there was some affirmative testimony. The witness, J. E. Jurgen, testified: "Whether it whistled up above or not, I don't know, but after it hit the mail crane east of the depot it did not whistle." There is no testimony showing how far east of the depot the mail crane was located, but there is testimony that the depot was 475 feet east from the point of the collision. Assuming that the depot extended east and west for 50 feet, the jury would have had the right to conclude that the train traveled 525 feet immediately preceding the collision without blowing the whistle.

Ordinarily a person on a railroad track, or so close thereto as to be within the clearance of a train, will step to one side in ample time to avoid injury, and an engineer in charge of a train may assume that an adult person in a place of danger, near or upon the tracks, will exercise ordinary care to remove himself to a place of safety, but such assumption may not be carried beyond the point where a person of ordinary prudence would infer from appearances that such person was heedless or oblivious of the danger, and from that moment the engineer in charge of the train is required to exercise all reasonable effort to avoid a collision.

Under the facts before us, we think it was for the jury to say whether the engineer saw, or, by the exercise of reasonable care, could have seen, the position of the deceased; whether he was in a position of peril; at what point as the train approached the deceased it would have become apparent to a man of reasonable prudence that the deceased was oblivious of the danger he was in; whether after that point was reached the engineer should in the exercise of reasonable care have blown the whistle; and whether, if the whistle had been blown, the collision

would have been averted.

In this discussion of the case we have refrained from considering the facts in relation to the other specifications of negligence alleged in the petition, for the reason that, in our opinion, the trial court correctly withdrew those issues from the consideration of the jury.

We are of the opinion that the court erred in failing to submit the case to the jury upon the doctrine of "the last clear chance," as applied to the charge of negligence in failing to blow the whistle, or otherwise give warning.

For cases supporting the doctrine discussed, see *Lucas v. Omaha & C. B. Street R. Co.*, 104 Neb. 432, and cases there cited; *Gunter's Admr. v. Southern R. Co.*, 126 Va. 565; *Southern R. Co. v. Bailey*, 110 Va. 833; *Chesapeake & O. R. Co. v. Corbin's Admr.*, 110 Va. 700; *James v. Iowa C. R. Co.*, 183 Ia. 231; *Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 655; and note under *Martin v. Hughes Creek Coal Co.*, 41 L. R. A. n. s. 264 (70 W. Va. 711).

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

REVERSED.

JOHN KOSKOVICH, APPELLEE, V. GEORGE RODESTOCK, APPELLANT.

FILED NOVEMBER 17, 1921. No. 21645.

1. **Witnesses: CONFIDENTIAL COMMUNICATIONS.** Under section 7898, Rev. St. 1913, only such confidential communications are privileged as are necessary and proper to enable a physician to discharge the functions of his office according to the usual course of practice or discipline. And, while great latitude will be given to a physician in determining what facts should be disclosed, yet in its ultimate analysis it becomes a judicial question to determine whether such disclosures were necessary and proper.

2. ———: ———. Under the facts disclosed in the opinion, the declarations of the plaintiff made to the physician were not privileged, and the exclusion of such statements when offered in evidence was error.

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

V. E. Garten and *A. E. Garten,* for appellant.

W. J. Donahue and *F. D. Williams, contra.*

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

DAY, J.

This is an action for damages for personal injuries arising out of an assault and battery inflicted upon the plaintiff. There was judgment for the plaintiff for $5,000. Plaintiff appeals.

The only question presented by the record is whether the court erred in excluding the proffered testimony of Dr. William M. Green, a physician, called on behalf of the defendant. The ruling of the court was based upon the theory that the declarations of the plaintiff, which the defendant sought to establish by Dr. Green, were confidential communications intrusted to him in his professional capacity, and for that reason were inadmissible under the provisions of our statute.

It appears that plaintiff and defendant engaged in a physical encounter in which the plaintiff was severely beaten by a club wielded by the defendant. In the affray the plaintiff sustained a wound upon the head, a broken arm, and a number of bruises upon the body.

It was the theory of the defense that the plaintiff was the aggressor in the affray; that he assaulted the defendant with a loaded revolver and snapped it three times; and that the blows struck by the defendant were delivered in self-defense. The defendant supported this theory by his testimony, and also introduced in evidence the revolver which he secured during the fight, the barrel of which was slightly bent out of alignment with the cylinder. He also introduced three unexploded cartridges which indicated they had been struck by the trigger.

The plaintiff denied the assault upon the defendant; denied that he at any time had the revolver in his hand or that he had snapped it; and claimed that when he was knocked down the revolver fell out of his pocket, and that defendant got hold of it and threw it in the pasture. The plaintiff was corroborated in his version of the affray by his companions, while the defendant's theory was not corroborated by any witness other than himself.

The plaintiff engaged Dr. Green, professionally, to treat his injuries. The defendant sought to show by Dr. Green that the plaintiff had told him "that he pulled his revolver and snapped it several times, but that the blamed thing would not go off." That this was material evidence for the defense must, we think, be conceded.

Section 7898, Rev. St. 1913, provides as follows: "No practicing attorney, counselor, physician, surgeon, minister of the gospel or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

It is quite apparent from the language of the statute above quoted that it was not the intention of the legislature to disqualify the classes of persons named therein from testifying concerning all communications made to them in their professional capacity. It is only such confidential communications intrusted to them in their professional capacity, and which are necessary and proper to enable them to discharge the functions of their office according to the usual course of practice or discipline, which are privileged and within the protection of the statute. If the legislature had intended to exclude all communications received in a professional capacity, there would seem to be no necessity of adding the words, "and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." At common law there was no

privilege as to communications between a physician and his patient. This rule has been modified by statute to the extent above indicated. It is obvious that whether a communication was confidential and necessary and proper to be given must be determined in every case according to its peculiar facts; and, while great latitude should be given to the classes of persons named in the statute in determining what facts should be disclosed, yet in its ultimate analysis it becomes a judicial question to determine whether the disclosures were necessary and proper.

It is difficult to imagine how the fact that the plaintiff had a revolver in his hand, and snapped it several times but that it would not go off, as narrated by him, would throw any possible light on, or assist in any manner, the proper treatment of his injuries. The nature of the injury was self-evident, and the treatment would be the same regardless of what the plaintiff was doing when he received it.

The views expressed herein find support in *Missouri P. R. Co. v. Castle,* 172 Fed. 841, where this same statute is construed.

For other cases having an immediate bearing on the question, see *Blossi v. Chicago & N. W. R. Co.,* 144 Ia. 697; *Green v. Terminal R. Ass'n,* 211 Mo. 18; *Kansas City, Ft. S. & M. R. Co. v. Murray,* 55 Kan. 336; *Collins v. Mack,* 31 Ark. 684; *Brown v. Rome, W. & O. R. Co.,* 45 Hun (N. Y.) 439; *Griffiths v. Metropolitan Street R. Co.,* 171 N. Y. 106; *Travis v. Haan,* 119 App. Div. (N. Y.) 138.

From what has been said, it follows that the proffered testimony of Dr. Green should have been received in evidence, and it was error for the trial court to exclude it.

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

REVERSED.

LOU BROWN V. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1921. No. 21912.

1. **Criminal Law: WITNESSES: OATH: PRESUMPTION.** Where, upon a trial, an adult witness is sworn in the usual and customary manner of administering oaths in the courts of this state, by the uplifted right hand, it will be presumed, in the absence of an affirmative showing to the contrary, that such witness not only understood the nature and obligation of the oath, but that he regarded it as binding on his conscience. Such presumption is not overcome by the mere fact that the witness understood English imperfectly and gave his testimony through the aid of an interpreter.
2. ———: ———: ———: **WAIVER.** In such case, if it is conceived that the witness does not understand the obligation, he should be interrogated specifically upon that question and an answer elicited; and a failure to so inquire will be deemed a waiver of the objection.
3. **Indictment.** Where a crime may be committed by several methods, the indictment may charge that it was committed by all, provided they are not inconsistent or repugnant to each other.
4. ———: **REPUGNANCY.** An allegation in an information charging that the crime of robbery was committed by force and violence, and by putting in fear, is not repugnant.

ERROR to the district court for Morrill county: ANSON A. WELCH, JUDGE. *Affirmed.*

R. J. Greene, Richards & Carter and *Hugh C. Wilson,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

Heard before MORRISSEY, C.J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

DAY, J.

Criminal prosecution on a charge of robbery. Accused was convicted, and has brought the record of his trial to this court for review. A number of assignments of error are noted in the brief, but only such need be considered

as were presented upon the oral argument.

It is first urged that there was error in receiving the testimony of the prosecuting witness, Piedad Herrera, the basis of this objection being that the witness was a citizen of Mexico; that he was unfamiliar with the English language; and that the mode of administering the oath to him was not such as to be the most binding on his conscience. The record shows that upon the opening of the trial all the witnesses were sworn together, Piedad Herrera being among the number. The oath was administered by the clerk of the court in the usual manner observed in this state, namely, by the uplifted right hand. When Piedad Herrera was called to the witness-stand to testify, it developed that he was a citizen of the Republic of Mexico; that his knowledge of English was limited to a few words; and it was apparent that he could not give his testimony except through the aid of an interpreter. To test his ability to understand English, and to determine the necessity of calling an interpreter, he was asked several questions by the court, as well as by counsel, to some of which he made no answer at all, and to others replied, "No savie English," and "No talk." He was then asked by counsel for the defendant, "Do you know what the clerk said to you when you men were standing up here and he asked you to hold up your right hand and swear?" to which he made no answer. An interpreter was then called and duly sworn by the court to truly interpret the questions propounded by counsel into the Mexican language, and the answers of the witness thereto into English, adding thereto, the following: "You will also interpret to the witness the oath to be administered into the Mexican language." The court thereupon repeated the usual form of oath taken by witnesses. Following some questions propounded to the interpreter by counsel touching his qualifications to act as such, the record then recites: "Piedad Herrera was called as a witness on behalf of the plaintiff and being first duly sworn testified as follows." Under this state of the record we are of the

opinion that the objection to the testimony of the witness Piedad Herrera was not well founded. The presumption is always in favor of the regularity of proceedings in court, and where, as in this case, the record recites that the witness was duly sworn, it will be presumed, in the absence of an affirmative showing to the contrary, that he understood he was being sworn as a witness, and that he regarded the form of the oath as binding on his conscience. If the defendant conceived that the witness did not understand that he was being sworn as a witness, or that he did not regard the mode of administering the oath as binding on his conscience, he should have interrogated the witness with respect to these matters. The mere fact that the witness did not answer the questions put to him in English falls far short of an affirmative showing that he did not understand the oath or regard it as binding upon his conscience. No attempt was made to inquire of the witness through the interpreter concerning these matters. Other witnesses of the same nationality as Piedad Herrera were called, and it developed that they regarded an oath taken on the Holy Bible as more binding on their conscience, and as to them the oath was so administered. This, however, does not amount to an affirmative showing that Piedad Herrera considered an oath taken in that manner as most binding on his conscience. In *Pumphrey v. State,* 84 Neb. 637, it was said: "If a litigant conceives that such witness (an adult citizen of the Empire of Japan) does not understand or will not give heed to the oath administered, he may interrogate the witness before he is sworn, or prove his incompetency by other relative evidence. If he fails to do so the relevant testimony of the witness should be received."

It is next urged by defendant that the information is bad because two separate offenses are charged in one and the same count of the information, to wit: Robbery by force and violence; and robbery by putting in fear. The information is in the usual form, and, stripped of its verbosity, charged the defendant with the crime of rob-

bery by taking from the person of Piedad Herrera by force and violence, and by putting him in bodily fear. Section 8594, Rev. St. 1913, defining the offense of robbery, is as follows: "Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with intent to rob or steal, shall be deemed guilty of robbery, and upon conviction thereof, shall be imprisoned in the penitentiary not more than fifteen nor less than three years."

This section of the statute does not define two separate felonies, but defines one only, which may be committed by two methods, namely, by force and violence, or by putting in fear. It is a general rule of criminal procedure that, when under a statute an offense may be committed by several methods, the indictment or information may charge that it was committed by any or all such methods as are not inconsistent with, or repugnant to, each other. The averments in the information are not repugnant, but are perfectly consistent with each other, and therefore are not improperly joined. The principle here announced finds support in 2 Wharton, Criminal Procedure (10th ed.) sec. 1221. In *State v. Montgomery,* 109 Mo. 645, the indictment charged, as in this case, that the crime was committed by taking from the prosecuting witness by force and violence, and by putting him in fear. A similar objection was made as is made in this case. It was held: "Where a crime may be committed by several methods, the indictment may charge that it was committed by all, provided they are not inconsistent with, or repugnant to, each other." Besides, section 9050, Rev. St. 1913, provides: "No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected; * * * nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Even if it be conceded that the information was bad for duplicity, there appears no basis to believe

that such defects "tend to the prejudice of the substantial rights of the defendant upon the merits."

Lastly, it is urged that the court erred in its instructions to the jury. Particular complaint is made against instruction No. 5. This instruction sets out the essential elements necessary to constitute the crime of robbery under the statute. The criticism is made that the instruction does not require the jury to find beyond a reasonable doubt that these essential elements of the crime were committed by the defendant. If this were the only instruction given tending to connect the defendant with the commission of the essential elements of the crime, we think the criticism of the instruction would be well taken. By instruction No. 7, however, the court told the jury: "The burden of proof is upon the state to prove beyond a reasonable doubt by the evidence in this case each and all of the above-mentioned essentials of the crime charged and also that it was committed at the time and place stated in the information upon the said Piedad Herrera by the defendant in the manner charged in said information as hereinbefore stated." It is well established that the instructions should be considered together, and when so considered, if the law is correctly stated, it is sufficient. It seems plain that, taking the two instructions together, the jury could not have been misled in this case.

From an examination of the entire record, we find no error which would justify a reversal of the judgment.

The judgment is

AFFIRMED.

GERMAN AMERICAN STATE BANK, APPELLANT, V. MUTUAL BENEFIT, HEALTH & ACCIDENT ASSOCIATION ET AL., APPELLEES.

FILED NOVEMBER 17, 1921. No. 21644.

1. **Principal and Agent:** NOTES: GUARANTY. The mere fact that an insurance company knows that its soliciting agents, in selling its

insurance, take notes payable to themselves for the premiums, and on their own responsibility discount the notes, deduct their commissions and remit the balance of the proceeds of the notes to the company, is not sufficient to impute to the company the further knowledge that promises are being, or may be, made by such agents that the insurance company will guarantee payment of the notes.

2. ———: ———: ———. Such soliciting agents, authorized to sell insurance and procure the issuance of policies to applicants only upon remittance to the company of the net premium in cash, have no implied authority, from the mere fact that they are permitted to extend their individual credit to applicants, to bind the insurance company by a contract to guarantee the notes so taken by the agents from such applicants.

3. ———: ———: ———: ACTIONABLE FRAUD. False representations by such soliciting agents, in making an arrangement with the bank for the discount of all such notes so taken, that the insurance company was back of such transaction and would guarantee payment of the notes and would deposit money in the bank as security, were more than mere promissory representations, but were representations as to the present attitude of the company toward such transaction, and, being false, are actionable.

4. ———: ———: UNAUTHORIZED ACTS OF AGENT: RATIFICATION. The acceptance of the proceeds of the notes previous to any knowledge on the part of the company, either actual or imputed, of its agents' unauthorized acts, which purport to bind the company, does not constitute ratification, since, in order that the principal be estopped, he must have had such knowledge of its agents' unauthorized acts as to give him an opportunity to exercise a choice between an adoption of the transaction and an assumption of its burdens, or a rejection of it in its entirety.

5. ———: ———: ———: ———. In order that a ratification will result from a continued retention of the fruits of such a transaction, which have been received by the principal in ignorance of the unauthorized acts of its agents, the principal must, after attaining knowledge, be able to return what he has received and be restored to his original position.

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

Nolan & Woodland and *Byron G. Burbank,* for appellant.

Kennedy, Holland, De Lacy & McLaughlin and *Lambert, Shotwell & Shotwell, contra.*

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., BROWN and ELDRED, District Judges.

FLANSBURG, J.

This is an action for damages brought by the German American State Bank against the Mutual Benefit, Health & Accident Association, Clair C. Criss, president of such association, and Floyd C. Grovey, a soliciting agent. The action is based upon the claim that certain worthless notes, taken by Grovey, and other soliciting agents, as first premium notes on policies issued by the defendant insurance company, had been sold to the plaintiff bank through false and fraudulent representations, made by the said agents; that the said Grovey and other soliciting agents, in so doing, acted within their actual and ostensible authority as agents of said insurance company; and further that the company had received the benefits from the transaction and had thereby ratified its agents' acts. The trial court, upon the evidence adduced in behalf of the plaintiff, directed a verdict in favor of all defendants and dismissed the case. The plaintiff appeals.

The contention of the plaintiff is twofold, one being that the soliciting agents, in selling notes to the bank, made promises and representations at the instance of the defendant insurance company, within the actual or ostensible authority of such agents, and with the full knowledge and approval of such insurance company; and the other that, in any event, the company having received a portion of the proceeds of the sale of said notes, and not having returned the same, after its discovery of the fraudulent acts of its agents, had thereby ratified their transactions.

The plaintiff bank is located in the town of Chalco, Nebraska. It had a capital stock of $10,000, and deposits, at the time in question, of between $45,000 and $48,000. The defendant company is a mutual benefit, health and

accident association, with its office in Omaha. In July, 1916, the defendant Grovey, with four other soliciting agents of the defendant insurance company, went to the town of Chalco for the purpose of selling health and accident insurance. They presented themselves at the plaintiff bank and stated that Chalco, and the territory around, was an excellent field for selling their insurance, but that it was necessary that they take notes from applicants for the first premium. Plaintiff's testimony shows that they represented they would sell insurance to, and take notes from, only farmers, business and professional men of responsibility in that county and immediate vicinity, and represented that, if plaintiff would arrange to discount the notes, the defendant insurance company would guarantee their payment. Though they stated that the company was not allowed to take notes for first premiums, nor to indorse them, still they represented that the company was back of their transaction, and, as to the notes to be sold to the bank, said: "The paper is guaranteed by the (defendant) company," that the company is in on this, "they get the proceeds of the money." When the president of plaintiff bank objected that the bank was small and could not afford to advance any considerable amount of money in the purchase of such notes, the defendant's agents represented that the defendant company would deposit as much as $5,000, to be covered by time certificates, the deposit to be held by the bank as security for the payment of the notes, and that, if any of the notes were not paid when due, the company would take them up. The bank thereupon agreed to discount notes for these agents. With regard to this arrangement, the plaintiff bank had no dealings or correspondence with any of the general officers of the defendant insurance company, nor with defendant Criss, its president, but dealt only with the soliciting agents mentioned.

The first few notes taken by the bank were discounted at approximately 16 2/3 per cent. of the face of the notes, and from then on, by agreement, the discount was 10 per

cent. Since the average time for maturity of the notes was six months, and since they bore interest at 10 per cent. per annum, the profit to be made by the bank was to have been an exceedingly large one. During the six months following, the plaintiff bank discounted notes, presented by these soliciting agents, to the amount of $41,371. For the first few months of this period most of these notes were made payable to and indorsed by one Jenkins, one of such soliciting agents, and it appears that on October 10 the plaintiff bank, through its directors, requested and procured from the five soliciting agents, who were acting in conjunction in the matter, a written agreement, signed by each of such solicitors, providing that, if the bank should be unable to collect any of the notes when due, such soliciting agents would take up the notes and pay to the bank their amount, less the original discount, plus interest. This agreement purported to be a guaranty on behalf of the soliciting agents personally, and not a guaranty on behalf of the defendant insurance company, made by these parties as agents for the company. Since the plaintiff did not at this time seek any written guaranty from the company but from the agents only, its action would seem to indicate, and defendant insurance company lays considerable stress upon that argument, that the plaintiff had not been relying upon any guaranty made by the agents on behalf of the company, and, in fact, did not consider that any such guaranty existed.

Not until on December 11 following, at a meeting of the directors of plaintiff bank, was a committee appointed to call upon defendant insurance company, to procure from the company a contract that it would guarantee the payment of the notes. When the committee called upon this defendant, it was promptly informed that defendant insurance company would not, and could not, under its by-laws, guarantee such notes; that it did not take first premium notes from applicants for insurance, but required that the payment of first premiums

should be in cash, and that, where soliciting agents took notes for the first premiums, it was purely a matter of extension of credit to the applicant by the agent, and that the agent, in all cases, was required to account to the company in cash. Subsequent to this meeting the defendant insurance company, on December 19, wrote a letter to the plaintiff bank reiterating these same statements.

Up to that time the plaintiff bank had discounted for the soliciting agents notes to the amount of $22,918. Upon receiving this information from the insurance company, that any transaction that the plaintiff had with the soliciting agents was purely a matter between the bank and the soliciting agents, the bank did not cease but still continued to discount paper, and from that time forward discounted notes to an aggregate face value of $18,453. It was not until in March, 1917, after an investigation of the bank by the state bank examiner, and objection by him to the bank's discounting any more of such paper, that the bank ceased purchasing notes and finally concluded its dealings with the defendant's soliciting agents. At this time one of these agents insisted that the bank continue to take notes, alleging that the agents had always performed their agreement in taking up unpaid notes when due. To this demand the bank president made answer that it was necessary to refuse to purchase notes because of the attitude of the state bank examiner.

Defendant Criss, president of the insurance company, stated that neither the company nor any of its general agents had any knowledge of any guaranty arrangement between these soliciting agents and the bank until December 11, though the record shows, and he testifies, he knew that these soliciting agents would take and were taking, as is the custom in the sale of such insurance, notes from applicants for insurance to cover the payment of the first premium; that as a usual thing, in such business, agents took notes in perhaps 90 per cent. of the cases. The agents were entitled, under their contract with the defendant insurance company, to one-half of the first

premium as their commission. When the agent forwarded an application to the insurance company, with an amount in cash to cover one-half of the first premium, the company accepted such money and issued the policy, knowing that the agent might take, and quite probably had taken, a note for the first premium, payable to himself, and disposed of the note to his satisfaction, so as to be able to both realize a commission and forward to the company the necessary cash.

It further appears that in July, shortly after the soliciting agents first made their arrangement with the plaintiff bank, the defendant insurance company deposited $1,000 with such bank and took as evidence thereof a certificate of deposit to run one year. Similar deposits, however, it was shown, were made by this insurance company in many small banks throughout the community where it wrote insurance, and it does not appear at the time this deposit was made that the defendant company was informed or charged with notice, in any way, that the bank intended to treat such deposit as a security for payment of the notes in question under an arrangement made by the soliciting agents.

It is further pointed out by plaintiff that, during the period of the sale of these notes, the bank, at the time of discounting the notes, would, in many instances, issue to the soliciting agents certificates of deposit in lieu of cash, and many of these certificates were transferred to the defendant insurance company in payment of net premiums due to the company on the policies issued. These certificates of deposit coming into the hands of the insurance company in this way totaled at one time some $6,000, but there is nothing in the testimony to show that the insurance company, nor that any of the agents of the company, unless it was the soliciting agents mentioned, considered the deposits in the bank, represented by these certificates, as having been placed there to secure the payment of the notes in question, nor that the insurance company, its president or general agents had any

knowledge of any arrangement whereby it was to make deposits with the plaintiff bank for such purpose. The fact that the defendant company held so much on time certificates is not at all inconsistent with its position that it knew nothing of its agents' representations, to the effect that the company would make deposits to secure the payment of notes, since, it quite clearly appears, the insurance company would have received such time certificates and held them to maturity, regardless of any such agreement as that represented to have been made by its agents.

After December 11, the date when the insurance company had denied any connection with the transaction between its solicitors and the plaintiff bank, it made certain arrangements with attorneys, representing the plaintiff bank and who were attempting to collect the notes, that it would cancel policies, where the notes had not been paid, and credit unearned premiums on the notes, in order to minimize the loss, but this was under an express agreement that what it should do in that regard should not be to its prejudice in any way in denying its liability upon the transaction in question.

It appears also that in two or three instances, where the premium note taken by its soliciting agent had not been paid and the policy issued was delivered up, the defendent company canceled the policy and issued another policy, in lieu thereof, and delivered it to its agent, retaining the net premium theretofore paid on the canceled policy, and that the agent substituted the premium note of the new applicant in place of the unpaid note held by the bank. The company, in these instances, did not, as we view it, treat the notes as its own and forfeit the policies for nonpayment, but simply allowed the agent, where the premium notes had not been paid, and where the policy had been voluntarily redelivered by the policyholder to the agent, to turn in the policy and receive another policy, issued to another applicant, but upon the credit by the insurance company of the cash premium theretofore remitted by the agent on the original policy. Noth-

ing in that action can be treated as an admission, on the part of the company, that it was a party to the notes in any way, nor did its action amount to an assumption by it of a right to forfeit policies upon nonpayment of the notes given and made payable to its soliciting agents.

It also appears that the company, after it had on December 11 refused to guarantee payment of the notes, remitted considerable amounts, which had become payable on accident claims to the parties insured, direct to the bank, so as to allow a credit of the amounts to be made upon the notes held for premiums. This, however, was nothing more than an arrangement in accommodation to the bank and to the company's agents, and a transaction whereby they were enabled to collect the amount owing from the company to the insured and credit the insured with payment of the amount upon the notes.

It is contended by the plaintiff that the facts, as above shown, are sufficient to support a finding that the transaction between the plaintiff bank and the defendant's soliciting agents was actually known to and participated in by the defendant insurance company. With this contention we are unable to agree. We do not see that these facts, so far as the insurance company is concerned, go any further than to show that the company knew its agents were selling its insurance, taking notes payable to themselves for the premiums, and, on their own responsibility, discounting the notes at the bank. We find nothing, at least prior to December 11, 1916, to show, nor to charge the insurance company with knowledge of, a contract of guaranty, by which the insurance company was itself to become bound as a guarantor upon these notes. After December 11, the date when the company had made a complete disavowal and refusal to make such a guaranty, the bank could not, of course, continue to purchase notes and hold the company as a guarantor upon them.

The question next presented is whether or not the agents had either actual or ostensible authority to bind

the company on such a contract of guaranty. These were only soliciting agents, who had authority to sell insurance and procure the issuance of a policy to the applicant, by remittances to the company of the net premium in cash. They informed the bank that the company did not take nor indorse notes given on first premiums. The notes taken by these agents were not payable to the company, but were payable to the agents personally and indorsed by them to the bank. They had no authority to take notes in payment of premiums. Their transaction was one between themselves, the applicant, and the bank, by which the net premium could be procured in cash and forwarded to the insurance company. When the net premium was forwarded and the policy issued, the first premium, as far as the company was concerned, was paid. The insurance company had no interest in the notes, nor right to forfeit the insurance in case of their nonpayment. *Union Life Ins. Co. v. Parker,* 66 Neb. 395; *Pythian Life Ass'n v. Preston,* 47 Neb. 374; *Reppond v. National Life Ins. Co.,* 100 Tex. 519, 11 L. R. A. n. s. 981; *Jacobs v. Omaha Life Ass'n,* 146 Mo. 523; *Buckley v. Citizens Ins. Co.,* 188 N. Y. 399.

Counsel for plaintiff cite cases to the effect that, when the company thus allows its agents to extend credit to the applicant and take notes payable to such agents, the action of the agents in negotiating, or even in taking, the notes will, as between the company and the insured, be held to constitute payment of the premium, and that the moneys collected on such notes will be considered to be funds held in trust for the insurance company. *Echols v. Mutual Life Ins. Co.,* 106 Neb. 409; *Travelers Ins. Co. v. Douglas Co.,* 198 Mich. 457; *Security Life Ins. Co. v. Stephenson,* 136 S. W. (Tex. Civ. App.) 1137; *Thum v. Wolstenholme,* 21 Utah, 446.

These holdings are upon the theory, however, that the company has allowed its agent to substitute his personal obligation in place of that of the insured and, such having been done, the obligation of the insured is settled.

The account would then stand between the insurance company and its agent. But it does not follow, in thus allowing the agent to extend his individual credit to the insured, and in allowing the agent to negotiate the note in order to raise the necessary money to forward to the company, that the company itself has extended the credit, nor that the company has any concern in protecting the agent in the personal obligation assumed by him.

In the light of the surrounding circumstances, known to all the parties, the alleged transaction in this case between the bank and the soliciting agents was, from all outward intents and purposes, one for an agreement whereby the agents were contracting that their principal would guarantee their individual obligations.

These agents had no express authority from the company to guarantee payment of notes so taken. It does not appear that, to conduct the insurance business, it was necessary that the company guarantee such notes taken by its agents, nor that by usage or custom such was within the scope of the agents' implied powers. That being the case, authority to guarantee will not be implied from the mere fact of general agency of any kind. The plaintiff bank had the right to presume that the soliciting agents of the defendant company were authorized to sell insurance in the usual manner and make such contracts as would reasonably comport with usage and custom in that business, and to that extent the agents may be said to have been acting within the apparent scope of their authority. But where there is no implication, by reason of circumstances, of reasonable necessity, or of custom or usage, it seems clear that the agents here would have had neither authority nor the semblance of authority to make such a contract of guaranty as that in question. *Englehart v. Peoria Plow Co.*, 21 Neb. 41; *Oberne v. Burke*, 30 Neb. 581; *Graul v. Strutzel*, 53 Ia. 712; *First Nat. Bank v. Farson*, 226 N. Y. 218; *Owens Bottle-Machine Co. v. Kanawha Banking & Trust Co.*, 259 Fed. 838; 2 C. J. p. 665, sec. 313, p. 636, sec. 280.

It is contended that the defendant insurance company has ratified its agents' transactions by an acceptance and retention of the benefits. The acceptance of the proceeds of the notes, previous to any knowledge on the part of the company, either actual or imputed, of its agents' unauthorized acts which purported to bind the company, would, of course, not constitute ratification, since in order that the principal be estopped he must have had such knowledge of his agents' unauthorized acts as would give him an opportunity to exercise a choice between an adoption or a rejection of the full consequences of such acts. *Bullard & Co. v. De Groff*, 59 Neb. 783; *Fitzgerald v. Kimball Bros. Co.*, 76 Neb. 236; *Holm v. Bennett*, 43 Neb. 808; *O'Shea v. Rice*, 49 Neb. 893; 2 C. J. 495, sec. 115. When with knowledge he accepts the benefits, he is estopped from denying an assumption of the burdens. Prior to December 11, 1916, we have found there was no such knowledge; and following that date the company at that time having made a complete disavowal, there could have been no contract nor deceit by the company's agents regarding such a contract.

But counsel contend that the company has not tendered a return of the proceeds of the notes after a discovery of the facts, and that its continued retention of the benefits works a ratification. In order that a ratification will result from a continued retention of the fruits of such a transaction which have been received by the principal in ignorance of the unauthorized acts of its agents, the principal must be able to return what he has received and be restored to his original position. Had the insurance company, after discovering the facts, been able to make restitution without undergoing loss, the case would have been different; but here it had issued its policies of insurance, had furnished insurance thereunder, and, had it attempted to exercise its statutory right to cancel all insurance yet unexpired, it would have been required to return the unearned premiums to the policyholders. It had valid and subsisting contracts with the persons whom

it had insured, and, so far as the insurance company was concerned, the premiums were paid. As pointed out, the company had no right to cancel the policies by reason of default in payment of the notes. The company then was not able to make restitution of the funds received without a consequent loss in the amount of funds returned, since it had become legally obligated to furnish the value of those funds to others. Under such circumstances, we cannot see that the company can be held to a ratification of its agents' acts by reason of its failure, after attaining knowledge, to return the moneys received by it. *Marshall & Co. v. Kirschbraun & Sons,* 100 Neb. 876; *Owens Bottle-Machine Co. v. Kanawha Banking & Trust Co., supra;* 2 C. J. 496, sec. 116.

The question of the liability of the defendant Grovey, one of the soliciting agents, remains yet to be determined. The petition was framed upon the charge of fraud. One of the false representations, as we have said, was to the effect that these agents would sell insurance to and take notes from only farmers, business and professional men of responsibility. It is admitted that each note bore on its face the name of the maker, his residence and occupation, and that many of the signers did not come within the represented class. Of course, this information written on the note would not indicate the responsibility of the maker. The plaintiff's cashier, however, testified that he did not rely upon this representation, but upon the representation as to the insurance company's guaranty of the notes. There is testimony in behalf of the plaintiff to support the issue that the agents represented that the insurance company was behind their transaction; that it would guarantee the notes; that it would furnish a deposit as security; and that these representations were relied upon. In view of this testimony, it is reasonable that the bank should also believe that the deposit, which was actually sent by the insurance company, was sent under and in recognition of this arrangement. Other evidence in behalf of plaintiff, on the other hand, tends

to refute this testimony. The fact that the bank on October 10 took a guaranty from the agents personally, the fact that the bank sent a committee to the insurance company on December 11 in order to get a guaranty from the company, and made no suggestion whatsoever about representations made by the insurance company's agents, to the effect that the company would guarantee the notes, and the fact that the company continued to discount notes after December 11, might lead to the inference that the bank had not been relying upon any such guaranty, but would not, as a matter of law, refute the direct testimony in behalf of the plaintiff, that the bank did rely upon the representation that the insurance company was behind the transaction and would guarantee payment of the notes. As to whether or not there was such a reliance during the period from the first discount of the notes up to the time when the company made its disavowal on December 11, it would seem to us, the record presents an issue of fact for the jury.

The argument is made that these representations were nothing more than promises on the part of the agents as to what the insurance company would do in the future, and, though such representations might create contractual obligations on the agents' part, they would not be actionable on the ground of fraud. The representation that the insurance company was back of the agents in the transaction and would guarantee the notes and deposit security was more than a mere promise to procure such a guaranty. It was, as well, a representation of the then existing intention and attitude of the insurance company. It is quite obvious such was the idea intended to be conveyed. That representation was a false representation as to existing facts. The company's attitude is clearly shown to have been contrary to what was represented. Plaintiff, in all reason, would not have relied on the insurance company warranting the notes, except for the representations as to the company's existing at-

titude. The bank, being bound to take knowledge of the limitation of authority of these agents, could not have relied on a warranty or a promise of warranty made on behalf of the company by them, based alone upon that authority. The misrepresentation of the company's attitude, as we view it, was fraudulent and actionable. *Cerny v. Paxton & Gallagher Co.*, 78 Neb. 134; *Pollard v. McKenney*, 69 Neb. 742; *McCready v. Phillips*, 56 Neb. 446; *Gale v. McCullough*, 118 Md. 287; *Deyo v. Hudson*, 225 N. Y. 602; *Nickle v. Reeder*, 166 Pac. (Okla.) 895; *O'Sullivan v. France*, 168 N. Y. Supp. 28; *Old Colony Trust Co. v. Dubuque Light & Traction Co.*, 89 Fed. 794.

There is proof to show that many of the notes were worthless and that the bank sustained injury. As to notes taken by the bank subsequent to December 11, when the falsity of the representations relied upon became fully known, it does not appear, as the record now stands, that plaintiff has any cause of action on the ground of fraud.

The judgment of the lower court, dismissing the case against the insurance company, is affirmed, and the judgment as to the defendant Grovey is reversed and the cause remanded for further proceedings.

AFFIRMED IN PART, AND REVERSED IN PART.

WILLIAM F. SCHWERIN ET AL., APPELLEES, V. CHRIS ANDERSEN, APPELLANT.

FILED NOVEMBER 17, 1921. No. 21501.

1. **Appeal:** DIRECTION OF VERDICT. "Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict." *Suiter v. Park Nat. Bank*, 35 Neb. 372.
2. **Contracts:** TERMS OF PAROL CONTRACT: QUESTION FOR JURY. Where the evidence as to the terms of an oral contract is conflicting, it is for the jury to pass upon the facts and to determine what the contract was, under proper instructions.
3. ———: DIRECTION OF VERDICT: PREJUDICIAL ERROR. Evidence examined, and *held* sufficient to require the submission of the case

to the jury, and that it was error to direct a verdict for the plaintiffs.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Reversed.*

T. J. Doyle, O. S. Spillman, Douglas Cones, and *P. R. Halligan,* for appellant.

H. C. Brome and *M. H. Leamy, contra.*

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

CORCORAN, District Judge.

This is an action brought by the plaintiffs, a partnership engaged in the lumber business, to recover from the defendant upon an account for material and labor furnished the defendant for the erection of a garage building at Pierce, Nebraska, in the summer of 1917.

The plaintiffs, in their petition, allege that on or about July 1, 1917, they entered into a verbal contract with the defendant to furnish him the material necessary to construct a brick garage in the city of Pierce at certain prices and with certain profits upon such materials as then agreed upon, and to furnish the necessary labor at cost to them, with no profit upon the labor so furnished. Plaintiffs claim they have performed their contract, and allege that they sold and delivered to defendant building materials to the amount and value of $13,644.67, and that they furnished and paid for the labor employed about the construction of the building, in the sum of $4,709.55, upon which sums plaintiffs aver that defendant paid the sum of $8,000, and no more, and pray judgment for the balance claimed to be due in the sum of $10,354.22, together with interest.

The defendant, for answer, admitted the partnership character of the plaintiffs, and that he had paid plaintiffs the sum of $8,000 upon the contract; and for further answer claimed that about the time alleged by plaintiffs he entered into a verbal contract with plaintiffs for the

erection of his building, in many of the essential features the same as alleged by plaintiffs, but differing to some extent as to the scale of profits to be allowed plaintiffs upon certain articles, and pleaded an entirely different agreement from that set up by plaintiffs as to the construction of the building. The petition of the plaintiffs simply disclosed an ordinary transaction for the sale and delivery of building materials, for the sale of which they were engaged in business as retail dealers. The answer of the defendant sets forth the claim that he entered into a contract with plaintiffs as independent contractors for the construction of his building complete at a stipulated scale of prices. Under this contract, as claimed by defendant, the building was to be but one story; and that when the building had been constructed and nearly completed as a one-story building he was induced by one of the plaintiffs to add a second story. He claims that he was advised by the plaintiff firm that the one-story building would cost him in the neighborhood of $8,000, and that considerable negotiation ensued as to the cost of the second story, and that different propositions were made by the plaintiff firm as to what they would construct it for, and defendant claims that he finally agreed with the plaintiffs to add the additional story to the building at an added cost of $4,000; the whole building to cost completed the sum of $12,000, and no more; and further claims that he was guaranteed by the plaintiff firm that the building would cost no more than $12,000.

The answer further tenders two other issues: First, faulty construction of the building by plaintiffs; and, second, negligence by plaintiffs in allowing the building to be destroyed by fire. A general denial of all other matters is also included in the answer; the defendant pleading a counterclaim for the $8,000 paid plaintiffs and for damages. The reply substantially denied the allegations of defendant's answer.

For a trial of the issues as tendered by the pleadings a jury was impaneled, and at the conclusion of the trial the

court directed the jury to return a verdict for the plaintiffs for substantially the full amount of the claim. This is assigned as error, and after the overruling of the defendant's motion for a new trial and the entry of judgment upon the verdict the defendant brings the case to this court upon appeal.

The record of the trial, which consumed several days, is very voluminous, but from the view of the whole case entertained by this court an extended discussion of the evidence could serve no useful purpose. For the purpose of this review but little attention need be paid to the claim of the defendant as to the faulty construction of the building or the negligence attributed to the plaintiffs in connection with the fire which destroyed the building on January 16, 1918. It appears from the evidence that the plaintiffs furnished the material and employed labor and commenced the construction shortly after entering into whatever arrangement was made between the parties. The work proceeded until the following January, when the lower story was completed and was being occupied by the defendant, who had moved at least part of his stock into that part of the building, and the workmen were engaged upon the second story finishing a large hall which occupied the greater part of the upper story, and but a few days' work remained to be done when, as before stated, the building caught fire in the nighttime and was totally destroyed.

The controlling question in this case is the action of the trial court in directing the verdict of the jury. To determine this question involves a consideration of the evidence as to the contract actually made by the parties and what was afterwards done in pursuance thereto. Upon this important question there is a sharp conflict in the evidence. Both of the plaintiffs active in the management of the firm's business, Samuel W. and Daniel F. Schwerin, testified substantially to the facts pleaded in their petition. This testimony was to the effect that they sold the material and furnished the labor in the ordinary

routine of their business as dealers in that character of merchandise, and deny any agreement upon their part to undertake the construction of the building as independent contractors. They also deny *in toto* the claim of the defendant that they ever agreed to finish the building for any stipulated sum.

The defendant Andersen, upon the other hand, testified with reference to his conversation with Daniel F. Schwerin, one of the plaintiffs, and claims that this conversation took place about the time they were ready to begin work upon the second story, if it was to be built. The conversation claimed by the defendant will be found commencing upon page 411 of the bill of exceptions, from which we quote:

"Q. Tell what he said when he told you the second story would cost $2,800. A. He told me he could get me a bunch of fellows to give me a lease on that for five years for $25 a month. Q. What further talk did you have with him, if any? A. Twenty-eight hundred dollars looked cheap to me and I said, 'Are you sure the cost will not exceed $2,800 for that second story?' And he said he would figure it up once more, which he did, or he told me he did anyway, and come back and told me that it would be $3,500. And I told him if that was true I would have to have $30 a month rent for it. He had already been around and seen different fellows and had them agree to pay $25 a month, and he went around again and got them to agree to pay $30 a month. Well, I wanted to be dead sure what this was going to cost, and I told him I didn't want him to be making any mistake on that, and then he figured it the third time for me. Q. What did he say after that? A. He told me that he would guarantee me that the second story complete would not cost me to exceed $4,000 and that he was sure he could hold it some under that. Then I raised the rent to $35 a month, and he went around and got the fellows to agree to that. He said he would guarantee the building would not cost me to exceed $12,000 complete and he was quite certain he

could hold it under that. Q. Up to the time he told you that, had you told him to go ahead and put the second story on? A. No, sir; I had not. Q. When he told you that he would guarantee that the building would not cost to exceed $12,000, tell the jury whether or not you relied on that statement? A. Yes, sir; I did. Q. Tell the jury whether or not you were induced by that statement to go on and put on a second story? A. Yes; I was. * * * Q. After he guaranteed to you that the completed building would not cost to exceed $12,000, what did you say to him with reference to going ahead and building the second story? A. I told him to go ahead and put it on."

This testimony in support of the defendant's answer tendered an issue of fact. The conflict between the two theories of the case is clear and radical. The question presented for decision is whether, under this state of the record, the trial court was warranted in directing the verdict. Counsel for plaintiffs, in the brief, attempt to brush this testimony aside with the assertion that Daniel F. Schwerin could not bind the firm by making such an agreement. This argument is ingenious, but not convincing. It is a familiar rule that acts of one partner acting for the firm, and within the scope of the partnership business, bind the partnership. If Daniel F. Schwerin made the contract, as testified to by the defendant, then the plaintiffs as partners are bound thereby. The important question is, did he make it? What inference is to be drawn from the facts appearing in the evidence? Where inferences are to be drawn from facts it is the province of the jury to draw those inferences.

"Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict." *Suiter v. Park Nat. Bank,* 35 Neb. 372.

"Where the evidence as to the terms of an oral contract is conflicting, or the meaning doubtful, it is for the jury to ascertain the intention of the parties and to determine what the contract was, under proper instructions." 13 C. J. 787, sec. 998.

These rules are supported by an unbroken line of decisions by this court, and, in fact, no other rule has ever prevailed in this jurisdiction. It is argued in the able brief of counsel for plaintiffs and at the bar that, on account of the numerous items in the account, it would not be possible for the jurors to carry the figures in their minds and arrive at a correct computation of the amount due, and that therefore it was necessary to direct the verdict. This argument might well be addressed to opposing counsel before the trial as a reason why a trial by jury should be waived, but it affords no logical justification for invading the province of the jury after the case had been tried to them.

Counsel also devote a large part of their brief to the discussion of the question as to whether the contract was entire or divisible, and many authorities are cited in support of the several contentions. This branch of the case has not been considered by the court, as the conclusion reached renders such a consideration unprofitable and unnecessary. The situation is similar with reference to defendant's claim as set forth in his counterclaim. As a retrial of the case will be necessary, no good purpose could be served by further discussion of these several features of the controversy.

The right of the defendant to have his contention and his theory of the contract submitted to the jury is a substantial right of which he was deprived by the action of the court in directing the verdict. This was clearly an error, for which the judgment must be reversed and the cause remanded for further proceedings in accordance with law. REVERSED.

ADAM W. WALTER, APPELLEE, V. UNION REAL ESTATE COMPANY, APPELLANT.

FILED NOVEMBER 17, 1921. No. 21706.

1. **Taxation: ACTION TO REDEEM: TRIAL TO COURT.** An action to redeem from a void tax foreclosure sale is properly triable to the

court without the intervention of a jury.

2. ———: FORECLOSURE: JURISDICTION. In an action to foreclose tax sale certificates, where an affidavit is filed alleging that the defendant named is a nonresident of the state, when in fact he died a resident of the state previous to that time, and the only service obtained was constructive service under such an affidavit, the court acquired no jurisdiction, and a decree and sale under such circumstances is void.

3. ———: ———: ———: LIS PENDENS. In an action of foreclosure, where the plaintiff has failed to secure proper service, a notice of *lis pendens* filed at the time of the commencement of the action is not a substitute for legal service and confers no jurisdiction upon the court for any purpose.

4. Limitation of Actions: FORECLOSURE OF TAX LIENS: INSANE DEFENDANT. Where the owner of real property is confined in an asylum for the insane at the time of an attempted foreclosure of tax liens against his property, and continues to be mentally incompetent after his discharge from the hospital for the insane, the statute of limitations does not commence to run against his right to redeem until he has been sufficiently restored to his mental powers to be able to comprehend that he was the owner of the property, and able to take some action to protect his rights with reference thereto.

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

R. J. Greene, for appellant.

Doyle & Halligan, contra.

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

CORCORAN, District Judge.

This is an action brought by the plaintiff to redeem certain lands in Banner county from tax sale, and praying that his title to the land be quieted in him. From a decree granting the prayer of plaintiff's petition, fixing the amount to be paid by him to cover delinquent taxes, interest and costs, after off-setting certain rents, and quieting the title in plaintiff, the defendant brings the case to this court upon appeal.

On September 15, 1891, Leonidas E. Walter acquired title to the land in question by patent from the government. On November 30, the same year, he sold and deeded the land to Adam W. Walter, his brother, who is the plaintiff in the present action. This deed was not recorded until October 24, 1919, a short time before the commencement of the present action. Leonidas E. Walter died, a resident of Buffalo county, on November 15, 1899, and on the 28th of the same month plaintiff was, by the authorities of Buffalo county, committed to the state hospital for the insane at Lincoln, and in 1903 was transferred to the state hospital at Hastings, from which institution he was paroled May 23, 1905, and discharged upon the records November 13, 1906. The plaintiff appears to have wandered about from place to place and from state to state for a number of years, finally coming to Lincoln in the year 1919, where he found a niece, Mrs. Thurman, who appears as his next friend in the present litigation. It was at about this period that he appears to have first recollected that he had any land. The action to foreclose the tax certificates upon the land was brought in the district court for Banner county on February 13, 1902, by one Carlisle, who had acquired the certificates. This action was brought against Leonidas E. Walter as the owner of the land, and an affidavit for constructive service was filed alleging that Leonidas E. Walter was a nonresident of the state of Nebraska. Publication upon this affidavit was the only service had or attempted. Default being made, a decree was entered foreclosing the tax lien and ordering a sale of the premises, which was had during the year 1902, and the paper title acquired by Carlisle. The land, which was rolling, wild prairie, seems to have become trading stock for the next 14 years, and passed through the hands of several owners by mesne conveyances until it reached the defendant company on May 25, 1916. The defendant company then commenced another action to quiet the title to this and other lands on February 13, 1917, in the district court for Banner

county. This action was brought under the present statutes, and was directed against the lands, and all parties claiming any interest in them. Service was had by publication, and, after a default had been made and entered, a decree was taken quieting the title in the defendant company, plaintiff in that suit. The plaintiff commenced this action on December 31, 1919, by filing his petition tc redeem the land from the tax foreclosure sale.

The defendant company urges many errors of the trial court in reaching the decree entered in the case. Among these are that the defendant was entitled to a trial by jury; that the bar of the statute of limitations precluded a recovery by the plaintiff; that the notices of *lis pendens* filed in the foreclosure case of 1902 and in the *quia timet* action of 1917 barred the present plaintiff of all right in the land. The plaintiff, on the other hand, contends that the foreclosure suit was absolutely void; that the statute of limitations cannot be invoked against the plaintiff, whom it is insisted was *non compos mentis* from the time of his commitment to the asylum in 1899 to a time shortly before the commencement of the present action.

Counsel has failed to convince this court that he is in any wise serious in urging the contention that the defendant company was wrongfully deprived of a trial by jury. It is true that the answer sets forth in rather vigorous language the demand that the case should be tried by a jury. The demand appears, however, to have been totally abandoned with the filing of the answer. The record discloses that the case was tried in a very informal manner. All the evidence appearing in the record was taken on two different dates in the city of Lincoln, where counsel met in the office of one of them, and by stipulation took the depositions for both sides. Upon the taking of this evidence the different exhibits used in the case were identified and attached to the depositions. A very meager, and, in some instances, practically no foundation was laid for their admission in evidence. The whole rec-

ord was made up there; the depositions of the witnesses and the original exhibits were all bundled up and sent out to Banner county for the trial court to pass upon. This was authorized by the following paragraph found in the stipulation dictated by counsel for the defendant company himself:

"Mr. Greene: It is further stipulated that this testimony shall be sent to the judge of the court, Honorable R. W. Hobart, and that this cause shall be submitted on this testimony and the pleadings, and that he shall decide the case on the same."

Under this stipulation it would be rather difficult to understand that the defendant company was demanding a jury trial. The record does not disclose that counsel was even present in court when the cause was submitted. A jury could not well be impaneled without his presence or the presence of some one representing the defendant to attend to the matter of securing a proper jury. We consider the matter too trivial to warrant further discussion. In any event, the case was properly triable to the court without the intervention of a jury. It is the usual proceeding under the statute to redeem from a tax sale foreclosure, and as such the court may hear and determine the action without a jury.

That the decree in the tax foreclosure case was absolutely void, there can be little question. Counsel for the defendant company did not in the argument at the bar, nor in his able brief, attempt to sustain it. The only attempt to secure service was against Leonidas E. Walter, who had died, a resident of the state, some three years previous to the commencement of the action. The only living party before the court was the plaintiff. The action was not one against the land, but one against the record owner. As such, it was a personal action, and, there being no service, the court had no jurisdiction, and the decree and sale under it were each void and conferred no right upon any one.

Counsel appears to attach considerable importance to

the filing of the notice of *lis pendens* in the original action. The filing of this statutory notice could not have the effect of bringing parties not even sued into the litigation. The office of the notice is to warn all persons dealing with the title, in the interim between the commencement of the action and the securing of proper service, that litigation is pending affecting the title to the property in question. It does not and cannot take the place of legal service. If it could, counsel and litigants would not be displaying very commendable financial wisdom by incurring large bills of expense to secure service and thus bring defendants into court, if paying the nominal fee for filing the notice of *lis pendens* would answer the same purpose. The most that the notice of *lis pendens* could do in the present instance was to call attention to the fact that an action was pending in which no service upon any defendant had been secured.

This brings us to the discussion of the most important feature presented by the record, the plea of the statute of limitations. This plea must depend upon the evidence adduced at the trial. The evidence of the plaintiff shows that he was committed to the state hospital for the insane at Lincoln in November, 1899, in the same month that his brother Leonidas had died, and was an inmate of the hospital at the time the decree was entered in the tax foreclosure suit. This is also shown by the commitment by the proper officers of Buffalo county and the records of the hospitals for the insane at both Lincoln and Hastings. His testimony further shows that after leaving the hospital at Hastings he went first to a relative at Gibbon, Nebraska, and from there was taken by another brother to his home at Kearney. He appears to have rambled from place to place, and was a part of the time in Kansas, Arkansas, and Illinois. This was during the period from 1906 to about 1918. The evidence upon this point is not very satisfactory, but such as it is it is not disputed. Sometime in 1918 he claims he had a recollection that he had some land, that he had traded his brother a team of

horses for it, and that this occurred before he was sent to the asylum. The unrecorded deed to the land involved in this suit was found in his trunk, where it had probably reposed for nearly 20 years. If this testimony is true, and no attempt has been made to dispute it, then it must follow that the statute of limitations could not run against this man while he was incompetent and unable to comprehend that he had any land.

Upon the other hand, the evidence on behalf of the defendant company falls far short of establishing adverse possession in the defendant and its grantors for the statutory period. The only evidence upon the subject is that of Mr. Marshall, managing officer of the defendant company, who testified that his company acquired title and entered into possession on May 25, 1916. He understood that a tenant of a former owner had been in possession for some years previous to that time, but had no personal knowledge of that fact. Putting it in his own language his knowledge upon that subject was "purely hearsay." In this state of the record it is reasonably clear that the defendant has failed to establish a title by adverse possession.

The action brought by the defendant company against the land on February 13, 1917, after it had acquired the title, and in which it obtained a decree quieting its title, could not have the effect of depriving the present plaintiff of his right in the property. The rights of third parties not having intervened and the present action having been commenced to redeem within five years from the entry of the decree in 1917, under the terms of section 7646, Rev. St. 1913, the present plaintiff is clearly asserting his right in time, and it can make no substantial difference whether he asked to open the decree of 1917 and be let in to defend in that action, or whether he chose to follow the course adopted and prosecute the present action to redeem.

Finally, counsel complains of the form of the decree, in which the trial court recites that the cause came on

for hearing "on the petition of the plaintiff and the answer of the defendant," and omits to state, "and the evidence." This objection is highly technical and without merit. The findings of the court show that the court set forth in the decree many facts not shown by the pleadings, but which appear only in the evidence, establishing conclusively that the court considered the evidence. The omission of the words complained of is clearly an oversight, and the defendant is not prejudiced thereby.

The trial court found that the defendant and its predecessors in title had paid the sum of $536.75 in taxes, interest and costs, and that the rental value of the premises since the defendant went into possession in 1916 was the sum of $200, which the court ordered deducted, and required plaintiff to pay the balance into court for the use of the defendant, as the terms upon which he could redeem from the tax sale, and upon these terms quieted the title to the property in the plaintiff. The findings and decree are amply sustained by the evidence, are clearly right, and are in all things

AFFIRMED.

JAMES H. DAILEY ESTATE, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED NOVEMBER 17, 1921. No. 21714.

1 **Municipal Corporations: BUILDING PERMITS: ESTOPPEL.** When application for a building permit is made under a building ordinance which requires that, before the erection of any building, the owner shall submit plans and specifications and obtain a building permit from the building inspector, and shall agree to build in accordance with the plans and specifications and with the spirit and letter of the building ordinance, and the ordinance further provides that the building inspector shall not grant a permit for the erection of any building until he has carefully inspected the plans and specifications and ascertained that such plans and specifications are in conformity with the building ordinance, and that the proposed building will be of sufficient strength, and the means of ingress and egress are sufficient, and

further provides that every permit issued by the building inspector shall be subject to revocation by the city council if the work done under such permit is not according to the terms of the application upon which it was issued, or is being prosecuted in violation of law or ordinance, *held*, that the applicant under such an ordinance could not, after having applied for, received and accepted from the building inspector a permit to build, plead that the provisions of the building ordinance under which he received a permit were illegal and void and not binding upon the applicant.

2. ———: BUILDING ORDINANCE: CONSTITUTIONALITY. The building ordinance pleaded by the appellant in its petition, and referred to in the opinion, examined, and *held* to be general and uniform in its provisions, and not granting arbitrary powers to the building inspector and city council, and is not, for that reason, unconstitutional.

3. Petition examined, and *held* not to state a cause of action, and that the demurrer was properly sustained.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

D. J. Flaherty, for appellant.

C. Petrus Peterson and *Charles R. Wilke, contra.*

Heard before MORRISSEY, C.J., ROSE and FLANSBURG, JJ., DICKSON and TROUP, District Judges.

DICKSON, District Judge.

This action was brought in the district court for Lancaster county by appellant, plaintiff below, against the appellees, the city of Lincoln, its mayor, commissioners, city engineer, and building inspector, defendants below, to restrain them from interfering with the completion of a building after the appellees had revoked the permit issued to appellant for its construction.

From the petition it appears that appellant was the owner of certain real estate situated within the fire limits of the city of Lincoln; that in August, 1919, appellant applied for a permit to construct a two-story, hollow tile building on said lots, and furnished therewith plans, drawings, and specifications, and structural detail draw-

ings, as required by the ordinance and building inspector of said city; that pursuant to said application, and on or about the 18th day of August, 1919, plaintiff was issued a building permit by the building inspector of the defendant city to build a building on the property owned by plaintiff, the material part of said building permit being as follows:

"Permission is hereby granted to Dailey Estate to erect a brick and concrete garage building on lots No. 15 and 16, block No. 30, addition—Kinney's, O street. This permit is granted on the express condition that said Dailey Estate in the erection of said building shall conform in all respects to the ordinances of the city of Lincoln regulating the construction of buildings, and may be revoked at any time upon the violation of any of the provisions of said ordinances."

That, in accordance with said building permit, the plaintiff proceeded to construct a building on said lots at a cost of $30,000, or more, and that said building was practically completed at the time of the commencement of this action; that the same is a two-story, reinforced concrete, skeleton building, with hollow tile walls. That nothing remained for the completion of said building except laying a small part of the tile floor, a part of the inside finishing of the doors and hanging some of the doors, and a small amount of work to be done in finishing the interior casings on part of the windows, and inserting the glass in a plate glass front, and the glass in other windows in said building; that on the 5th day of January, 1920, plaintiff herein was served with notice by the city commissioners of the city of Lincoln to show cause why said building permit should not be revoked for the alleged reason that plaintiff had not complied with a certain section of the building ordinance of the city of Lincoln; that pursuant to said notice plaintiff, by its president, appeared before said board of city commissioners and asked to be advised in what respect said building did not correspond with and violated any ordinance of the city of Lin-

coln; that the city engineer and building inspector were sworn, and stated that the plaintiff had violated a section of the building ordinance of the city of Lincoln in the construction of the west wall of said building less than twelve inches in thickness, and contrary to the plans and specifications filed with the application for the building permit; that plaintiff was denied the right to produce witnesses to show that it had not violated any valid ordinance or section of any ordinance of the city; that the city commissioners thereupon revoked and canceled said building permit, the alleged reason being that said plans and specifications filed with the application for building permit showed a twelve-inch wall of hollow tile on the west side, and, instead, an eight-inch wall had been constructed. Plaintiff admits the fact to be that its plans and specifications filed with its application for a building permit specify a twelve-inch wall of hollow tile, and that it constructed an eight-inch wall of hollow tile instead, but alleges that the agreement it was compelled to make, as a condition precedent for procuring a building permit under sections 2, 3, and 6, of ordinance No. 1124 of the city of Lincoln, to build in accordance with the plans and specifications and with the spirit and letter of the ordinance, when said plans and specifications incorporated a plan of construction not required by any law or valid ordinance of the city of Lincoln, is not binding on the plaintiff and is null and void.

Plaintiff alleges that there was passed, enacted and published an ordinance known as ordinance No. 1124 in said city (and hereinafter referred to as the building ordinance); said ordinance being entitled "An ordinance to regulate the construction, use, alteration, repair and removal of buildings." Many sections of this ordinance are set forth in plaintiff's petition, but only such parts thereof as are material to this controversy will be noticed. Section 1, in substance, provides that it shall be unlawful for any person, firm or corporation to construct, erect, repair, alter or add to any building or portion thereof, or

to carry on any building operation in the city of Lincoln, except in compliance with the provisions of this ordinance. Section 2 provides that before the erection, construction, alteration or reroofing of any building, or any part thereof, or the excavation of any cellar or lot is commenced within the corporate limits of the city of Lincoln, the owner or his architect or builder shall first obtain a written permit from the building inspector for such purpose. The applicant for each permit shall state the exact site to be occupied by any proposed building or structure, the intended use, the kind of material to be used, the dimensions and estimated cost thereof, the probable time to be consumed by the proposed work, the name of the owner, the architect and contractor or builder. Such statement shall also contain an agreement to the effect that the proposed building or structure shall be built in accordance with the plans and specifications and with the spirit and letter of this ordinance. It is provided by section 3 of this ordinance that the plans and specifications for the erection or alteration of any building, except one or two-family dwelling-houses, shall be presented for examination with the application for permit. Plans and specifications, also such structural detail drawings as the building inspector may require, for the construction or alteration of every building within the fire limits, shall be deposited in the office of the building inspector. By section 6 of the ordinance it is provided that the building inspector shall not grant a permit for the erection of any building until he has carefully inspected the plans and specifications thereof and ascertained that such plans and specifications are in conformity with the ordinances of the city of Lincoln, that the proposed building will be of sufficient strength, and the means of ingress and egress are sufficient. Section 8 of this ordinance provides that every permit issued by the building inspector shall be subject to revocation by the city council, should the building inspector find that the work being done under said permit is not according

to the terms of the application upon which the permit is issued, or is being prosecuted in violation of law or ordinance, and that it shall be his duty to notify the owner or owners to appear before the city council at some time stated, and show cause why said permit shall not be revoked, and until the time for such appearance all work shall cease. Should the parties notified fail to appear at the time stated, or should the city council after a hearing determine such action to be necessary, they may revoke said permit, and notice thereof in writing shall be immediately served on the owner, superintendent or contractor of the work and posted on the property. Section 80 of the ordinance provides:

"Inclosure walls of brick or plain concrete for skeleton buildings when supported by steel or reinforced concrete girders, shall be not less than twelve inches thick. When two such buildings adjoin, such brick or plain concrete inclosure walls shall be not less than eight inches thick for such sections where they adjoin."

It is further alleged by plaintiff in its petition that the provisions of the building ordinance providing that the building inspector shall not grant a permit for the erection of any building until he has carefully inspected the plans and specifications and ascertained that the proposed building will be of sufficient strength, and that the means of ingress and egress are sufficient, and that the provision of said ordinance requiring that every permit issued by the building inspector shall be subject to revocation by the city council, should the building inspector find the work being done under such permit is not according to the terms of the application upon which the permit is issued, and that the agreement it was compelled to make to build in accordance with the plans and specifications and with the spirit and letter of the ordinance, as a condition precedent to granting a building permit when said plans and specifications incorporated a plan of construction not required by any law or valid ordinance of the city, are all null and void and of no force and effect.

It is further alleged that the defendants have notified the plaintiff to construct a twelve-inch wall instead of an eight-inch wall on the west side, and threaten to arrest and cause to be arrested any of the officers, employees, agents and servants of the plaintiff who may attempt to complete the construction of said building; that the building was, at the time of the commencement of the action, in an incomplete condition, open and exposed to the weather and untenantable.

The plaintiff prays that the defendants, and each of them, their servants, agents and employees, be restrained and enjoined from in any way molesting or interfering with plaintiff in the completion of said building. That it be adjudged and decreed that the west wall is constructed in compliance with all valid provisions of the ordinance of the city of Lincoln, and that the defendants, and each and all of them, be restrained and enjoined from in any way interfering with any person who may occupy said building for any lawful purpose, and that upon the hearing hereof said injunction may be made permanent, and for such other and further relief as equity and good conscience require.

To this petition a demurrer was filed, the reasons assigned being that the petition does not state facts sufficient to constitute a cause of action against the defendants and in favor of the plaintiff. The demurrer was sustained, and, plaintiff electing to stand on the petition, the cause was dismissed and an appeal prosecuted to this court by the plaintiff.

From the record in this case it appears that the plaintiff made application for a permit to build a skeleton building, and submitted plans and specifications showing the west wall to be built of hollow tile twelve inches in thickness, but, instead, built it only eight inches thick; otherwise, the building seems to have been constructed in accordance with the plans and specifications submitted. Section 2 of the building ordinance provides that the applicant for a permit shall agree to build in accordance

with the plans and specifications and with the spirit and letter of the ordinance.

This case presents for consideration the question, Could the plaintiff, after having submitted plans and specifications for a twelve-inch wall, and having accepted the permit and agreed to build in accordance with the plans and specifications, built instead an eight-inch wall, and, by so doing, was the permit subject to revocation by the city commissioners? The defendants contend that the permit was asked and granted under section 80 of the building ordinance, which governs the building of such buildings as the permit was applied for, while the appellant insists that there was not in force any ordinance that governed the building of such a building, for the reason that section 80 provides for a brick or concrete wall twelve inches in thickness, and hollow tile is not mentioned and does not come within the provisions thereof, and that to obtain the permit he was compelled to agree to build a twelve-inch wall. Be that as it may, we think it is quite clear that, when application was made and the permit granted and accepted, the parties construed this section of the building ordinance to mean brick, cement or hollow tile, and that plaintiff's contention was an afterthought. It is the plaintiff's contention that that part of the building ordinance providing that the building inspector shall not grant a permit for the erection of any building until he has carefully inspected the plans and specifications and ascertained that the proposed building will be of sufficient strength, and that the means of ingress and egress are sufficient, and the provision that every permit issued by the building inspector shall be subject to revocation by the city council, should the building inspector find the work being done is not according to the terms of the application under which the permit was issued, and that the agreement to build in accordance with the plans and specifications and with the spirit and letter of the ordinance as a condition for granting the building permit, are all null and void and of

no force and effect.

We are of the opinion that the facts stated in the petition do not raise the legality, illegality or constitutionality of the complained-of provisions of this building ordinance. The plaintiff could not, after having applied for and accepted from the building inspector a permit to build a wall twelve inches thick, build one eight inches thick, and, when ordered to show cause why the permit granted should not be revoked or canceled, for that reason plead that the provisions of the building ordinance requiring him to agree to build in accordance with the plans and specifications were illegal and void and not binding upon him. Nor could the plaintiff, after having applied for, received and accepted from the building inspector a permit, question his authority to grant the same. Nor could it, after having agreed that if it did not build in accordance with the plans and specifications submitted its permit might be canceled by the council, question the council's authority to cancel its permit. By its conduct it is estopped from questioning the right of the building inspector to issue the permit granted on its application and the council's authority to revoke the same for not building in accordance with the plans and specifications. As between the plaintiff and defendant, the provisions of the sections complained of cannot be questioned by plaintiff. If the plaintiff desired to question the legality of this building ordinance, it should have done so before it applied for, received and accepted a permit thereunder. Or if the building inspector required plaintiff to submit plans and specifications for a building not required by the building ordinance, then was the time to question his authority. The record does not bear out the contention of the plaintiff that the building inspector required it to submit plans and specifications for a building not required by the building ordinance. The petition alleges that the plaintiff filed an application for a permit to construct a two-story, hollow tile building, and furnished therewith full and complete plans, drawings

and specifications as required by ordinance; that, in accordance wth said building permit, it constructed a two-story, reinforced concrete skeleton building with hollow tile walls. There is nothing in the petition that justifies the plaintiff in charging that it was compelled to submit plans and specifications for any kind of a building, much less one not incorporated in the building ordinance. It prepared its own plans and specifications and submitted them for approval to the building inspector; it proposed the plans and specifications for the kind of building it desired to erect, and submitted them to the building inspector, who inspected them and found them to comply with the building ordinance; he neither suggested nor exacted any change; he accepted them as presented. The plaintiff proposed and presented plans and specifications for a skeleton building with a twelve-inch wall to meet the requirements of section 80 of the building ordinance as construed by it. This was the kind of building plaintiff proposed and agreed to build, and this was the kind of building it did build, with the exception of the west wall. Having construed section 80 to cover the proposed building and to require a twelve-inch wall of hollow tile, it is not for the plaintiff to now say that no such wall was required, and to disregard the plans and specifications to build in accordance therewith.

We might thus dispose of the constitutional question presented and avoid passing on the constitutionality of the building ordinance, but, after a careful examination of the ordinance and the authorities, we have reached the conclusion that the complained-of provisions of the building ordinance do not vest arbitrary powers, as averred by the plaintiff, in the building inspector and the city council, and are not unconstitutional for that reason. Section 1 of the ordinance provides that it shall be unlawful to build any building except in compliance with the provisions of the building ordinance. Section 2 provides that, before the erection of a building is commenced, a permit in writing must be obtained from the building

inspector, and that the applicant shall agree to build in accordance with the plans and specifications submitted and with the spirit and letter of the ordinance. Section 3 provides for the submission of plans and specifications at the time of making the application for a permit. Section 6 provides that the building inspector shall not grant a permit for the erection of any building until he has carefully inspected the plans and specifications thereof, and found that such are in conformity with the building ordinance, and that the building will be of sufficient strength and the means of ingress and egress sufficient. Section 8 provides that every permit issued by the building inspector shall be subject to revocation by the city council, if, after notice and hearing, the work is not being done under the permit according to the terms of the application or in violation of the ordinance. It will be noticed that the granting of the building permit is dependent upon other sections of the ordinance which contain a general and uniform regulation for the construction of buildings, and that no permit shall be granted until the building inspector has carefully inspected the plans and specifications and ascertained that they are in conformity with the ordinance, and that the building will be sufficiently strong and the means of ingress and egress are sufficient. The building ordinance prescribes general and uniform rules regulating the kind of buildings that may be erected, and vests authority in the building inspector to issue permits to those whose plans and specifications comply therewith. A building ordinance regulating the kind of buildings to be erected, and requiring the construction thereof according to the plans and specifications and with the spirit and letter of the ordinance, would be a nullity unless power was given to determine whether the proposed building was in conformity therewith and to require construction in conformity to the plans and specifications, and the power to cancel a permit if not so built. The city council might have reserved these rights to itself or might delegate the power, as in the instant

case, to the building inspector. The ordinance in question is distinctive from those involved in many of the cases cited by counsel for appellant. The courts are quite uniform in holding that building ordinances that do not prescribe a general or uniform rule for building, and vests the power to grant a permit in a building inspector, are unconstitutional as conferring arbitrary powers upon the person clothed with authority to grant a permit. Such an ordinance might subject the property owner to the arbitrary will of the inspector. The ordinance in question grants no such arbitrary power to the building inspector, and is easily distinguished from those cited in the many cases by counsel for appellant, and is not subject to the objections urged against it.

For the reasons before given, it follows that the judgment of the district court is right, and it is

AFFIRMED.

JULIA A. JONES, APPELLEE, V. TOM DOOLEY, APPELLANT.

FILED NOVEMBER 17, 1921. No. 21650.

1. **Appeal in Equity:** INCOMPETENT EVIDENCE. Upon appeal in actions in equity, this court will not consider incompetent evidence received by the trial court.
2. ———: CONFLICTING EVIDENCE. Upon appeal in actions in equity, when the testimony of witnesses orally examined before the court upon the vital issues is conflicting, this court will, while trying the case *de novo*, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

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

William R. Patrick, for appellant.

H. A. Collins, contra.

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

GOSS, District Judge.

This is a suit in equity to cancel a life lease upon 80 acres of land in Sarpy county. From a decree for plaintiff, the defendant appeals.

Plaintiff, 60 years old, a widow for 14 years, had a life estate in the land, derived from her husband's estate. She lived in Omaha, and had never seen the land, which had no buildings on it. She had leased it during her tenure, first through a local agent, now dead, and, since 1916, through J. R. Wilson, clerk of the district court, who left some of the details to his daughter. Plaintiff allowed her agent to decide upon the tenant and the rental, and to pay the taxes, so that about all she seemed to have to do with the property was to receive her net income from it. For some years the land had been leased by Mr. Uhe, first at $250 a year, and latterly at $300 a year. The taxes were about $50 annually. Mr. Uhe held the land on a lease from March 1, 1919, to March 1, 1920, when the events occurred in the summer of 1919 which are the subject of controversy. The defendant knew that Wilson was the local representative of the plaintiff and that Miss Wilson also had to do with the land. He conceived the idea of purchasing it, and, saying nothing to the Wilsons until after his lease was provided for, he went direct to plaintiff with his proposal. He then learned from plaintiff, and later confirmed it from the records, that she had only a life estate. She says he told her that Mr. Wilson was tired of looking after the land, and that Mr. Uhe did not want the land after March 1, 1920. Upon hearing from him that she was without an agent, she says she asked time to consult with her cousin, Mr. Colvin, of South Omaha, who once had a farm adjoining her land; but she says that the defendant returned and pressed her for action before she had had time to see Mr. Colvin and get his advice. On his third trip to Omaha to see plaintiff, and after both were aware that she had only a life estate, and after he had been furnished the address of the remainderman and had

hopes of purchasing the fee, it was agreed between the parties that the land would be leased to defendant. He went away, prepared the life lease, which is in evidence, returned to her home and arranged for her to execute the lease. He then went down town, engaged a notary, and returned with him to have the lease acknowledged. What occurred there is the subject of sharp conflict between plaintiff and defendant in the testimony. The notary read the lease to her. The notary says that he then handed it to her, and she had some discussion with defendant about the life term, and then signed. She testifies that when the life lease was read she objected to giving a lease for more than one or two years, and they said, "I will change that, and they wrote there." She thinks Mr. Dooley was the one who did the writing, and after that she signed the lease. Defendant denies any talk about changing the life term, and any pretense of writing anything in the lease; the notary did not hear defendant suggest any change in the form, although he testifies that the parties discussed the life term. The plaintiff's testimony and the general atmosphere of the entire evidence indicate that she was a deaf, nervous, inexperienced woman, probably suffering greater impairment than the usual woman of her years, and at the time considerably confounded by a recent death in her family. The defendant denies that there was any talk or pretense of modifying the written lease.

The defendant is 39 years old, for several years county clerk of Sarpy county, and evidently a man experienced in real estate matters. He denies all statements of plaintiff in her testimony calculated to show misrepresentation on his part, and claims the utmost good faith and fair dealing. He admits that if the land were built up a little it might rent for $10 or more an acre. Under the lease he was to pay $300 a year and the taxes for the 80 acres.

The statute, read literally, requires us, in a review of an appeal in equity, to retry the issues of fact and reach

an independent conclusion. Rev. St. 1913, sec. 8198. But when the testimony of witnesses orally examined before the court is conflicting, this court will, while trying the case *de novo,* consider the fact that the trial court had the opportunity of observing the witnesses, their manner of testifying, and other circumstances in the case which tend to indicate which version of the transaction is reliable, when, from the conflict of testimony, it is impossible that both versions can be true. *Cooley v. Rafter,* 80 Neb. 181; *Langmann v. Guernsey,* 95 Neb. 221; *Occidental Building & Loan Ass'n v. Adams,* 96 Neb. 454; *McLaughlin Bros. v. Hilliard,* 97 Neb. 326; *Shafer v. Beatrice State Bank,* 99 Neb. 317; *Greiner v. Lincoln,* 101 Neb. 771; *Dworak v. Dobson,* 102 Neb. 696; *Gaunt v. Smith,* 103 Neb. 506.

We leave out of view all hearsay evidence admitted by the trial judge and complained of by appellant.

The trial judge was familiar with the surroundings, knew most of the witnesses, if not all of them, and had an opportunity to observe their manner while testifying. With these advantages he formed a decisive opinion on the conflicting evidence in this case. The case is not free from doubt; but, taking into consideration all the competent evidence and giving due weight to the finding of the trial court, we do not feel justified in coming to a different conclusion. We decide that there is no error in the decree.

The judgment is

AFFIRMED.

BARBARA JANESOVSKY ET AL., APPELLEES, V. HENRY RATHMAN ET AL, APPELLANTS.

FILED NOVEMBER 17, 1921. No. 21673.

1. **Intoxicating Liquors:** ACTION FOR DEATH: INSTRUCTIONS. Under section 52 of the 1917 liquor law (Laws 1917, ch. 187), interpreted in the light of sections 54 and 58 thereof, it is not im-

proper to instruct the jury that, if they find that the defendants furnished the deceased "intoxicating liquors which caused or contributed to his intoxication and that his death occurred by accident caused or contributed to by such intoxication," they should find for the plaintiffs.

2. Trial: QUOTIENT VERDICT. Where the jurymen separately indicate the amount of damages, the amounts are added, the total sum divided by the number of jurors, the quotient afterward assented to as the amount of their verdict and returned into court and declared by the jury to be their verdict, the judgment based thereon will not be set aside.

3. Appeal: MISCONDUCT OF ATTORNEYS: REVIEW. A litigant desiring to claim error on account of the misconduct of opposing parties or counsel must call the attention of the trial court to such misconduct at the time it occurs, ask the court for protection, and preserve in the bill of exceptions the record of what occurs, so that the trial court may have an opportunity to protect the litigant, and, failing that, this court may not properly review the action of the trial court.

APPEAL from the district court for Dodge county: A. M. POST, JUDGE. *Affirmed.*

F. Dolezal, Cain & Johnson and *Hanley & Hopkins,* for appellants.

R. B. Hasselquist, contra.

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

GOSS, District Judge.

Plaintiffs, the widow and minor children of Ben Janesovsky, brought this action for loss of means of support caused by the death of the husband and father in an automobile accident shortly after midnight of July 19, 1919. The jury returned a verdict for plaintiffs for $8,958, and defendants appealed.

This action was brought under the 1917 liquor law (Laws 1917, ch. 187). It expressly repealed sections 3844 to 3894 of the Revised Statutes for 1913, commonly called the "Slocumb Law." The pertinent portions of the present act are as follows:

"Section 52. Any wife, child, parent, guardian, employee, or other person who shall be injured in person or property or means of support, by intoxication of any person, shall have a right of action against any person, association, or corporation, who by himself, his agent, or servant illegally furnished the intoxicating liquor that caused or contributed to the intoxication of such person, for all damages sustained."

"Section 54. On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or the injuries inflicted, by a person or persons under the influence of liquor, it shall only be necessary to sustain the action to prove that the defendant or defendants sold, gave, or furnished intoxicating liquors to the person or persons so intoxicated or under the influence of liquor whose acts or injuries are complained of, on that day or about that time, when the act was committed or injuries received."

"Section 58. The legislature hereby declares this act to be for the immediate preservation of the public peace, health, and safety, and all its provisions shall be liberally construed for that purpose."

Appellants complain of instruction No. 6, given by the court, in which he told the jury that, if the defendants furnished the deceased "intoxicating liquors which caused or contributed to his intoxication, and that his death occurred by accident caused or contributed to by such intoxication," they should find for plaintiffs. They declare that, under the law, there is no liability unless there is intoxication and injury by that intoxication alone, that all causes of injury, save that of intoxication, are excluded, and that the intoxication must be the proximate cause of the injury, and not merely a contributing cause.

We think that all of section 52, construed with section 54 in the liberal manner enjoined by section 58, justify the instruction given by the trial judge. Under the former law, section 3862, Rev. St. 1913, was identical with section 54 of the present act, and was repeatedly con-

strued when questions arose as to what must be the proximate cause of the damages on account of which suits were brought. Under the old law the traffic was denounced; here the intoxication of a party having dependents is made the basis of suit against any defendant who furnishes liquor to the person so intoxicated or under the influence of liquor, where acts are done or injuries are inflicted by reason of such intoxication. In construing the language of this section it has been held by this court many times that it is not necessary that the liquor furnished be the sole, or even the principal, cause of the injury. A few of the cases are: *McClay v. Worrall,* 18 Neb. 44; *Cornelius v. Hultman,* 44 Neb. 441; *Gran v. Houston,* 45 Neb. 813; *Schiek v. Sanders,* 53 Neb. 664; *McClellan v. Hein,* 56 Neb. 600; *Smith v. Lorang,* 87 Neb. 537.

We conclude that it was not error for the court to give the instruction, and likewise he did not err in refusing the converse requested by defendants.

Complaint is also made of instruction No. 11, as to the finding of the jury concerning the inability of the deceased to protect himself, by reason of intoxication, from the results of accidents or circumstances to which he was subjected. We do not think the jury limited this to his inability to protect himself at the instant of the fatal accident, or that it can be construed in such narrow limits. This instruction was adapted from *Gran v. Houston,* 45 Neb. 813, 826, omitting a portion which might have made the criticisms here applicable. The instruction directed the attention of the jury to the inability of the deceased to protect himself, not alone at the instant of impact, but during his wild ride to death. At the best, even the driving of so dangerous an instrument as an automobile is an invitation of disaster to an intoxicated person, because the driver may not only speed to death as deceased did in this case, but he may not be able to protect himself from injury by other vehicles as a sober man might do. Inasmuch as this instruction applies to the circumstances

from the time deceased entered his car until he ran it into the railroad, it was proper.

Misconduct of plaintiffs and attorneys during the trial and argument is asserted by appellants; but, inasmuch as this was not objected to, nor was the court given an opportunity to pass upon it, at the time, it will not suffice here. *Chicago, B. & Q. R. Co. v. Kellogg,* 54 Neb. 127; *Kriss v. Union P. R. Co.,* 100 Neb. 801.

Misconduct of the jurors is alleged, in that it is claimed that the verdict was a quotient verdict arrived at by each juror writing on his ballot a sum which he thought ought to be the verdict and then dividing the total by twelve. The correct rule is that this, of itself, does not make the verdict a quotient verdict, when the result is afterward assented to by each juror as his verdict. *Reick v. Great N. R. Co.,* 129 Minn. 14; *Clary v. Blondel,* 178 Ia. 101; *Village of Ponca v. Crawford,* 23 Neb. 662. Moreover, the issue of fact, presented by affidavits and counter affidavits of jurors, was passed upon by the trial court. This will not now be disturbed. *Canon v. Farmers Bank,* 3 Neb. (Unof.) 348; *Farmers Irrigation District v. Calkins,* 104 Neb. 196.

Lastly, we find no errors in the admission of evidence or in the record as to the analysis of the cider furnished by defendants to the deceased. The disagreement of the experts has been passed upon properly by the jury.

The judgment is

AFFIRMED.

EVA MCENTARFFER, APPELLANT, V. EMMA PAYNE ET AL., APPELLEES.

FILED NOVEMBER 17, 1921. No. 21678.

1. **Witnesses:** COMPETENCY: HUSBAND AND WIFE. Under the present law, the husband has such a direct legal interest in the real estate of the wife as to render him incompetent to testify, in her suit to enforce an oral contract between her and a person now de-

ceased to convey lands, as to a conversation between the deceased and the husband.

2. ———: ———: REPRESENTATIVE OF A DECEASED PERSON. Any party so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and to make the defense which the deceased might have made if living, may be said to represent a deceased person within the contemplation of section 7894, Rev. St. 1913.

3. **Specific Performance**: PAROL CONTRACT: PROOF. Where it is sought to enforce an oral agreement of a person now deceased to convey or devise lands, the proof to establish the existence of such oral agreement must be clear, satisfactory and convincing.

4. **Appeal in Equity**: CONFLICTING EVIDENCE. Upon appeal in actions in equity, when the testimony of witnesses orally examined before the court upon the vital issues is conflicting, this court will, while trying the case *de novo*, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

APPEAL from the district court for Saline county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Glenn N. Venrick, for appellant.

Charles H. Sloan, Frank W. Sloan, Thomas J. Keenan, J. A. Wild and *F. B. Donisthorpe, contra.*

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

GOSS, District Judge.

This action in equity was brought by Eva McEntarffer against the personal representatives, heirs and devisees of Benjamin Thompson for the purpose of enforcing his alleged oral agreement to convey land to her. The case was heard by the court, the relief prayed was denied and the action was dismissed.

About 1896, when she was five years old, plaintiff, an orphan, went to live with Benjamin Thompson and Rebecca, his wife, as arranged with plaintiff's mother on her deathbed. She continued to live with them until she was past her majority. She went by their name, was

treated as if she were a daughter, and she treated them as if they were her parents. October 6, 1910, when she was about 19 years old, she was married to Harry McEntarffer, with whom she has lived ever since. She claims that in February, 1911, she and her husband had an advantageous opportunity to go to South Dakota, but that Benjamin Thompson, being the owner of a farm of about 200 acres near Swanton, made plaintiff a counter proposition that, if she and her husband would go on this farm and assist him in caring for it, he would pay them the sum of $25 a month, and, at or before his death, he would give the farm to her; that she and her husband agreed to the proposition, entered upon the performance of the oral agreement, and continued therein up to the death of Benjamin Thompson on November 29, 1917; and that Thompson carried out his part, except that he failed to convey the farm to her or to devise it to her, but, on the contrary, provided by will that all his property should be converted into cash and the proceeds divided among his blood relatives as if he had died intestate. On his deathbed Benjamin Thompson made and delivered to appellant a deed to 80 acres of land, not a part of the farm in litigation here.

Appellant assigns error by the trial court in excluding the offered testimony of her husband and of herself as to conversations held with the deceased bearing upon the contract. This depends upon section 7894, Rev. St. 1913, wherein it is said: "No person having a direct legal interest in the result of a civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." Appellant argues that her husband has no direct legal interest. We think the correct solution of this lies in the answer to the question: Will the husband gain or lose by direct legal operation of a judgment in this case? This was under consideration in *Holladay v. Rich,* 93 Neb. 491, and, because the husband has an in-

terest in her real estate, under the present statute, which cannot be defeated by any act of the wife, it was held that the husband could not testify.

Appellant further argues that the defendants were not the representatives of the deceased, and therefore the testimony of McEntarffer on this point was admissible. This is fully answered in the negative by *McCoy v. Conrad,* 64 Neb. 150, in which this court quotes with approval Judge Sedgwick's opinion as trial judge, overruling a motion for a new trial: "If a party is so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and to make the defense which the deceased might have made if living, or to establish a claim which the deceased might have been interested to establish if living, then he may be said, in that litigation, to represent a deceased person."

These principles apply to appellant with at least equal, if not greater, force than to her husband. And so we decide that the court did not err in refusing to allow either of them to testify as to conversations with the deceased.

The record is voluminous. Each case of this nature must be determined on its own facts and circumstances. Nearly all the evidence was oral. It is conflicting. It does not satisfy us as to the claims of the appellant by meeting the calls of the law that, to establish an oral agreement with a person now deceased to convey land, the evidence of the terms of the contract must be clear, satisfactory and convincing. *Moore v. Moore,* 58 Neb. 268; *Rau v. Rau,* 79 Neb. 694; *Labs v. Labs,* 92 Neb. 378; *Damkroeger v. James,* 95 Neb. 784; *Overlander v. Ware,* 102 Neb. 216; *Powers v. Norton,* 103 Neb. 761.

Moreover, it is now well settled that we should give such weight to the findings of the trial court as to credibility of witnesses and on conflicting evidence as, under all the circumstances, such findings may be entitled to. *Faulkner v. Simms,* 68 Neb. 299; *Cooley v. Rafter,* 80 Neb. 181; *Langmann v. Guernsey,* 95 Neb. 221; *Occi-*

dental Building & Loan Ass'n v. Adams, 96 Neb. 454; *McLaughlin Bros. v. Hilliard,* 97 Neb. 326; *Shafer v. Beatrice State Bank,* 99 Neb. 317; *Greiner v. Lincoln,* 101 Neb. 771; *Dworak v. Dobson,* 102 Neb. 696; *Gaunt v. Smith,* 103 Neb. 506. The trial judge had an opportunity to observe the witnesses and their manner while in the court-room and while testifying. Taking into consideration all the evidence, and giving due weight to the finding of the trial court, we conclude that there was no error in the decree.

The judgment is

AFFIRMED.

MARY MALLETT, APPELLANT, V. AUGUSTA GRUNKE ET AL., APPELLEES.

FILED NOVEMBER 17, 1921. No. 21696.

1. **Specific Performance: MARRIAGE CONTRACT.** On examination of entire case, *held* that the proofs tend to show an oral contract of marriage, and not a contract to act as housekeeper and to care for deceased as long as he lives, in consideration of his property.
2. **Statute of Frauds: CONTRACT IN CONSIDERATION OF MARRIAGE.** A contract in consideration of marriage is void, unless it, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therewith. Rev. St. 1913, sec. 2630.

APPEAL from the district court for Dodge county: A. M. POST, JUDGE. *Affirmed.*

Montgomery, Hall & Young and *Dolezal, Spear & Mapes,* for appellant.

Cain & Johnson, contra.

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

GOSS, District Judge.

This is an action in equity to enforce specific performance of an alleged oral contract between Mary Mallett,

the plaintiff, and Louis Kienbaum, now deceased, to give her care and companionship to him during his life, and, in consideration thereof, to receive all his estate upon his death. The plaintiff alleges performance on her part, and, deceased having failed to provide by will or other instrument for the conveyance of the property to her, brings this suit against his heirs and administrator. On the trial the court found for the defendants upon the issues joined.

Louis Kienbaum, a bachelor, 46 years old, lived until about 2 weeks before his death on his 240-acre farm about 4 miles southeast of the village of Snyder. He also owned 3 lots and a house in the village. About May 20, 1919, he expressed to Leroy Kleeman, one of his neighbors, his need of a housekeeper and cook, as they were on their way home from Omaha, where they had seen Mrs. Mallett, who is Kleeman's mother-in-law, whom he had previously met at Kleeman's home, and of whose cooking, at least, he had formed a favorable opinion; and he stated his intention of seeing what she would say to it. In August he told Kleeman that she was going to keep house for him. Kleeman expressed the belief that this arrangement would cause gossip, and others volunteered like opinions. His judgment approved the wisdom of the criticism, and his bashful nature readily responded to this commendable stimulus to enter upon the theretofore untried relation of marriage; and so Louis decided to see if she would not marry him. She consented, and arrangements were begun for her to sell her home in Omaha and move to Snyder, where he would build a good house on his lots. An architect and builder in Omaha, who had built Mrs. Mallett's house in Omaha, was consulted and plans were ordered for a house somewhat similar to hers. Some of her canned goods and other personal property were taken to Snyder by automobile, and late in September he and she made arrangements to be married on September 29. On Sunday, the 28th, they drove from Kleeman's home, where she had been visiting and where he

had been boarding for two weeks, to Omaha. He stopped at her house over night, and at an early hour of the morning called her and her daughter and stated that he was ill. He became unconscious, was taken to a hospital, and died on Thursday, October 2, 1919, without consummating the intended marriage.

If the contract was for the marriage of the parties, it was void under section 2630, Rev. St. 1913, which provides that every agreement, promise or undertaking made upon consideration of marriage shall be void, unless such agreement, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therewith.

The plaintiff was not permitted to testify, of course, her testimony being prohibited by the provisions of section 7894, Rev. St. 1913, on the grounds that she had a direct legal interest in the result of the action, and that in relating the transactions and conversations between herself and deceased she would be an adversary to the defendants as representatives of the deceased.

We are unusually impressed with the apparent honesty and truthfulness of all the witnesses and parties to the action. The vital question in the case is whether there was an agreement and part performance thereof between Mrs. Mallett and Louis Kienbaum that she should have his property in consideration of caring for him, as alleged; if, on the other hand, as the defendants claim, the agreement was one of marriage, then her cause of action was properly dismissed.

From a careful reading and analysis of the testimony given by the witnesses for the plaintiff alone, we have come to the conclusion that it is overwhelmingly shown that the agreement was an entirety, and that it contemplated marriage as its necessary and pivotal feature. It is true that early declarations of Louis Kienbaum were testified to, tending to show that he wanted to have her keep house and care for him, and that he would compensate her by building a house on his Snyder lots and giving her

the property, by giving her everything he had, by giving her his property, by leaving his property to her, by giving her some property, and the like. But it also appears from the evidence of these same witnesses that when, on his early expressions of his plan of having her as a housekeeper, the parties, and particularly Mrs. Kleeman and her husband, daughter and son-in-law of Mrs. Mallett, raised objection, he saw the force of it and expressed his intention of seeing if Mrs. Mallett would not marry him. We have no manner of doubt, from the entire circumstances indicated by the witnesses for plaintiff, that the minds of the parties never met, except as they met on this more or less platonic marriage agreement; and that both of them early recognized the wisdom of, and acted upon, the advice of their relatives and friends, to the effect that she must be more than cook and caretaker. In the latter weeks everything that was said and done by both of them looked toward marriage, and nothing that was at any time said or done by her or on her behalf ever looked in any other direction. If they ever had an agreement that she was to be his housekeeper, it was superseded by this oral marriage contract. This situation of plaintiff is not at all helped by the testimony of the witnesses for the defendants.

It would merely prolong our opinion, without profit to any one, to analyze in detail the evidence. Suffice it to say that, if defendants had offered no testimony, the trial judge would have had ample support in the testimony presented by plaintiff for dismissing the case.

Having decided that the agreement was one of marriage, and therefore void, it is unnecessary to consider the debated subject as to whether the plaintiff, by reason of the moving of a few of her domestic articles to Snyder, by her hospitality to Louis while overnight at her home in Omaha on his way to the altar, by her care of him in her home for a day after he was there stricken with his fatal illness, by her visit to him at the hospital, and by other merely natural and friendly acts, could be said to

have entered upon part performance of an agreement to be his housekeeper and to care for a 46-year-old man the rest of his life.

The decree of the district court was right, and it is

AFFIRMED.

ERNEST DARWIN V. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1921. NO. 22011.

1. **Rape:** CORROBORATIVE EVIDENCE. In a prosecution for rape, it is not essential that the prosecutrix be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. *Fager v. State*, 22 Neb. 332.
2. **Criminal Law:** ACCUSED AS WITNESS: INSTRUCTION. When a defendant in a criminal prosecution becomes a witness in his own behalf, it is not error for the court to instruct the jury that in considering his testimony they may weigh it as they would weigh the testimony of any other witness, taking into consideration his interest in the result of the trial, his manner, and the probability or improbability of his testimony, and give to it such weight as, under all the circumstances, they think it entitled to.

ERROR to the district court for Gage county: LEONARD W. COLBY, JUDGE. *Affirmed.*

Hazlett, Jack & Laughlin, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

GOSS, District Judge.

Plaintiff in error, hereafter called defendant, about 25 years old, was convicted of statutory rape upon Wilma Drury, a girl less than 15 years old.

The information charged that the crime was committed on or about May 30, 1920. The state's evidence tended to show that the offense was committed about the middle of May, and the court properly charged the jury as to the date, fixing it as on or about May 15, 1920.

The only witnesses who testified as to the act were Wilma Drury, the prosecuting witness, and Ethel Fielder. The story of these witnesses is as follows: They say that about 7 o'clock one evening, in the middle of May, they were loitering at the railroad station in Beatrice and were invited by one Smith, a brother-in-law of Wilma, to go riding in his car. They accepted and rode uptown, where the defendant joined the party. They drove about three miles, stopping on the roadside near a bridge. Defendant and Wilma left the others in the car, climbed over a wire fence, went out of sight of the car into the bushes and sat down, where she says they smoked cigarettes a few minutes and then mutually engaged in the commission of the act charged; and that, while she and defendant so lingered, Ethel, who had left her companion, climbed the barbed wire fence and entered the copse in search of her chum, came upon them, and saw them thus engaged. Ethel testified to the same state of facts.

The defendant and Smith categorically denied this testimony, and defendant sought to prove an alibi by accounting for his presence at other places from about the 10th of May to a time late in June.

The errors assigned by defendant relate to two instructions given by the court, to one instruction requested by defendant but refused, and to the failure of the verdict to respect the alibi or to be supported by the evidence.

The disputed questions of fact were for the jury, and the evidence is sufficient to support the verdict, if submitted to the jury under proper instructions.

The following instruction, given by the court, is assigned as error: "The court instructs the jury that in the prosecution for rape it is not essential to a conviction

that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to the material facts and circumstances which tend to support her testimony and from which together with her testimony as to the principal fact, the inference of guilt may be drawn."

It is conceded that this instruction has been approved substantially by this court several times: *Fager v. State,* 22 Neb. 332; *Dunn v. State,* 58 Neb. 807; *Klawitter v. State,* 76 Neb. 50; *Harris v. State,* 80 Neb. 195. But it is urged that it is inapplicable to the facts here, and tended to confuse the jury, because Ethel Fielder was the only one to whom the instruction might properly apply. As we view it, the instruction benefited rather than injured the defendant, for it had a tendency to destroy the force of the testimony of Ethel Fielder that she saw the parties in "the particular act constituting the offense."

Complaint is also made of this instruction: "The jury are instructed that under the law of this state the accused is a competent witness in his own behalf, and you are bound to consider his testimony; but in determining what weight to give to his testimony you may weigh it as you would the testimony of any other witness, and you may take into consideration his interest in the result of the trial, his manner, and the probability or improbability of his testimony, and give to his testimony such weight as, under all the circumstances, you think it entitled to."

It is criticized because the court used the word "may" instead of "should." We do not see where this prejudiced the defendant. The jury probably understood it in the sense of a direction to weigh or to consider. If the jury understood it as merely permissive, then it helped the defendant.

The instruction is further attacked as having the vice of singling out the defendant from other witnesses, as if the court considered his credibility worthy of finer sifting than that of other witnesses. This instruction, copied

from *Housh v. State,* 43 Neb. 163, has been approved in many cases, and we will not disturb those decisions. *Wallace v. State,* 91 Neb. 158, and cases cited.

Defendant assigns as error the refusal of the court to give a certain instruction, as to the proof of an alibi, to the effect that it was not necessary for the proof to cover the whole period during which the offense might possibly have been committed, but merely to cover it so as to raise a reasonable doubt in the minds of the jurors. The court gave an instruction requested by defendant to the effect that if from all the evidence, and whether from lack of proof by the state or from evidence on behalf of defendant, they had a reasonable doubt of the presence of the accused at the time and place of the act, as testified to by prosecutrix, they should acquit the defendant. We conclude that the court sufficiently charged the jury as to the burden of proof, and as to the alibi, and that there was no error in refusing this additional instruction.

We find no error in the case. The judgment is

AFFIRMED.

JESSIE G. WILKINS, ADMINISTRATRIX, ET AL., APPELLEES, V. BENJAMIN H. ROWAN ET AL., APPELLANTS.

FILED NOVEMBER 17, 1921. No. 21542.

1. **Wills: CONSTRUCTION: "ISSUE OF THE BODY."** Where there was a devise of land to James for life, and at his death to the issue of his body in fee simple, if he shall leave any such issue surviving him, if not, then the same to go to the heirs of testator's blood, *held,* that by the term "issue of his body" testator meant lineal descendants, and not children only.

2. ———: ———: DEVISE. A devise of land to James for life, and at his death to the issue of his body, if he shall leave any such surviving him, but, if he shall not, then said land to go to the heirs at law of testator, *held,* an estate in remainder, and not an executory devise to the issue of James, and that B. and D., sons of James, took a vested estate in remainder at the death of testator, subject to open and let in afterborn issue.

3. ———: ———: ———. *Held*, further, that said vested estate, or interest, was defeasible, and not absolute, and that the death of D., one of the sons of James, during the life of his father, defeated his interest, and that his (D.'s) three minor children took the interest of their father, not as his heirs at law, however, but as issue of the body of their grandparent as substituted devisees in place of their deceased father, and conditional upon their surviving their said grandparent.

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

Paul Jessen, Matthew Gering, Albert S. Johnston and *Peterson & Devoe*, for appellants.

Pitzer, Cline & Tyler, contra.

Heard before MORRISSEY, C. J., ROSE, DAY and FLANSBURG, JJ., LESLIE, District Judge.

LESLIE, District Judge.

This is an action brought in the district court for Otoe county for the construction of the will of David R. Rowan, who was a resident of Ohio. Upon the construction of his will depends title to 160 acres of land in Otoe county. The paragraph of the will involved is as follows:

"Third. I own a farm of 160 acres situate in Otoe county in the state of Nebraska, on which my said son James Rowan has for some years resided and now resides, and I will and devise said farm of 160 acres to my said son James Rowan, to have and to hold during the term of his natural life, and at his death, to the issue of his body, in fee simple, if he shall leave any such issue, but if he should not leave any such issue surviving him, then in that case, the same must go to my heirs of my blood, that is, to the person or persons who would at that time inherit the same from me, in case I then died intestate, being the owner thereof."

David R. Rowan, the maker of the will in question, will hereafter be referred to as testator to avoid confusion of his name with that of his deceased grandson, David R. Rowan.

The testator was the father of two sons, Robert, residing in Ohio, and James, residing in Nebraska. At the time of the execution of his will he was the owner of 110 acres of land in Clermont county, Ohio, upon which his son Robert resided, and 160 acres in Otoe county, Nebraska, upon which his son James resided. He devised the Ohio land to his son Robert and the issue of his body, in the exact language used by him in devising the Nebraska land to his son James and the issue of his body.

At the time of the death of the testator, James Rowan, to whom the life estate in the Otoe county land was devised, was the father of two sons, Benjamin H. and David R. Rowan. James Rowan and his son Benjamin are still living. David died in 1919, leaving a widow and three minor sons.

The original plaintiff was Caroline E. Rowan, for herself and her minor sons. She died before disposition of the case in the lower court, and the action was revived as to her in the name of Jessie G. Wilkins, Administratrix. As guardian for the children of David R. Rowan, she was also substituted in place of their deceased mother, Caroline E. Rowan, who had appeared as their next friend. James Rowan, holder of the life estate, Benjamin H. Rowan, surviving son of James Rowan, Frank E. Coe, administrator of the estate of David R. Rowan, deceased (son of James Rowan), Albert S. Johnston, trustee of the bankrupt estate of Benjamin H. Rowan, Citizens State Bank of Peru, and Wilbur W. Sims were made defendants.

The interest of the Citizens State Bank arose out of a mortgage executed by Benjamin H. Rowan and his wife. The interest of the defendant Sims is due to a lease of the premises executed by James Rowan, holder of the life estate, and Benjamin H. Rowan, his only surviving son.

Following the death of David R. Rowan, his brother, Benjamin H., claimed to be the sole surviving issue of the body of their father, to whom the life estate was devised, and that, as such, would become vested with title to the

entire estate in remainder conditional upon surviving his father; in other words, that the will created a contingent remainder, or an executory devise, and that by the use of the words, "issue of the body," is meant children, and not grandchildren or lineal descendants. The appellant Coe, as administrator of the estate of David R. Rowan, claims that David was possessed of a vested interest in the land dating from the death of the testator, and that this title passed by descent to his widow and children and became an asset in the hands of the administrator.

The appellees, who are the minor children of David R. Rowan, concede that Benjamin H. Rowan has the same interest in the land their father had in his lifetime, but contend that it is a vested interest, subject to defeasance, in case of his death before the termination of the life estate. They further assert that they have a present vested interest in the land coextensive with that held by Benjamin H. Rowan, not as heirs at law of their father, but as issue of the body of their grandparent, James Rowan, as substituted devisees in place of their father, David R. Rowan, conditional upon their outliving their grandfather, in whom the life estate is vested.

The trial court found in accordance with the views of the appellees, and decreed that Benjamin H. Rowan had a vested interest to an undivided one-half interest in the land contingent upon his surviving his father, and that appellees, minor children of David R. Rowan, had a vested interest in an undivided one-half interest in the land conditional upon their surviving their grandfather. From this decree appellants have appealed to this court.

The first question presented is whether the words, "issue of his body," mean lineal descendants, or are restricted to children. 1 Schouler, Wills, Executors and Administrators (5th ed.), sec. 535, states: "A gift to 'issue,' as a phrase of law, imports *prima facie* descendants of every degree from the common ancestor, including children and those more remote."

2 Jarman, Wills (6th ed.) *946, states: "The word

'issue,' though its popular sense is said to be children, is technically, and when not restrained by the context, coextensive and synonymous with descendants, comprehending objects of every degree."

This court in *Godden v. Long,* 104 Neb. 13, opinion written by Chief Justice Morrissey, held as follows: "The term 'issue,' or 'lawful issue,' in its primary legal sense, means descendants or lineal descendants generally, and not merely children. * * * It is only when it is used in a special instrument, whose context shows that a narrower construction was intended, that its meaning will be limited."

The rule in this state and other state and federal jurisdictions seems to be settled that a devise to "issue" or "issue of the body" will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent. *In re Lawrence's Estate,* 181 N. Y. Supp. 498; *Petry v. Langan,* 227 N. Y. 621; *In re Farmers Loan & Trust Co.,* 231 N. Y. 41; *City Nat. Bank v. Slocum,* 272 Fed. 11, 19; *Hickox v. Klaholt,* 291 Ill. 544.

We do not find such words of qualification in this will, and hold that by the use of the words, "issue of his body," the testator meant lineal descendants.

At the date of the death of the testator, and when the will was admitted to probate, James Rowan, who took the life estate, was, as previously stated, the father of two sons, David and Benjamin. We are asked to decide whether they took a vested interest at the death of the testator, or a contingent interest to take effect at the death of their father. If they took a vested interest, it becomes necessary to determine, in the case of David, who died before his father did, whether his interest descended to his heirs at law or was defeasible and lapsed at his death. Benjamin H. Rowan claims that the estate created by the language of the will is a contingent remainder to take effect at the date of the death of James Rowan, to whom the life estate was devised. He further

contends that, if it is not construable as a contingent remainder, it may consistently be held an executory devise. In some cases the line between a contingent remainder and an executory devise is not clear, but they are fundamentally distinguishable. Both are interests or estates in land to take effect in the future and depend upon a future contingency. An executory devise is an interest such as the rules of law will not permit to be created in conveyances, but will allow in case of wills. It follows a fee estate created by a will. A contingent remainder may be created by will or other conveyance, and must follow a particular or temporary estate created by the same instrument of conveyance. Thompson, Wills, sec. 241, defines the distinction between an executory devise and a contingent remainder in this language: "The essential characteristics of a remainder are: (1) There must be a precedent particular estate, whose regular termination the remainder must await. (2) The remainder must be created by the same conveyance, and at the same time, as a particular estate. (3) The remainder must vest in right during the continuance of the particular estate, or *eo instanti* that it determines. (4) No remainder can be limited after a fee simple. The necessary features of a remainder arise out of the definition. The definition describes a remainder as the remnant of the whole after a part has been disposed of. It follows, therefore, of course, that there must be that part in order to fulfil the definition. The chief distinction between a remainder and an executory devise is that a remainder follows a particular estate, while an executory devise follows a fee."

Washburn, Real Property, sec. 1757, states that one of the distinctions between a remainder and an executory devise is that a remainder follows a particular estate, while an executory devise follows a fee.

In *Burleigh v. Clough,* 52 N. H. 267, the rule is announced as follows: "'An executory devise is a future interest, such as the rules of law do not permit to be

created in conveyances, but allow in the case of wills, like an interest given after an estate in fee simple, or to arise *in futuro,* without a particular estate to support it. The distinction between an executory devise and a vested remainder is elementary. An executory devise is such a disposition of lands by will, that thereby no estate vests at the devisor's death, but only on some future contingency. It needs no particular estate to support it. An estate in remainder is one limited to take effect and be enjoyed after another is determind. No remainder can be limited after the grant of a fee simple, because the tenant in fee has the whole."

No estate in fee simple was created by the testator's will that preceded the devise to the issue of the body of James Rowan, to whom was devised the life estate, therefore the estate created by the will of the testator and devised to the issue of the body of James Rowan, life tenant, was a remainder, and not an executory devise.

The next question is whether the remainder thus created is vested or contingent. The subject of estates in remainder has been a fruitful subject of litigation in this country and in England over a long period of time. In the instant case it has been presented to this court by the pleadings and the briefs with unusual clearness. It was also argued to the court with great care and ability. The cases cited are so numerous that we shall not undertake to refer to all of them, or even to a considerable number, however interesting and instructive it might prove. The policy of the law has always been to look with favor upon the early vesting of estates, and a remainder will never be held to be contingent if it can reasonably be held to be a vested remainder.

2 Underhill, Law of Wills, sec. 860, states the rule to be: "Whenever it is possible the future interest will be construed as vested, and hence alienable and devisable by the remainderman. It is not so much the certainty or uncertainty of the enjoyment of the fee in remainder after the life estate ends as the uncertainty of the person who

has a present right to enjoy the future estate if the particular estate came to an end now, which determines the character of the remainder. A remainder is vested if the remainderman, being alive, will take at once if the life tenant were to die. The fact that his enjoyment is postponed, and, on a certain event, as on his death, may never take place at all, does not make the remainder contingent. But where there is no person now in being upon whom the enjoyment and possession of the remainder would devolve as a remainderman, if the particular estate were to terminate, the remainder is contingent."

1 Schouler, Wills, Executors and Administrators (5th ed.) sec. 562, states: "In short the law does not favor the abeyance of estates but estates by way of remainder vest at the earliest period possible, unless the will shows a contrary intention. And vested interests liable to devestment are preferred in construction to interests contingent."

2 Alexander, Commentaries on Wills, sec. 1005, states: "It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman, who is ascertained, lives until the determination of the preceding estate. Where the devise is to the remainderman 'from and after' or 'after' or 'at' or 'on' the death of the life tenant, or words of similar import are employed, such expressions are construed as relating to the time of the enjoyment of the state and not as to its vesting, and such remainder is a vested one. The uncertainty as to whether or not the remainderman will live to come into actual possession or enjoyment of the estate does not make the remainder contingent, for that is an uncertainty which attaches to all remainders."

In *Archer v. Jacobs,* 101 N. W. 195 (125 Ia. 467), the court held: "Where a will devised one-fourth of testator's estate to his daughter for life, and upon her death the same to go, share and share alike, to her children or grandchildren, but, if she should die leaving neither chil-

dren nor grandchildren, then to testator's son or his children, the daughter upon the death of the testator took a life estate, and her children then in being took a vested remainder, although such remainder was subject to open and let in after-born children, and although there was no certainty that such children would survive their mother or leave surviving issue." Quoted from with approval in *Shackley v. Homer,* 87 Neb. 146, 177.

This court in *Schuyler v. Hanna,* 31 Neb. 307, held as follows: "It is the present capacity of taking effect in possession, if the possession were to become vacant, not the certainty that it ever will become vacant while the remainder continues, which distinguishes a vested from a contingent remainder."

The supreme court of Illinois in *Hickox v. Klaholt,* 291 Ill. 544, held: "Whenever there is one in being capable of taking the remainder at the termination of a life estate, the remainder is vested in interest although it must wait the termination of the life estate before it can vest in possession."

We think this rule is too well settled to require further discussion, and hold that Benjamin H. Rowan and David R. Rowan, sons of James Rowan, to whom the life estate was devised, took a vested interest at the testator's death. This being true, was the vested interest which they took absolute and indefeasible, during the existence of the life estate, or was it defeasible, and was the vested interest of David R. Rowan defeated by the event of his death? He died during the lifetime of his father, in whom the life estate vested.

Thompson, Wills, sec. 258, says: "There is a class of gifts occupying an intermediate position between absolute gifts and contingent gifts which vest in the beneficiary subject to being divested by the happening of a contingency or the exercise of a power. Until the contingency happens or the power is exercised this gift has all the incidents of an indefeasible interest. If the contingency never happens or the power is never exercised

the gift bcomes absolute. The most common example of this class of gifts is where a remainder is vested subject to be divested on the death of the first taker leaving children, or the birth of issue of another."

In *Sumpter v. Carter,* 115 Ga. 893, the will of John M. Carter provided as follows: "I give, bequeath, and devise to my beloved wife * * * all of my property and effects * * * during her natural life or widowhood, * * * and, in case of my said beloved wife not intermarrying, then in that event my will is that at her death my whole estate be then equally divided between my six children, to wit, my five daughters (naming them) and my son (naming him). My said effects thus going into the hands of my said daughters not to be subject to the control of any husband, but the same to belong to my said daughters and their children. And in case either of my said six children should depart this life without leaving issue, then their part of my estate to be equally divided between my other children, to be controlled in the same way as first above directed."

The court held that a vested remainder may be absolutely or defeasibly vested, and that upon the death of the testator each of his children took a vested remainder interest, subject to be divested in favor of testator's other children, as substituted devisees, upon such child dying during the existence of life tenancy, without leaving a child or children who survived the life tenant.

This question was before this court in *Shackley v. Homer,* 87 Neb. 146. The testator, Harrison W. Cremer, devised certain tracts of land to his executors to be held by them in trust until his son Cedric attained the age of 25 years, with directions that when Cedric attained this age the executors should convey the land in question to him in fee. The testator further provided that, in the event of the death of said Cedric before reaching the age of 25 years, leaving a widow or child or children surviving him, said executors should convey a one-third part of the premises devised to such son to his widow, and the

remaining two-thirds to such child or children, share and share alike. If he leaves no widow but leaves a child or children the premises shall be conveyed to them. If he leaves a widow, but no children, they shall convey to the widow an undivided one-third of the premises and the remainder to his mother, brother and sister, or such of them as shall be living, share and share alike. The court held that upon the death of Harrison W. Cremer, testator, the full title to the property in question vested in Cedric E. Cremer, subject, however, to defeasance in the event of his death before attaining that age.

In the case of *Case v. Haggarty,* 91 Neb. 746, the will of the testator, Henry F. Hill, read as follows: "2d. I give and bequeath to my beloved wife Hannah C. Hill, in lieu of homestead and dower, the use, during her natural life, of the southwest quarter of section 17, of town (ship) 6 north, of range 4 east, Saline county, Nebraska, provided that she shall keep the taxes paid thereon and the interest on the incumbrance that may be thereon at my death. The intention being that this bequest shall release all my other real estate of which I may die seised or possessed of all claims of dower or other interest by my said wife, and that at her death said property shall descend to my heirs share and share alike, that is to say, to my now living children, viz., Susan Case, Beatrice Davidson and Rose Kline shall each be entitled to a one-third interest in said property, but should either of my said daughters die before my said wife then the portion that would have gone to her shall descend to her children share and share alike, and should either of my said daughters die without issue then it is my desire that the portion that would have gone to her shall go to the surviving sisters, or their heirs."

Rose Kline mortgaged her interest in the premises during the lifetime of her mother Hannah C. Hill, and predeceased her mother, leaving children. The court was called upon to determine the status of the mortgage given by her, and held as follows:

"By the language used, it seems clear that it was the intention of the testator that the fee title should vest in the three living children, only upon the condition that they should outlive their mother, and, in case of their not doing so, the title should go to their children by force of the will; that whatever interest the daughter would have should terminate at her death, if that event occurred before the death of the widow, and upon such death the interest she would have had should go to her children. If this is the proper construction, not only the interest of Rose Kline but that of her mortgagee was terminated by her decease."

The rule is well established in other jurisdictions that an estate in remainder may vest in a devisee subject to defeasance. This court has heretofore announced its adherence to that doctrine, and we shall hold in the instant case that Benjamin H. Rowan and David R. Rowan took a vested estate, defeasible or indefeasible, according to the intention of the testator.

In the foregoing paragraphs we have held that by the use of the words, "issue of his body," the maker of the will meant lineal descendants; that the language of the will created a remainder, and not an executory devise; that this remainder was vested, and not contingent; that is to say, Benjamin H. Rowan and David R. Rowan, sons of James Rowan, took a vested interest in the land as remaindermen at the death of their grandparent, the testator, and that their vested interest is defeasible or indefeasible, according to the intention of the testator.

The construction contended for by appellant Benjamin H. Rowan is disposed of when we hold that the estate created is a vested, and not a contingent, remainder, or executory devise, and that the testator meant lineal descendants by the use of the expression "issue of his body." The construction contended for by appellants Johnston, trustee, and Citizens State Bank are likewise disposed of by the court's holding on these two questions. We need, therefore, only consider the constructions contended for

by appellant Coe and appellees. We cannot agree with learned counsel for appellant in his views.

Had the will read: "I will and devise said farm to my said son James, to have and to hold during the term of his natural life, and at his death to the issue of his body in fee simple, if he shall leave any such issue,"—Benjamin H. Rowan and David R. Rowan would have taken an absolute vested interest that would have descended to their heirs at law at their death, subject only to open up to let in after-born issue of the body of their father. But the testator did not stop here. The will provides that if he (James Rowan) shall not leave any such issue surviving him, then, in that case, the same must go to the heirs of testator's blood. Were we to adopt the view of appellant Coe, it would be equivalent to saying that the last above quoted provision of the will is meaningless or invalid; it would be to hold that, if both of the sons of James Rowan predeceased their father, each leaving a widow and no issue surviving, the fee would go to James Rowan, the father, and the widows of the two sons. This was not the testator's intention. He said in unimpeachable language that it should go to his son James for the term of his natural life, at his death to the issue of his body, if he should leave any issue surviving him, if not, then that it should go to his own (testator's) heirs at law. It was within the power of the testator to have given the farm to his son James for life, and at his death to his issue, without limitations or conditions; or to have devised it to his son James for life, and at his death to the issue of his body or their heirs, their widows, the state, a charitable institution, or whomsoever else he chose, but he said: "If my son James leaves no issue surviving him at his death, then same shall go to the heirs of my blood." His desire evidently was that it should not go to strangers to his blood.

Appellant Benjamin H. Rowan suggests the following: "Let us assume that immediately after the probating of the will, the life tenant, his wife and their then living

children should have joined in a warranty deed to a purchaser for value; such a deed, if the remainder vested, would convey the absolute title; then what right would a third child, born after the deed had been delivered, have to take any part of the property? We are entitled to an answer to this inquiry, as it contains, to use a common expression, the milk in the cocoanut."

We think the views we have heretofore expressed furnish the answer. To make it plainer, however, we will say that the grantee would have taken what the grantors had to give. James had a life estate, Benjamin and David each had a vested estate in the remainder, subject to defeasance. Had B. and D. both survived, their grantee would have taken an indefeasible estate in fee simple. During the life of James, the grantee would have had his interest; that is, a life estate, plus a defeasible vested estate in remainder. David having predeceased his father, his death defeated his vested interest. It would have defeated it had he in his lifetime conveyed it to a grantee. Any interest that either Benjamin or David might have conveyed to a grantee would have been defeasible by their death, during the existence of the life interest of their father. If both of them had survived their father and a third child had been born, the grantee's title, like his grantors', would have been defeated or reduced to this extent, for it would open to let in the afterborn issue. This is the only construction that can be given that gives effect to the whole instrument, and carries out the evident intention of the testator, and that would not deprive his heirs of their right under the will to take the property in case James Rowan died without issue surviving him.

The construction contended for by appellant Benjamin H. Rowan would mean that, if David predeceased his father, as he did, leaving issue, and Benjamin survived him, even a day, and left issue, the children of Benjamin would take to the exclusion of the children of David. This is an illogical, inequitable, and unnatural distribu-

tion of the estate. The law favors that construction of a will which conforms most generally to the general law of inheritance.

We are satisfied it was his intention that his son Robert and his lineal descendants, if any survive him, should take the Ohio farm; that James and his lineal descendants, if any survive him, should take the Nebraska farm; that, if either died without leaving issue surviving, the land should go to the other son, or his issue, who would be, of course, the heirs at law of the testator. The decree entered by the trial court carries out this thought.

For the reasons herein stated, the decree of the district court is

AFFIRMED.

KATHARINE E. STRATBUCKER, APPELLANT, V. BANKERS REALTY INVESTMENT COMPANY, APPELLEE.

FILED NOVEMBER 17, 1921. No. 21616.

1. **Appeal:** EXCLUSION OF EVIDENCE. Where the petition states a cause of action, it is reversible error for the trial court to exclude competent evidence tending to prove the material allegations of such petition.
2. **Statute of Frauds:** SALE OF STOCK. A cash sale of stock upon an agreement whereby the seller undertakes to repurchase at the buyer's option constitutes an entire and indivisible transaction sufficiently performed to take it out of the statute of frauds, though the agreement to repurchase be oral.
3. **Corporations:** SALE OF STOCK: AGREEMENT TO REPURCHASE. If it does not appear to be in bad faith and injurious to the rights of its creditors or stockholders, a contract with a corporation, by which it sells certain of its shares of stock and agrees to repurchase the same upon the happening of a certain specified event, is not *ultra vires*, and for a breach thereof the purchaser may recover from the corporation the amount agreed upon as the price of such repurchase.

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

Charles Battelle, for appellant.

Gaines, Ziegler, Van Orsdell & Gaines, contra.

Heard before LETTON, DEAN and DAY, JJ., STEWART and SHEPHERD, District Judges.

SHEPHERD, District Judge.

This is an action for rescission. Plaintiff declared on two causes of action involving two similar purchases of the capital stock of the defendant company. She says that she bought upon the promise and representation of the company, made through its agent, Johnson, that at any time after the expiration of one year she might upon 30 days' notice return the stock to the defendant and have her money back with interest, and upon the further representation that the company maintained a reserve or resale fund of $100,000 duly deposited in bank. She says, further, that she believed said representations and relied upon them and so bought the stock; that they were in fact false, and known to be so by the defendant; that she made due and timely tender of said stock to defendant and demanded the return of her money on the 3d day of August, 1918, more than a year after it was bought; and that she now tenders the same in court and prays judgment for the amount paid therefor.

The defendant denied these allegations, and alleged in much detail that the stock in question was purchased by the plaintiff on written subscription contract signed and fully understood by her, and containing a provision that the stock would be issued by the defendant company in accordance with its constitution and by-laws, and that no conditions, agreements or representations other than those printed on said contract or in the said constitution and by-laws should bind the company, and that neither said constitution and by-laws nor said contract provided for the repurchase or return of stock, as alleged in the petition, nor was any officer or agent of the company authorized or permitted to so agree or represent; that the company received plaintiff's stock subscription believing

that her purchase was absolute, unconditional, and in conformity with the written agreement by her signed; that the plaintiff is estopped to plead the things pleaded and relied upon in her petition; and that the representations and agreements by her pleaded were wholly oral, and are for the purpose of varying and changing her written contract, and are consequently within the statute of frauds; that to permit her to recover on the grounds stated in her petition would be to work a fraud on other purchasers of the stock and upon the creditors of the company, and would also entail an unauthorized and illegal reduction of the capital stock; that the defendant at no time ratified, approved or had knowledge of, the pretended oral contract; and that plaintiff received large amounts in dividends on said stock, and made no effort to have the same resold till heavy losses had depreciated its value; and that she is estopped by her laches. The reply was a general denial of the averments of the answer.

Upon trial the plaintiff separately offered in evidence the two certificates of stock issued to her upon her purchase, also two applications for stock not referred to in her petition. These offers were objected to on three grounds: (1) That the petition fails to state a cause of action; (2) that the contract for resale or repurchase was not to be performed within a year, and was consequently within the statute of frauds; and (3) said offers were attempts to alter and vary the terms of a written contract of subscription by proof of oral representations leading up to the same. The objection was sustained in each instance. Upon each ruling the plaintiff offered to prove, among other things, in great detail, that the defendant represented that it maintained a cash reserve fund and had it deposited in the bank. This was a material allegation and the printed matter on the back of said stock certificates and applications, being excerpts from the company's by-laws, referred to repurchase and to said fund and tended to prove it. As a matter of fact, without the said applications in evidence, there was

nothing to in any wise show that the oral representations made by the agent tended to vary the terms of a written contract, for the pleadings make the existence of any written contract a matter of dispute. But, even if we consider them as being such contract, the printed matter described, referring to repurchase and to said fund, is both competent and effective. An excerpt from the same is as follows:

"Sec. 3. Resale Fund. One half of the guarantee reserve as provided in section 2 of this article shall be used as a resale fund; such resale fund to be deposited in a bank or trust company selected by the board of directors, * * * and it shall be the duty of the manager of the resale fund to personally resell such stock in the order received or take over such stock as offered for resale upon such terms as such manager shall deem to be for the best interest of the company, and to use the resale fund without any discrimination among stockholders in purchasing, taking over, or reselling such stock offered for resale."

The above is from the written application for stock, apparently the very instrument which the defendant refers to in its objection as the contract sought to be varied by the evidence offered. Yet here is written evidence strongly tending to establish the existence of the large resale fund that was one of the inducements that led plaintiff to purchase. And plaintiff offered to prove that it was not in fact maintained. The excerpt also tends to show that there was an agreement, and a written agreement for that matter, to repurchase. Other statements printed on the back of the stock certificates are of similar probative force.

The court therefore committed error in rejecting the evidence in question, unless there is force in the objection that the agreement to repurchase was within the statute of frauds, because oral and not to be performed within a year. And considering these points of objection, it is evident that they are not sound. In the first place the excerpts referred to tend to establish a contract to re-

purchase in writing. And in the second place, conceding that it was oral, this court is of opinion that the sale and delivery of the stock for cash and the promise to repurchase constituted an entire and indivisible transaction sufficiently performed to take it out of the statute. *Hankwitz v. Barrett,* 143 Wis. 639. Nor can it be maintained that the agreement of the company to repay the purchase price upon the tender back of the stock is without power, and that therefore the petition fails to state a cause of action. This court has held to the contrary in *Fremont Carriage Mfg. Co. v. Thomsen,* 65 Neb. 370. We are content to abide by the doctrine therein announced, particularly in cases where no showing is made that such repurchase would endanger the life of the corporation or that the corporation is insolvent.

The representations made by Johnson, the selling agent of the company, to the effect that the company maintained this big reserve or resale fund and would promptly apply it to the repurchase of her stock upon demand after a year had elapsed, were doubtless made to persuade the plaintiff and operated as the inducement upon which she signed an application for the stock and entrusted her money to the defendant. There were references to the resale fund and to repurchase on the back of this application that tallied with the representations of said agent, and yet were so indefinite and so ambiguous as to render his explanation both natural and necessary. This inclines us to the view that these representations were a part of an indivisible contract, and that evidence of the same, though they rested in parol, was admissible.

The judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

EUGENE E. BRIARD, APPELLANT, V. CECIL E. HASHBERGER ET AL., APPELLEES.

FILED NOVEMBER 26, 1921. No. 21736.

1. **Adverse Possession:** ISLANDS: ACCRETIONS. Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong.
2. ———: ———: ———. Evidence examined, and *held* to establish title in defendants to the original island and its accretions by adverse possession.

APPEAL from the district court for Colfax county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

John C. Sprecher, for appellant.

George W. Wertz and *W. C. Hronek, contra.*

Heard before LETTON, DAY and DEAN, JJ., SEARS and WESTOVER, District Judges.

LETTON, J.

This is an action in ejectment to recover a certain tract of land forming a part of an island in the Platte river lying opposite a tract of land owned by plaintiff on the north bank of the river and lying to the north of the thread of the stream. Defendants admit plaintiff owns the land described lying on the north of the river, but deny his title to any portion of the island.

By way of cross-petition they allege that they and their grantors have been in the open, notorious and exclusive possession of the whole of the island claiming title for more than ten years before the beginning of this action, the possession being at all times adverse and hostile to any claims of the plaintiff, and that they are now the owners of the island in fee simple. They pray that plaintiff's action be dismissed and the title to the premises quieted and confirmed in them.

The case was tried to the court without the intervention of a jury. At the conclusion of the trial the court found that the defendants were, at the commencement of the action, the owners in fee simple of the entire island with all accretions thereto, plaintiff's action was dismissed, and the title quieted in defendants. Plaintiff appeals.

The island in question is known as Hashberger's Island. It extends in a northeasterly and southwesterly direction, and contains from 100 to 160 acres. It lies about 300 or 400 feet south of the north bank of the river. The main channel of the river has been, for the greater part of the time since the island was formed, south of it, and the depth of the water in the channel between it and the main land has varied at times from shallow enough to wade or drive across to deep enough to swim horses and cattle. The plaintiff claims title to the portion of the island which lies opposite the bank of that portion of the main land which he owns, upon the ground that, if an island arises in a nonnavigable stream between the main land and the thread of the stream, it belongs to the riparian owner opposite whose land it rises. This is the law in this state, and is not challenged by defendants. The questions here are not questions of law, but are questions of fact.

The testimony in behalf of plaintiff is substantially to the effect that there were first formed in the river several small islands or "tow heads," as they are locally termed (probably for the reason that soon after their formation they are thickly covered by a growth of young trees), the largest one lying opposite the Benson farm, which is to the west of plaintiff's land; that these were originally disconnected from each other, and that that portion of the present island lying opposite plaintiff's land was formed by accretion to the small island, or "tow head," which arose opposite his land; that defendants were living part of the time in a cabin upon another small island opposite the Benson land, and that afterwards,

when the cross-channels between it and the others gradually filled in so as to form one tract, defendants wrongfully claimed the whole of the island. The evidence in plaintiff's behalf also tends to prove that in 1911 his son herded cattle for him upon the portion of the island which he claims, and that it was then open and uninclosed.

On the other hand, the testimony on behalf of defendants is to the effect that the "tow head" opposite the Benson farm arose between 30 and 35 years ago; that in 1903 it consisted of four or five acres mostly covered with willows and other trees; that in that year Cecil E. Hashberger, an uncle, his brother and a cousin built a shanty on the island for hunting purposes, and it has since been known as Hashberger's Island; that in 1905 defendant Cecil E. Hashberger purchased the interest of the others in the shanty and island; that there were no other islands or "tow heads" in the river there at that time; and that the additions to the area of this small island both to the northeast and southwest have all been formed by gradual accretions. The brother testified that before taking possession he went to the county seat to ascertain how he might obtain title to the small island, he found that it had never been surveyed, and was told that by squatting upon it he might obtain a title; that this was before he built the shanty, and that when he built it he claimed ownership of the property.

The evidence on behalf of defendants is also to the effect that a year or two after Hashberger purchased the shanty he and his wife moved into it as a permanent residence; that he added several rooms to the house and also erected outbuildings; that he hunted and trapped all over the island; that he has conducted a lodge or camp for hunters at his place for many years; that he partially cleared the island of trees and small willows, so as to allow grass to grow for pasture; that he has pastured his horses and cow there for many years, and cattle more recently; that he has cultivated a garden ever since he lived there; that in recent years he has fenced the whole

island; and that he has asserted title to the island ever since he occupied it. He denies that plaintiff ever used the land for pasturing or herding cattle upon it, and says that plaintiff has never, to his knowledge, claimed to own the island until a short time before he began this action.

There is no claim made that any part of the accretions were made to the mainland. The evidence preponderates in favor of defendants upon the disputed question of fact as to whether the accretions attached to the original island on which the shanty was built, or whether they attached to a smaller island or islands which arose opposite plaintiff's land.

The testimony further convinces us that defendant Hashberger obtained title to the original island upon which the shanty was built, and all accretions thereto, by adverse possession for more than ten years. The accretions became the property of the owner of the island. The fact that quite recently, and after title ripened, defendants procured a conveyance from the owner of the Benson farm to any right or title which he had to the original small island and its accretions, we think does not aid plaintiff, since defendants had a right to purchase their peace from litigation. We are convinced that the district court reached the proper conclusion from the facts in evidence, and its judgment is

AFFIRMED.

LON C. KESTERSON, APPELLEE, V. CARL F. MARSH, APPELLANT.

FILED NOVEMBER 26, 1921. No. 21738.

1. **Vendor and Purchaser: EXECUTORY CONTRACT: ABANDONMENT.** It is the duty of one who claims an interest in real estate under an executory contract of sale, which the vendor refuses to perform, and which property is advancing in value, not to unreasonably delay the assertion of his claim and thus lull the adverse party into security. If he fails to assert his rights within a reasonable length of time after the breach of the contract by the

other party, he may under certain circumstances be held to have abandoned his right to enforce it, and the determination of what constitutes a reasonable time under all the circumstances of the case, and an abandonment, rests in the sound discretion of the court.

2. ———: ———: ———. Under the facts disclosed by the record, *held* that there was an abandonment of the contract by defendant.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

J. F. Ratcliffe and *Cordeal & Colfer,* for appellant.

H. P. Armitage, Henry W. Fouts and *John C. Hartigan, contra.*

Heard before LETTON, DAY and DEAN, JJ., SEARS and WESTOVER, District Judges.

LETTON, J.

Action to quiet title. Cross-bill asking specific performance of an executory contract to sell land.

Plaintiff, the vendor in the contract, derived title to the land in controversy by devise from his father. Following the devising clause, the will contained the following provision:

"Provided that the said real estate shall not be sold and conveyed until the expiration of ten years after my death, but shall remain intact, and the custody and control for a period of ten years after my death shall be in my executors hereinafter named, and my executors are hereby directed to collect the income of the said real estate and, after paying expenses, taxes and repairs, pay over from year to year to the said Lon C. Kesterson such income."

The father died in December, 1909. Plaintiff testified that the first conversation he had with defendant, Marsh, the vendee, was in Omaha in 1916, when Marsh made a proposition to buy 480 acres of the land for $6,700; that he told Marsh at that time he did not know whether he could give title or not; that Marsh wrote a contract and offered him $500, which he refused to accept, saying he would not accept it unless he could deliver a deed; that

the contract was left at the bank, and plaintiff agreed to notify Marsh if he could execute a deed; that after the contract was signed plaintiff went to Fairbury and found, upon examining the will there, that he could not convey title, and notified defendant to that effect by letter; that he received a letter from defendant about the middle of December to the effect that, if plaintiff would send the deed to a bank at Stratton, the money was waiting for him; that from that time on he heard nothing from defendant with reference to the transaction. On cross-examination he testified that the conversation as to the possibility of being unable to make a good title was had before the contract was signed, and that he did not attempt to carry out the contract when he found he could not make a deed.

Defendant testified that after the contract was drawn he gave plaintiff a check on a bank at Stratton for $500; that about a month afterwards $498 in money was returned to him by the bank, with the explanation that $2 was for exchange; that about the time for the delivery of the deed, but after plaintiff had informed him he could not execute the contract, and the money had been returned, he wrote plaintiff that the money was ready for him when he sent the deed. He also testifies that he is now ready and willing to pay plaintiff the $6,700 on its delivery; that he has kept the money returned to him ever since, and has made no offer or tender of it to plaintiff.

There is a direct conflict in the evidence with regard to whether any money was paid on the contract; but, according to defendant's own testimony, the amount of the check he gave when the contract was signed was returned to him, less $2 exchange. He retained the money, never made any demand that the contract be carried out, and made no tender of this or of any sum that he was to pay. The contract is dated October 4, 1916. It provides that a warranty deed and an abstract showing good and merchantable title are to be furnished on or before November 4, 1916. It recites that $500 has been paid,

and that the remainder is to be paid on acceptance of the deed. In January, 1920, a contract was made by plaintiff with another party to sell him the land for $20,000. The written contract was placed on record by defendant in February, 1920, over three years after its date, and the recording of the contract casts a cloud upon the title.

It is a matter of common knowledge, of which the court will take judicial notice, that the price of lands had advanced to an unprecedented degree in the same period of time, during this interval. The conduct of defendant was such as to lead plaintiff to believe that he was asserting no rights under the contract and to justify him in agreeing to sell the land to another. It was not until plaintiff had so changed his position that defendant placed the contract on record.

We are satisfied from the evidence that defendant abandoned the contract in 1916, and had no intention of ever carrying it out. It was his duty, if he desired to abide by it, to send the money back which was returned to him, with an intimation that he insisted that the contract be carried out; to tender the remaining purchase money and demand his deed when the time for delivery came. He has unreasonably delayed any proceedings to establish his alleged right, and his demand is stale. Land values fluctuate, and he cannot be permitted thus to speculate on the rise and fall of the value of the real estate. 10 R. C. L. 395, sec. 142; 21 C. J. 228, sec. 223.

Defendant argues that the will conveyed the fee simple title to plaintiff; that he had full power and authority to make a deed conveying a perfect title at the time the contract was executed, and that he had no valid reason for refusal. This and other contentions of defendant we find unnecessary to decide, since the abandonment of the contract by him, and the cloud on the title occasioned by the recording of the contract, are sufficient to entitle plaintiff to the relief sought.

The judgment of the district court is

AFFIRMED.

MART MUHLBACH, ADMINISTRATOR, APPELLANT, V. OMAHA LIFE INSURANCE COMPANY, APPELLEE.

FILED NOVEMBER 26, 1921. No. 21680.

1. **Insurance: CONTRACT.** A life insurance risk, before the issuance of a policy for which an application has been made, is not assumed until the minds of both applicant and insurer meet on definite terms to that effect.
2. ———: ———. An application for a life insurance policy to bear the same date as the application, a letter from the insurer to the applicant, acknowledging the receipt of the application with settlement for the first annual premium, and a receipt for the first annual premium, containing a promise to return the full amount received, if the policy should not be issued, *held* not to constitute a present binding contract of life insurance before the issuance of a policy, where those documents show that the premium was accepted subject to the further physical examination of the applicant and to the subsequent approval of the risk.

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

Thomas Lynch and *Byron G. Burbank,* for appellant.

Gurley, Fitch, West & Hickman, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., BROWN and ELDRED, District Judges.

ROSE, J.

This is an action to recover insurance in the sum of $10,000 on the life of Nicholas Muhlbach. It is alleged in the petition that the insurance is payable to his estate and that plaintiff is the administrator thereof. The action is based on life insurance for $5,000, with a provision for double that amount in the event of insured's death by accident. The application for insurance was dated January 17, 1919, and an annual premium of $162.40 was then paid. Four days later the lifeless body of the applicant was found on the ground, where he had apparently fallen from a windmill. Defendant never

issued the policy for which the application had been made, nor any other formal policy, and denied the existence of the insurance contract pleaded by plaintiff, and tendered back the premium. Upon a trial to a jury the court below directed a verdict in favor of defendant, and from a dismissal of the action plaintiff has appealed.

The controlling question is the existence of a life insurance contract between defendant and the applicant at the time of the latter's death. Plaintiff relies upon the application, upon the payment of the first annual premium when the application was made, and upon the terms of a letter acknowledging defendant's receipt of the application and the premium while the applicant was alive and in good health.

The application appears on a regular form furnished by defendant. In it the applicant gives his age as 21, his occupation as farmer, and his residence as Mullen, Nebraska. He names his estate as beneficiary. After answering "no" in his application to questions inquiring if he had ever been rejected as an insurance risk, if he had ever been intemperate, if he ever had any serious illness, and if there had ever been consumption or insanity in his family, he subscribed to the following:

"The foregoing statements and answers, and also those made to the company's medical examiner, are true and full, and they are offered as a consideration of the policy contract, which shall not take effect until the first premium shall have been paid, during my life and good health. I have examined and do accept the provisions of the policy applied for. * * *

"I, Nicholas Muhlbach, of Mullen, Neb., hereby specifically agree that the sum of $162.40 paid by me this 17th day of Jan., 1919, to C. A. Coons, agent for the Omaha Life Insurance Company of Omaha, Neb., as the annual premium on $5,000 insurance applied for by me shall be retained by the said Omaha Life Insurance Company as full and complete liquidation of any and all damages by them sustained should I refuse, fail or neg-

lect to present myself within ten days from the date hereof for examination by a reputable physician. Date my policy Jan. 17, '19."

The premium was handed to the "medical examiner" and by the latter to Coons, the soliciting agent, who sent it to defendant. Defendant's letter acknowledging the receipt of the application and the premium is dated January 20, 1919, and contains these statements:

"We acknowledge receipt of your application for $5,000 insurance, with settlement for premium, $162.40, through our Mr. C. A. Coons. Upon receipt of the medical and approval, policy will go forth."

In addition to the written instruments there is proof tending to show that the applicant was in good health when he made his application and paid his first annual premium, and that he was alive and in good health when defendant acknowledged the receipt of the application and the first annual premium.

Is a binding contract for present insurance shown? In the argument on behalf of plaintiff there is emphasis on the language of the application, "Date my policy Jan. 17, '19," and it is insisted that the applicant complied with all conditions essential to a present, binding insurance contract, that the risk was approved and accepted upon the payment of the first annual premium, while the applicant was alive and in good health, and that there was nothing in any of the writings to the effect that the insurance should not go into effect before the issuance of the policy.

The position of plaintiff seems to be untenable. The parties did not enter into a contract on the twenty-payment plan, and defendant promised to return all of the premium, if a policy should not issue. If the parties did not make an insurance contract, there was no necessity for agreeing that it should not go into effect. The applicant applied for a policy instead of a contract of insurance to become effective before the issuance of a policy. The application is introduced thus: "I, Nicholas

Muhlbach, hereby apply to the Omaha Life Insurance Company of Omaha, Nebraska, for a policy on the twenty-pay plan." The first annual premium paid was not the entire consideration for insurance. Statements to the medical examiner were parts of the consideration. The application so declares. Following the answers to questions relating to family history and to other questions material to an insurance risk, the application declares:

"The foregoing statements and answers, and also those made to the company's medical examiner, are true and full, and they are offered as a consideration of the policy contract."

The application itself, therefore, contemplated statements and answers in addition to those found therein. The undisputed evidence shows that the applicant left the office of the examining physician before the completion of the examination and never returned. The application also permitted defendant to retain the premium as liquidated damages, if the applicant failed to present himself for an examination by a physician within 10 days —an obligation which applicant did not perform. He not only contemplated a subsequent physical examination, but he was advised by letter as follows after he had paid his first annual premium:

"Upon receipt of the medical and approval, policy will go forth."

This was notice from defendant that a report of the "medical" examination was essential, that it had not been received, and that the application for insurance had not been approved. The premium paid was the price of a risk for an entire year on the twenty-payment plan, and there is nothing to indicate that any part of it was intended to cover a temporary risk pending further inquiry and investigation. Both insurer and applicant, in negotiating for life insurance, should contemplate an investigation sufficient to disclose all facts essential to an insurable risk and to reputable underwriting, since this is required by honest business and common sense. If these

tests could be safely used in determining the amounts of annual premiums, policyholders and insurers generally would be alike benefited. Part of the applicant's consideration for life insurance on the twenty-payment plan failed—disclosure of physical conditions and family history. As a result, the risk was not approved and the policy was never issued. A life insurance risk, before the issuance of a policy for which an application has been made, is not assumed until the minds of both applicant and insurer meet on definite terms to that effect.

The application, the payment of the premium, and the letter acknowledging the receipt of the application and the premium do not, however, include all of the transactions or all of the evidence. There was originally a blank form of receipt on the bottom of the application and it was detachable by means of a perforated line. The examining physician testified that he filled the blanks in this receipt, detached it from the application, and gave it to the applicant when the first annual premium was paid. This receipt states that the insurance shall be effective at the date specified, if approved by the medical director. It also recites:

"If the policy as applied for shall not be issued, the amount hereby receipted for shall be returned on surrender of this receipt."

This receipt not only gave notice to the applicant that the premium was accepted on condition of the medical director's subsequent approval of the insurance, but it contained a definite promise to return the entire amount of premium paid, "if the policy as applied for shall not be issued." Having thus agreed in advance to return all the premium paid, if the policy should not be issued, and the policy, without fault of defendant, not having been issued, no consideration whatever remained for insurance of a temporary nature during the time intervening between the date of the application and the approval or rejection of the risk on the twenty-payment plan. There was therefore no agreement or consideration for present bind-

ing insurance.

Plaintiff insists, however that testimony of the examining physician that he gave the applicant the receipt, in connection with all other evidence, does not justify the peremptory instruction in favor of defendant, for the reason that the agent who solicited the insurance testified that the receipt was not given; he being a witness called by defendant and the latter being bound by his testimony. The record shows that the soliciting agent who eventually received the premium for defendant was not present when the applicant handed the premium to defendant's examining physician, that the statement of the soliciting agent in relation to the receipt should be limited to his own acts, and that the testimony of the examining physician that he gave the receipt to the applicant is uncontradicted.

In conducting its life insurance business, defendant followed the practice of requiring an independent investigation into the family history of each applicant. This would have resulted in the information, contrary to the representations in the application, that the father and the mother and a sister of Muhlbach had been insane. With this information at hand, defendant would not have issued the policy for which the applicant applied.

The applicant's direction to date the policy January 17, 1919, in connection with other facts, is not necessarily a controlling factor. The date is a feature to be considered, but it does not always fix the time when a contract becomes effective. Delay in the approval or acceptance of conditions may postpone the meeting of the minds of the parties on the definite terms essential to a contract. This may apply to negotiations for insurance. If defendant, under date of January 17, 1919, had issued a valid policy effective only at a later date, insured, for the premium paid, would not necessarily have been deprived of his right to a full year's insurance. *Cilek v. New York Life Ins. Co.*, 97 Neb. 56. January 17, 1919, is refuted as the date of a contract for present insurance.

Upon an impartial examination of the record from

every standpoint, it seems clear that there is no evidence to sustain a finding that defendant and the applicant entered into any contract of insurance or that the applicant paid any consideration for present insurance of a temporary nature. It follows that there was nothing to submit to the jury, and that there was no error in the peremptory instruction in favor of defendant.

AFFIRMED.

AL MATHES V. STATE OF NEBRASKA.

FILED NOVEMBER 26, 1921. No. 21955.

Jury: PEREMPTORY CHALLENGES. The rule is that peremptory challenges are not to be exercised until the jurors have been passed for cause and twelve persons are in the jury-box having the qualifications of jurors.

ERROR to the district court for Harlan county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

J. G. Thompson, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

DEAN, J.

The plaintiff in error was convicted under section 8630, Rev. St. 1913, of feloniously receiving goods alleged to have been stolen. The jury fixed the value at $35. From an indeterminate sentence in the penitentiary, of from one to seven years, defendant has brought the case here for review.

The assignment of error upon which defendant mainly relies has to do with the court's ruling with respect to the peremptory challenges as provided by statute. Rev. St. 1913, sec. 9108, as amended, Laws 1915, ch. 166. When the examination for cause was concluded and there re-

mained twelve jurors in the box, the defendant exercised his first peremptory challenge. Thereupon he moved that another juror be called into the box to take his place and that such juror, so called, be examined for cause before the exercise of another peremptory challenge. The motion was overruled, the court holding that the parties should exhaust their respective peremptory challenges "against those jurors who are now in the box, whereupon the box will be filled with talesmen or other jurors."

In the trial of a person accused of committing a felony the exercise of peremptory challenges, as they relate to the present case, is governed by section 9108, Rev. St. 1913, as amended, Laws 1915, ch. 166. The rule that is applicable here, and to which we adhere, was announced in *Rutherford v. State,* 32 Neb. 714. In that case, in an opinion by Maxwell, J., it was held that peremptory challenges are not to be exercised until the jurors have been passed for cause and twelve men are in the box. To hold otherwise is there said to be an undue exercise of power prejudicial to the accused.

In *Hooker v. State,* 4 Ohio, 348, the reason for the application of the rule is well stated:

"The question is, whether this right of peremptory challenge may not be reserved, by the party accused, until after he has made all his challenges for cause. Prejudices often exist, for which no cause can be assigned. The personal appearance of an individual often creates the most unaccountable prejudices. The mere challenge, for cause, may provoke resentment, if the reason assigned prove insufficient to set aside the juror. The trial of a juror, challenged for cause, may excite a prejudice, which does not amount to a legal disqualification, but to the influence of which, the party accused ought not to be compelled to submit. For these reasons, the law has wisely provided that the right of the peremptory challenge ought to be held open, for the latest possible period, to-wit, up to the actual swearing of the jury." 24 Cyc. (f.) 250.

Defendant contends that the evidence does not support

the verdict. The evidence is not altogether satisfactory; but, in view of the fact that the judgment must be reversed on another ground, we do not find it necessary to pass on that question.

In view of the error pointed out, with respect to the exercise of peremptory challenges, the judgment must be, and it hereby is,

REVERSED.

FANNIE HOPE FARIS, APPELLEE, V. ELMER E. FARIS, APPELLANT.

FILED NOVEMBER 26, 1921. No. 21841.

1. **Divorce:** EXTREME CRUELTY. "There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty." *Myers v. Myers*, 88 Neb. 656.
2. **Evidence** examined, and *held* sufficient to support the decree.

APPEAL from the district court for Jefferson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Hazlett, Jack & Laughlin, for appellant.

Hartigan & Fouts, contra.

Heard before MORRISSEY, C. J., ROSE ALDRICH and FLANSBURG, JJ., FITZGERALD and WAKELEY, District Judges.

ALDRICH, J.

The district court for Jefferson county granted Fannie Hope Faris a divorce on the ground of extreme cruelty and allowed alimony in the sum of $3,000. Defendant appeals.

The parties to this action were united in marriage at Maryville, Missouri, on May 28, 1918. The appellant was a widower 57 years of age, with a family of 7 grown-up children. The appellee was a maiden lady of 42

years, a teacher in the public schools of Maryville, Missouri. She was a lady of culture and refinement. The appellant pursued a course of conduct calculated only to result in discord and dissatisfaction and to destroy the objects and purposes of matrimony, as appears of record.

It appears that defendant made a practice of writing long and scurrilous letters to their friends and relatives, the object and purpose of which was to discredit and make her ridiculous in their estimation. Another objectionable fault he had, and which is highly censurable, was the use of profane language in the presence of the plaintiff, as testified to by her. While it is true that he never used indecent or profane language toward the plaintiff personally, yet he often swore in her presence concerning things. This conduct is highly censurable and against every instinct of a gentleman. Another thing which defendant was guilty of was indulging in morose, sarcastic, and morbid conduct toward the plaintiff. He would go several days without speaking to plaintiff or recognizing her presence. As if desiring to provoke trouble and cause a disturbance, the defendant stopped payment on two checks drawn by plaintiff at Maryville on a Fairbury bank.

The appellant had a notice published in a Fairbury paper which was issued March 4, and in a Maryville paper which was issued March 2, 1920. This greatly humiliated and lowered the estimate of himself on the part of the appellee to such an extent that appellant could not hope to live in the respect and estimation that he formerly had. The notice complained of is as follows:

"To Whom It May Concern—Fannie Hope Faris having on the 1st day of March, 1920, deserted me and left her home at Fairbury, Nebraska, without just cause or provocation; therefore I hereby notify all persons that I will not be responsible for any debts of any kind or character whatsoever hereafter contracted by her. Elmer Faris."

The plaintiff made a visit to relatives on the 1st day of March, 1920, and left the defendant well and in usually

good spirits. The note telling him of her intended visit follows:

"11:15 A. M.

"Dear Elmer: You said you'd be gone but a few minutes and we are ready to go and you can't be found. I wanted to talk to you about the care of that meat. It should be put where it will be dry and cooler. I wouldn't try and use much of that bread. Am sorry it wasn't better. You'll probably have to go to town soon anyway and can get some bread. You can write me at Corning. I'll be there a few days.

"If you are not well you can let me know.

"With love,

"Fannie."

Then, in view of what followed, the conduct of defendant becomes intolerable and unbearable. He had the notices published, stopped payment on checks drawn by plaintiff, and sought to destroy her credit. These notices of his were wholly groundless and not based on truth, and under the circumstances of this case are sufficient to establish the allegation of extreme cruelty.

In *Myers v. Myers,* 88 Neb. 656, this court laid down a rule, that prevails throughout this jurisdiction, which shall be sufficient, if the facts establish it, to constitute extreme cruelty. The rule is as follows:

"There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of the husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty."

Estimated by the standard of this definition or rule of law, was the defendant guilty of extreme cruelty? Was he guilty of anything that would destroy the plaintiff's happiness or render a nullity the objects and purposes of matrimony?

In determining whether the circumstances show cruelty, modern courts take into consideration the intelligence, apparent refinement and delicacy of the complain-

ing party. *Fleming v. Fleming,* 95 Cal. 430, 29 Am. St. Rep. 124; *Marks v. Marks,* 56 Minn. 264, 45 Am. St. Rep. 466; *Mosher v. Mosher,* 16 N. Dak. 269, 125 Am. St. Rep. 654; *Reinhard v. Reinhard,* 96 Wis. 555, 65 Am. St. Rep. 66; *Kelly v. Kelly,* 18 Nev. 49, 51 Am. Rep. 733.

The extreme cruelty complained of in this case consists of annoying the plaintiff and pursuing a systematic course of ill treatment, such as depriving her of her credit, and notifying her friends and causing a great perturbance of mind by using profane language, and doing other things to cause grievous disturbance of mind and feelings, contrary to the happiness and well-being of the plaintiff—all this indicates extreme cruelty. This of itself makes the marital relation a failure, and under these circumstances it was impossible for plaintiff to live with defendant as his wife. It almost, if not quite, generally appears from the record that this conduct was intentional on the part of defendant. There is no question but what the plaintiff did her full duty toward the defendant in trying to get along. Now the question is: What acts of this defendant constitute extreme cruelty within the meaning of the statute? This cannot be defined with precision, but is a matter that must be determined according to the facts peculiar to this case, the court always keeping in view the intelligence, apparent refinement and delicacy of sentiment of the complaining party. This is the policy of law pursued by this court. It has been held as a rule by our court:

"Any unjustifiable conduct on the part of either a husband or wife, which so grievously wounds the mental feelings, or so utterly destroys the peace of mind, * * * or such as utterly destroys the legitimate ends and objects of matrimony, constitutes 'extreme cruelty,' * * * although no physical or personal violence may be inflicted, or even threatened." *Preuit v. Preuit,* 88 Neb. 124.

The evidence brings this case clearly within this rule and it should be followed in the instant case. It is in

line with many other decisions of this state. In short, the record shows that the relations make it impossible for them to live together as husband and wife; extreme cruelty is established; and in this case marriage is a failure. It is not necessary in order to establish extreme cruelty that it be joined with the concomitant force of violence or personal injury or fear. It is sufficient if it destroys personal happiness and peace of mind, and makes the marital relation impossible of consummation. Extreme cruelty and unusual conduct do not so much consist of doing some one particular thing to harass and annoy the plaintiff, but rather in doing many things; all taken together are calculated to destroy the marriage relations.

We note what the record shows concerning defendant's property, and in the matter of alimony the judgment for $3,000 was fair and reasonable. We believe from the record that the parties are incompatible, and affirm the decree.

AFFIRMED.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLEE, V. EVA BILLINGS, APPELLEE: MARY U. BILLINGS, APPELLANT.

FILED NOVEMBER 26, 1921. No. 21681.

Insurance: BENEFICIARY: RIGHTS OF DIVORCEE. Where a decree of divorce has been entered, under section 1606, Rev. St. 1913, the marriage status of the parties continues until the decree becomes operative to dissolve it, and, where the husband dies within six months after the entry of such decree, the relation of the surviving wife to the husband and to his estate is *held* not to be so fixed and altered by such a decree that the wife is, in practical effect, a divorced wife, so as to be prevented from taking as a beneficiary under a certificate of insurance, where a by-law denies a divorced wife the right to the proceeds.

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

Myers & Mecham, for appellant.

Thomas E. Brady, De E. Bradshaw and *J. M. Sturdevant, contra.*

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., BROWN and ELDRED, District Judges.

FLANSBURG, J.

This is an action begun by the Sovereign Camp, Woodmen of the World, against Eva Billings, appellee, and Mary U. Billings, appellant, to determine the rightful beneficiary under a certificate of insurance, held by H. Fred Billings in his lifetime as a member of such lodge. The plaintiff tendered the money into court, and the controversy here is between appellee, claiming as the wife of the insured, and the appellant, claiming as his mother.

On May 27, 1919, in a suit for divorce pending between H. Fred Billings, the insured, and Eva Billings, appellee, who were then husband and wife, a decree of divorce was entered, but within six months after the entry of such decree, on August 22, 1919, H. Fred Billings died. Appellant, Mary U. Billings, mother of the deceased, bases her right to the insurance money upon a by-law of the Sovereign Camp, Woodmen of the World, which provides, in effect, that whenever benefits are payable to the wife of a member and she and the insured "are divorced from each other," and no new designation of beneficiary is made, the benefit shall be payable as though the designated beneficiary had predeceased the member. In this case, Mary U. Billings, mother of the insured, would be entitled to take as beneficiary if, at the time of the insured's death, within the six-months period after the entry of the decree, the appellee and the insured are held to have been "divorced from each other," within the meaning of the by-law mentioned.

The trial court held that at the time of the death of the insured the appellee and insured were not, within the meaning of the by-law, divorced from each other, and entered judgment in appellee's favor. From this judg-

ment, Mary U. Billings appeals.

The appellant argues that the divorce action did not abate at the death of the insured, and contends that, at the expiration of six months from the entry of such decree, regardless of the intermediate death of H. Fred Billings, the original decree became final and constituted, from the time of its entry, the complete measure of all the personal and property rights between the parties; that the contract of insurance should be interpreted in the light of this situation, and that the wife, having been deprived of the benefits arising from the marital relation by a decree which was never appealed from, nor set aside, did not bear such a relation, as a wife, toward the insured as the by-law contemplated should exist in order that she be a beneficiary; that from the time of the entry of the interlocutory decree the parties were, in fact, in all practical effects, divorced; that appellee was no longer, as a wife, a beneficiary under the law of the insured's estate, and should not, by a fair interpretation of the by-law,be held to be a beneficiary, as a wife, of his insurance; that, under a proper and reasonable interpretation of the by-law, having in view its intent and purpose, she was at the time of the insured's death, in every practical sense, his divorced wife.

It is argued that in the case of *Holmberg v. Holmberg,* 106 Neb. 717, the court made no mention of, and gave no effect to, the general statute (Rev. St. 1913, sec. 8023), which provides that a pending action shall not abate by reason of the death of a party, and that the court disregarded decisions construing this statute as having application to a pending action, even though based upon a cause of action which would not, under our statute, survive. *Webster v. City of Hastings,* 59 Neb. 563; *Sheibley v. Nelson,* 83 Neb. 501.

Though the statute cited, purporting to prevent the abatement of pending actions, be given a most liberal interpretation, it could not prevent an action in divorce from abating when death occurs at a time before a decree

can become operative, for death would, as pointed out in the *Holmberg* case, extinguish the marriage status and destroy the subject-matter which forms the basis of the action. Under our interpretation of the divorce statute (Rev. St. 1913, sec. 1606), providing that the decree of divorce shall not become "operative until six months after trial and decision except for the purpose of review by proceedings in error or by appeal, and for such purposes only," the status of the divorce proceeding, during the six months immediately following the entry of the decree, is that of a pending action. *Everson v. Everson,* 101 Neb. 705; *Blakely v. Blakely,* 102 Neb. 164. During the entire pendency of that decree, the marital relation continues. The decree cannot, under the law, take effect and dissolve the marriage until at the expiration of the six months' period. In order that a marriage status be dissolved by a decree of divorce, such status obviously must exist at the time of the taking effect of the decree. When the marriage relation is extinguished by death prior to the time when the decree can go into effect, then the subject-matter, upon which the decree would otherwise have operated, is gone, and the parties to the suit manifestly can never be divorced by operation of law. The statute on abatement of actions, which provides that a pending action shall not abate by the death of a party, does not and cannot preserve the subject-matter of an action. A divorce action differs in character from every other. It is not based upon a claim for a money recovery, nor is it a proceeding for the establishment of property rights. Such other actions may ordinarily be as fully litigated, in favor of or against the estate of one of the parties, after the death of such party as before. There are salutary reasons why pending actions of that nature should not abate. But in a divorce action the money and property interests involved are only incidental to the principal object of the suit. Whether the object sought is a limited or an absolute divorce, the primary and underlying purpose of such action is a modification

or dissolution of the marriage relation. The settlement of matters of permanent alimony and property rights is only the incidental means of carrying into effect the one ultimate object. Until the decree can become operative as a divorce, the provisions of the decree, as to those incidental matters, cannot go into effect.

Though the interlocutory decree has the effect of suspending the personal obligations between the parties (*London Guarantee & Accident Co. v. Industrial Accident Commission,* 181 Cal. 460), yet, where an interlocutory decree is entered and the marriage relation is dissolved by death before the decree has become operative as a divorce, the living party is entitled to the property rights springing by operation of law from the marital relation, and is not concluded by the interlocutory decree fixing those rights (*In re Crandall,* 196 N. Y. 127; *Chase v. Webster,* 168 Mass. 228; *Estate of Seiler,* 164 Cal. 181; see note, Ann. Cas. 1914B, 1094), unless, perhaps, by contract, waiver or estoppel, the living party has become bound thereby. *Gould v. Superior Court,* 191 Pac. (Cal. App.) 56. Certainly, the living party could not take both the rights springing from the marital relation and the rights and benefits provided in lieu thereof by the decree.

At the time of the death of the insured, appellee was, in law as well as in practical effect, the wife of the insured. The marital relation had not been dissolved, nor had the appellee been severed from all beneficial interest arising from the marriage relation. Her relation in fact toward the person and estate of the insured was not, as appellant argues, that of a divorced wife.

For the reasons given, the judgment of the district court is

AFFIRMED.

SECURITY SAVINGS BANK, APPELLEE, V. WALTER H. RHODES, APPELLANT.

FILED NOVEMBER 26, 1921. No. 21727.

1. **Banks and Banking:** POWERS OF PRESIDENT. The president of a bank has no authority, springing from his official position, to make an agreement that the liability of a party on commercial paper payable to the bank shall never be enforced.
2. **Evidence:** WRITTEN CONTRACTS: PAROL EVIDENCE. When a written contract has been unconditionally delivered in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown, as such testimony would have the effect of adding to, varying or contradicting the express terms contained in the writing.
3. ———: NOTES: PAROL EVIDENCE. Where defendant signed and delivered a note to a bank, making it payable to the bank, and received the face value of the note in money, *held*, in an action to recover on the note by the bank, that the defendant could not show a contemporaneous oral agreement between himself, the bank and a third party, that the defendant was not to be held responsible upon the note, and that the third party was to pay it.
4. **Cases Criticized.** The opinion in *Barnett v. Pratt*, 37 Neb. 349, discussed and criticized, and the decisions in *First Nat. Bank v. Burney*, 91 Neb. 269, and *Exchange Bank of Ong v. Clay Center State Bank*, 91 Neb. 835, so far as inconsistent with the principles herein announced, are overruled.

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

Edward R. Burke, for appellant.

F. W. Fitch, contra.

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., BUTTON and COLBY, District Judges.

FLANSBURG, J.

This was an action by the plaintiff, Security Savings Bank, against the defendant, Walter H. Rhodes, upon a promissory note, signed by the defendant and payable to

the plaintiff. The defendant answered, admitting the execution of the note, but alleged that it was orally agreed that another person, not named in the note, should be held responsible, and that defendant should not be required to pay it. The court held that the answer of the defendant was insufficient and entered judgment on the pleadings. From this judgment the defendant appeals. The sole question is whether or not the answer, setting up such an agreement, pleads a legal defense.

The answer alleges that the defendant rendered certain services for the plaintiff bank and for one Davis, president of the plaintiff bank. What proportion of the services was rendered for the bank is not stated, but much the greater part appears to have been for Davis individually. In any event, it is alleged, Davis took it upon himself to pay the defendant what was owing him, some $2,700, and arranged that the defendant should make out and sign a note in that amount, payable to the bank, deliver it to the bank and receive upon it its face value. This was done. It is further alleged that Davis made an oral agreement with the defendant that the defendant would not be required to pay the note, but that Davis would pay it, and, in order to insure payment by Davis, Davis gave his note to the defendant in a like amount. It is further alleged that the bank knew of this oral agreement. The allegations of the answer in that respect are, however, somewhat indefinite. What other officers of the bank knew of the transaction is not alleged. It may have been that the pleader meant no more than a legal conclusion that the bank was charged with knowledge because of the knowledge of the facts by its president. It appears from the pleadings that the note became due and was not paid.

If the bank had no knowledge of the transaction, it of course would not be bound by the agreement made by its president, to the effect that a note, based upon a good consideration and taken by the bank, should not be paid. *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59; note, 28

L. R. A. n. s. 501.

Assuming, however, that the allegations in the answer are allegations of ultimate facts and are sufficient to show that the plaintiff bank had knowledge of the oral agreement, the question presented is whether or not such an oral agreement could properly be proved, or whether the testimony to that end would be incompetent as evidence tending to vary or contradict the express terms of the written instrument.

Although parol evidence may be admissible to show the consideration of a written contract when that consideration is expressed as a recital of a receipt, as distinguished from a complete contractual stipulation (*Mattison v. Chicago, R. I. & P. R. Co.,* 42 Neb. 545; *Spiegal & Son v. Alpirn,* p. 233, *post*); or to show a want or failure of consideration (*Davis v. Sterns,* 85 Neb. 121; *Norman v. Waite,* 30 Neb. 302); or to show that an instrument, purporting to be a written contract, is in fact a sham and was never intended as a contract between the parties (*Coffman v. Malone,* 98 Neb. 819, and note, L. R. A. 1917B, 263); or to show that the written instrument was conditionally delivered upon an oral agreement that it should not take effect as a contract until some condition had happened (*Musser v. Musser,* 92 Neb. 387); yet, on the other hand, when a written contract has been unconditionally delivered, in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency should occur, cannot be shown, as such proof would have the effect of adding to, varying or contradicting the express terms contained in the writing.

The rule is succinctly stated in 22 C. J. 1148, sec. 1540, as follows: "The rule excluding parol evidence has no place in any inquiry unless the court has before it some ascertained paper beyond question binding and of full effect, and hence parol evidence is admissible to show conditions relating to the delivery or taking effect of the

instrument, as that it shall only become effective upon certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed; but evidence is not admissible which, conceding the existence and delivery of the contract or obligation, and that it was at one time effective, seeks to nullify, modify, or change the character of the obligation itself, by showing that it is to cease to be effective or is to have an effect different from that stated therein, upon certain conditions or contingencies, for this does vary or contradict the terms of the writing."

For an able and exhaustive discussion of that rule and the authorities in relation thereto, see note, L. R. A. 1917C, 306.

In this case the written contract was an agreement that the defendant would pay on a fixed day, absolutely, a certain sum of money. Its express terms could have had no other meaning. The note was delivered to the bank and the defendant received the proceeds thereof. The agreement did not lack in consideration. That it was a subsisting contract must be conceded. By the very agreement sought to be proved Davis was to be responsible and pay it, and the defendant was to be relieved from that obligation. The bank was looking to the payment of the note. Evidence of such an oral agreement, as is set up by the answer, is inadmissible, as its effect would be to vary, by parol, the express terms of the note. *Van Etten v. Howell,* 40 Neb. 850; *Aultman, Miller & Co. v. Hawk,* 4 Neb. (Unof.) 582; *Nebraska Exposition Ass'n v. Townley,* 46 Neb. 893; *Western Mfg. Co. v. Rogers,* 54 Neb. 456; *Waddle v. Owen,* 43 Neb. 489; *Colvin v. Goff,* 82 Or. 314, and note, L. R. A. 1917C, 307; 22 C. J. 1152, sec. 1542.

The defendant finds some support in certain decisions of this court which we find it necessary to discuss. In the case of *First Nat. Bank v. Burney,* 91 Neb. 269, the

defendant Britton signed a promissory note with one Burney, and, in an action upon the note, he set up as a defense an oral agreement that Burney was to pay the plaintiff all the proceeds of the sale of certain live stock; that, if Burney applied such proceeds upon the note, defendant's obligation was to then expire. Burney, however, did not so apply the proceeds of the sale and discharge the note, but, it was alleged, plaintiff allowed him to squander the money so received. It was not denied that the note had been signed and delivered, and was, in fact, a note and at least binding as such upon Burney. In our opinion the testimony of an oral agreement, to the effect that the note was to be paid out of a certain fund only, was an attempt to contradict, by parol, the express terms and clear legal import of the written instrument, and such testimony should have been excluded as incompetent. The original opinion in that case (*First Nat. Bank v. Burney,* 90 Neb. 432), as we view it, should be adhered to.

The case of *Exchange Bank of Ong v. Clay Center State Bank,* 91 Neb. 835, is also relied upon by the defendant. In that case, the plaintiff bank transferred a note to the defendant bank and indorsed it "without recourse." The defendant bank was allowed to prove a parol agreement to the effect that the plaintiff bank had agreed to guarantee payment of the note. There were other phases of the record which might have led to the decision rendered. The assignment of the note appears to have been a sham assignment and merely for the purpose of falsifying the bank records at a time when a visit from the bank examiner was expected. There was also a letter which accompanied the note at the time it was sent to the defendant bank, and this letter contained an indefinite reference to some agreement which might have been sufficient to introduce an ambiguity and allow of the introduction of parol testimony in explanation thereof. But the decision was not based upon those grounds. The opinion recognizes the contract of the assignment of the

note to the bank as a subsisting contract. By its express terms, the assignment was "without recourse," and the testimony to prove a parol contract of guaranty, in direct contradiction of the terms of the written assignment, should have been held incompetent. To that extent the decision in that case is overruled.

In that case reference is made to the decision in *Norman v. Waite,* 30 Neb. 302, as being a decision in support of the opinion, but the decision in the case of *Norman v. Waite* was based upon a failure of consideration. It was held competent to show what the consideration for the contract was, and that the contractual obligation assumed, which constituted such consideration, had not been performed by the other party.

The case of *Barnett v. Pratt,* 37 Neb. 349, is also cited as authority in the *Exchange Bank of Ong* case, but in that case the court pointed out that the written instrument involved was, on its face, not a complete contract, but merely a receipt or memorandum, and that the parol evidence rule had no application. The court did in that case, by way of dictum, state that when the execution of a written agreement has been induced upon the faith of an oral stipulation, made at the time but omitted from the written instrument, though not by accident or mistake, parol evidence of the oral contract is admissible, although it may add to or contradict the terms of the written instrument. It is true that such is the rule in Pennsylvania, and a Pennsylvania case is cited in the opinion in support of the rule stated, but in Pennsylvania the so-called parol evidence rule has been almost entirely abolished. The decisions in that state upon that point are not only in the minority, but seem to hold a unique position among the decisions of the courts of the other states in this country. See discussion in notes, 18 L. R. A. n. s. 434, and L. R. A. 1917C, 321. To follow the dictum in the case of *Barnett v. Pratt, supra,* would be to utterly destroy the parol evidence rule.

In the case of *Towner v. Lucas, Exr.,* 13 Grat. (Va.)

705, it was represented to the defendant that, if he would sign the bonds, he would never be required to pay any part of the debt. It was argued in that case that the oral representation was an inducement to the signing of the written contract. In answer to that argument, the court said (page 724): "If it be averred that, although a note is on its face payable on demand and unconditionally, there was a contemporaneous oral agreement that the time for payment should be postponed, or required only upon the happening of a certain contingency, parol evidence of such an agreement is inadmissible. * * *. Yet it might be argued with the same force that this oral agreement may have induced the party to sign the note, and that it is a gross fraud to attempt to enforce it according to its terms. And so it would be if the existence of the agreement could be judicially established. But there being no legal proof of it, there is nothing of which fraud can be affirmed. The rule is founded in wisdom, and a different principle would weaken confidence in all securities for debts. Matters in writing, instead of finally importing the certain truth and agreement of the parties, would be a snare and delusion. The party relying on an instrument in writing as the final result in which all previous negotiations have centered would be met and 'controlled by an averment to be proved by the uncertain testimony of slippery memory.'"

We find a similarly reasoned decision by the supreme court of the United States in *Insurance Co. v. Mowry*, 96 U. S. 544. The court, in speaking with reference to such an oral representation, said (page 547): "The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his state-

ments, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule that the written contract must prevail over previous arrangements, and open the door to all the evils which that rule was intended to prevent."

For the reasons hereinbefore stated, the answer of the defendant, setting forth the oral agreement, was, in our opinion, insufficient to present a legal defense. The judgment of the lower court was correct, and is

AFFIRMED.

IDA LEVIN, ADMINISTRATRIX, APPELLEE, V. LOUIS MUSER, ADMINISTRATOR, APPELLANT.

FILED NOVEMBER 26, 1921. No. 22025.

1. **Appeal:** FINAL ORDER. Where the statutory method of revivor is followed and a conditional order of revivor made and, in pursuance thereof, an absolute order entered, such latter order is, in this state, a final order and appealable, under the provisions of our statute. Rev. St. 1913, sec. 8176.
2. **Revivor.** Where an action for damages, grounded on negligence causing death, is brought against a defendant, and the defendant dies pending the proceeding, *held*, that the action may be revived and continued as against the representative of his estate by reason of the provisions of section 8023, Rev. St. 1913.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Former judgment of dismissal vacated, and judgment of district court affirmed.*

Guy R. C. Reed, for appellant.

Wymer Dressler, contra.

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., BROWN and ELDRED, District Judges.

FLANSBURG, J.

This is an action by plaintiff to recover damages arising by reason of the death of plaintiff's husband, whose death, it is charged, was caused by the negligence of the defendant drug company and its proprietor, Carl T. Schmidt, in selling to the deceased unlabeled poison After the commencement of the action, defendant Schmidt died.

On plaintiff's motion, a conditional order of revivor was entered, and, in pursuance of that order, the court, on a finding that no sufficient cause had been shown against revivor, ordered the action revived as against Louis Muser, administrator of the estate of Carl T. Schmidt, deceased. From that order reviving the action the defendant Muser appeals.

Plaintiff insists that the appeal should be dismissed for the reason that the order of revivor is not a final order, nor appealable.

A final order, as defined by our statute (Rev. St. 1913, sec. 8176), is "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, *and an order affecting a substantial right made in a special proceeding,* or upon a summary application in an action after judgment."

In some jurisdictions, it is true, under somewhat similar statutes, an order made in a "special proceeding," before it can be appealable, must not only affect a substantial right but must, also, either have the effect of a final order in that proceeding, or prevent a judgment from which an appeal might be taken (3 C. J. 544, sec. 384), but in this state the statute has been so construed that an order affecting a substantial right, when made

in a special proceeding, has been held to be appealable, even though it does not terminate the action, nor constitute a final disposition of the case. *O'Brien v. O'Brien,* 19 Neb. 584; *In re Estate of Broehl,* 93 Neb. 166.

Had the court in this case refused to allow a revivor, such an order would, without question, have been final and appealable, for it would have brought the entire matter, as to the one party at least, to a definite conclusion, and would so far have prevented a final judgment on the merits of the case. *Mackaye v. Mallory,* 79 Fed. 1. The order of revivor actually entered, on the other hand, though it does not terminate the case, nor prevent a final judgment on the merits, does affect a substantial right, and, if it can be held to be an order entered in a "special proceeding," will, under the decisions of this court cited above, be sufficient upon which to base an appeal.

In the cases of *Hendrix v. Rieman,* 6 Neb. 516, and *Missouri P. R. Co. v. Fox,* 56 Neb. 746, it is held that, where the special statutory method of revivor is followed, as distinguished from the procedure to revive by the filing of supplemental pleadings and the issuance of summons, in effect the commencement of a new action (note, 33 L. R. A. n. s. 576), and where the conditional order is made and, in pursuance thereof, an absolute order of revivor entered, as provided by statute, the absolute order conclusively adjudicates the matters regarding the right of revivor, and those questions cannot then be later tried along with the merits of the case, nor reviewed on an appeal from the final judgment. The statutory method of revivor seems to have been considered in those cases as an independent and special proceeding, rather than a provisional remedy which is merely ancillary, and incidental to, and a part of the main case. See 1 C. J. 1010, sec. 134. These decisions have, however, been recognized as a rule of practice in this state for many years, and there are decisions in other states to support the rule announced. *Voss v. Stoll,* 141 Wis. 267; *Uhl-*

mann Fur Co. v. Gates, 155 Wis. 385; *National Council of Knights and Ladies of Security v. Weisler,* 131 Minn. 365. An order of revivor entered in a special statutory proceeding is, under these decisions, a final order, from which an appeal may be taken.

The contention on behalf of the defendant that the pending action, based upon the alleged negligence of Schmidt, has abated by the death of Schmidt, is foreclosed by the decisions of this court in *Webster v. City of Hastings,* 59 Neb. 563, and *Sheibley v. Nelson,* 83 Neb. 501, which decisions are based upon section 8023, Rev. St. 1913, which reads as follows: "No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace for misconduct in office, which shall abate by the death of the defendant." In those cases it is held that, where, from the nature of the case, the cause of action can continue—and this has been held true in actions for damages based on negligence—a pending action will not abate, even though it is not one of the actions mentioned in those provisions of the statute (Rev. St. 1913, sec. 8022) which declare that certain actions shall survive.

The dismissal of the appeal heretofore entered is vacated, and the action of the trial court, reviving the case against the administrator of the estate of Carl T. Schmidt, deceased, is affirmed.

JUDGMENT ACCORDINGLY.

S. SPIEGAL & SON, APPELLEE, V. A. B. ALPIRN, APPELLANT.

FILED NOVEMBER 26, 1921. No. 20770.

1. **Evidence:** WRITTEN CONTRACTS: PAROL EVIDENCE. Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of the payment of a money consideration, and is of a contractual nature, parol

or extrinsic evidence is not admissible to vary or contradict the consideration expressed.

2. ———: ———: ———. The rule that parol evidence is admissible to prove that contemporaneously with, or preliminary to, the execution of a written contract the parties entered into a distinct oral agreement on some collateral matter or as a condition on which the performance of the written contract is to depend, does not apply where the written contract is complete in itself and unambiguous, and where it expresses a contractual consideration. *Wehnes v. Roberts*, 92 Neb. 696; *Huffman v. Ellis*, 64 Neb. 623; *Norman v. Waite*, 30 Neb. 302; *Barnett v. Pratt*, 37 Neb. 349, and *De Laval Separator Co. v. Jelinek*, 77 Neb. 192, examined and distinguished.

3. **Sales:** DEFAULT: REMEDY. Where a contract of sale provides for deliveries in instalments and for the payment of the price of each instalment as delivered or within a stated time thereafter, the buyer cannot refuse to pay the price of an instalment when delivered, on the ground of a claim for damages for an alleged breach by the seller of another contract, and still insist upon further deliveries under the contract. In such case the buyer's default is a breach of the contract, entitling the seller to rescind and, if the market price has declined, to recover as damages the difference between the contract price and the market price of the instalments remaining undelivered.

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

Henry Monsky, for appellant.

Smith, Schall & Howell, contra.

DORSEY, C.

The plaintiff, S. Spiegal & Son, on June 29, 1917, sold the defendant, A. B. Alpirn, a quantity of scrap iron under a written contract of purchase and sale executed by both parties. This action was brought by the plaintiff to recover the purchase price of a portion of the iron which was delivered to the defendant under this contract, and to recover damages based upon the alleged refusal of the defendant to accept and pay for the remainder of the iron included in said contract.

The plaintiff's petition was upon two causes of action.

On the first, which was for the purchase price of the iron actually delivered, it is conceded that the plaintiff is entitled to $5,159.30. The defendant, however, interposed a counterclaim to the first cause of action, in which he set up a previous contract, executed November 11, 1916, in which the plaintiff had agreed to sell and deliver to the defendant 150 tons of scrap iron at $15 a ton, but which the defendant claims was not fulfilled. The defendant prayed for $3,200 as damages upon his alleged set-off, and asked that it be credited upon the $5,159.30 due the plaintiff on the first cause of action.

The plaintiff's second cause of action was based upon the fact that the defendant was not willing to take and pay for the remainder of the iron which he had contracted to buy under the contract of June 29, 1917, unless the plaintiff would allow him the $3,200 credit upon the iron already delivered; that his refusal to pay the $5,159.30 in full, without deduction, for the iron already delivered was a breach of the contract; that the market for iron had declined, and that the plaintiff was entitled to recover the difference between the contract price and the market price of the iron that remained undelivered under the contract of June 29, 1917.

The jury found specially that the plaintiff was entitled to recover $350 on the second cause of action, and that the defendant was not entitled to recover upon his counterclaim to the first cause of action. A general verdict was returned in favor of the plaintiff for $5,540.30, from which verdict and the judgment entered thereon the defendant appeals.

The controversy in this case is with regard to the validity of the defendant's counterclaim to the plaintiff's first cause of action, and as to the plaintiff's right to recover upon the second cause of action. Considering first the issue arising upon the counterclaim, the plaintiff's reply admits that the plaintiff did not deliver to the defendant a part of the iron referred to in the contract of November 11, 1916. As a defense to the defendant's

claim for damages by reason of the plaintiff's failure to deliver under that contract, which is the gist of the counterclaim, the plaintiff alleged that when the contract of June 29, 1917, was made, "it was agreed between the parties that in consideration of the sale of the iron contained in the contract in suit for $28 a ton that any and all differences, disputes and claims of the parties hereto, one against the other, arising out of the transaction concerning the contract of November 11, 1916, should be settled, and that said contract should thereby be annulled and abandoned."

Upon the issue as to whether there had been a release of the defendant's cause of action set up in his counterclaim, the court, over the defendant's objections, admitted testimony to the effect that, in the course of the conversations between the parties which preceded the execution of the contract of June 29, 1917, the defendant offered $22 a ton for the plaintiff's iron, while the plaintiff asked $35 a ton; that the defendant advanced his claim for reimbursement of his loss under the November contract and urged that he was entitled to a lower price on that account; that the plaintiff denied liability for such loss, but that finally a mutual concession was made, and the price of the iron under the June contract was fixed at $28 a ton, partly in consideration of the settlement and release of defendant's claim for damages under the November contract.

The defendant objected to the introduction of this testimony on the ground that parol evidence is inadmissible to contradict or vary the terms of a written instrument; that the contract of June 29, 1917, is complete in itself and unambiguous; that it sets out the mutual promises of the parties—those of the one as consideration for those of the other—without including any reference to the release of claims under the November, 1916, contract, and that the admission of the parol evidence complained of, in effect, reads into the contract a provision that varies and alters its express provisions.

The contract of June 29, 1917, which was signed by both parties, recited that the plaintiff sold and agreed to deliver to the defendant, according to the conditions of the contract, "the various quantities and grades of scrap iron, hereinafter more specifically described, to-wit, from 150 to 200 tons of mixed wrought iron" (describing it in detail); that "the agreed purchase price of the said property is $28 per ton f. o. b. cars Missouri Pacific tracks, Omaha;" that plaintiff should have the option to deliver any amount of the various items of the different grades of iron up to the maximum, but not less than the minimum; that delivery should commence not earlier than July 1, 1917, but that all iron should be delivered prior to September 1, 1917. It further provided that defendant would accept the iron according to the terms of the contract and pay the purchase price as follows: $1,000 on the date of the contract, the receipt of which was acknowledged, which was to be held as a deposit to insure faithful performance; that, as each car was loaded and weighed, the defendant was to pay for it at once, the $1,000 deposit being held by plaintiff to apply on the last car.

The plaintiff's plea of release of the defendant's claim for damages under the November contract and the testimony in support thereof introduce a new element into the transaction represented by the contract of June 29, 1917. That contract, standing alone, evidences a sale of a specified quantity of iron for which the plaintiff is to receive, and the defendant is to pay $28 a ton. With the new element injected into it by the plaintiff's plea, it becomes a contract for the sale of a specified quantity of iron for $28 a ton plus the release of a prior claim of the defendant against the plaintiff, an additional consideration not mentioned in the writing.

Counsel for the defendant points to the distinction between the contract of June 29, 1917, in which the consideration, or promise of the defendant to pay $28 a ton for the iron in instalments as delivered, is of a con-

tractual nature, and an instrument, like a deed, in which the recital of the consideration is a mere acknowledgment of the receipt of a money consideration. The general rule is that where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration, and is of a contractual nature, parol or extrinsic evidence is not admissible to vary or contradict the consideration expressed. 17 Cyc. 661, 662; 4 Wigmore, Evidence, sec. 2433; 10 R. C. L. 1042-1044, secs. 236-238. In appellant's brief several cases are cited in which the foregoing rule has been applied, and parol evidence excluded, under circumstances somewhat analogous to those in the instant case. *Baum v. Lynn,* 72 Miss. 932; *Sandage v. Studebaker Bros. Mfg. Co.,* 142 Ind. 148; *Parker v. Morrill,* 98 N. Car. 232; *Hei v. Heller,* 53 Wis. 415; *Arnold v. Arnold,* 137 Cal. 291; *Wessell v. Havens,* 91 Neb. 426.

Counsel for plaintiff argue that the rule just stated has no application to the instant case; that the contract of June 29, 1917, is not sought to be varied, but that the parol evidence relative to the alleged release of the defendant's rights under the November contract was offered as a defense to the defendant's counterclaim, and its admissibility must be tested only by the November contract and the rights existing thereunder. It is difficult to perceive upon what theory that proposition can be maintained. The plaintiff's first cause of action is for the purchase price of iron delivered to the defendant under the contract of June 29, 1917. The defendant counterclaims by setting up a claim for damages for the plaintiff's breach of the November, 1916, contract in failing to deliver iron thereunder. The plaintiff meets the counterclaim by pleading in the reply that at the meeting of the parties when the June, 1917, contract was entered into "it was agreed between the parties that in consideration of the sale of the iron contained in the contract in suit for $28 per ton" the claim of the parties arising out of

the November, 1916, contract should be settled and released.

The defense raised by the reply is, in other words, that, although the parties entered into a written contract on June 29, 1917, which is presumed to have embodied their complete agreement and the result of all their prior negotiations relative to the subject-matter, and although the contract, upon its face, appears to contain and express all that is necessary to constitute a contract for the purchase and sale of a stipulated quantity of iron at a stipulated price, yet there was, in reality, another consideration for the iron in addition to the stipulated price, namely, the release of the defendant's claim under the November contract. It is impossible to escape the conclusion that the parol evidence relating to the alleged release has a direct connection with and bearing upon the contract of June, 1917, and that unless it comes within one of the exceptions to the general rule above stated it would operate to vary the terms of the written contract and its admission would be error.

The plaintiff relies upon *Wehnes v. Roberts,* 92 Neb. 696, in which the following rule is stated in the syllabus: "Evidence tending to establish a separate oral agreement between the parties to a written contract, as to matters upon which such contract is silent, if it does not tend to vary or contradict the terms of the written document, is admissible." In that case Roberts sold Wehnes a threshing outfit, and the action was brought by Wehnes for damages resulting from the failure of Roberts to furnish certain repairs for the machine, and for breach of warranty that the machine would work. The agreement to furnish the repairs and the warranty were oral. At the trial the defendant Roberts objected to parol evidence of the agreement to furnish repairs and of the warranty on the ground that the threshing outfit had been sold to Wehnes under a written contract of sale, and that the parol agreement and warranty would vary it. The facts recited in the opinion of the case are somewhat indefinite.

The written contract of sale was not in evidence, and its contents were shown only by the testimony of the recollection of the parties. It is not clear from the opinion whether the written contract was complete in itself, or whether it expressed a contractual consideration. For that reason the facts upon which the decision rested are too vague to provide a sure foundation for the application of the rule stated in the syllabus or for the construction of the written contract therein. In order, therefore, to determine how far this court intended to go in that case in laying down a rule for the admission of parol evidence, it will be instructive to examine the prior decisions of this court which are cited and relied upon in *Wehnes v. Roberts, supra,* and which form the basis of the opinion therein.

Chief among these is *Huffman v. Ellis,* 64 Neb. 623, from which the language of the syllabus is copied and adopted. In that case the plaintiff, a real estate broker, sued upon a written memorandum appointing him agent to sell the land for an agreed commission. It was silent as to the time within which the sale should be made by the broker, and the court permitted oral evidence showing the agreement of the parties as to when the authority of the broker was to terminate. It was held that such evidence did not vary or contradict the terms of the memorandum.

Norman v. Waite, 30 Neb. 302, also commented upon in *Wehnes v. Roberts, supra,* was a suit for the foreclosure of a mortgage securing notes given for the purchase price of an interest in the plaintiff's law and real estate business. The defendant Waite purchased an equal partnership in the business of Rittenhouse, an established lawyer, and his mother gave a mortgage on her land to secure her son's notes. The court admitted parol evidence showing a failure of consideration for the notes and mortgage; that Rittenhouse had agreed to continue in the partnership and business, but abandoned the same, removed from the city and entered into business in

another place, after transferring the notes and mortgage.

It was upon these facts that Cobb, C. J., in the opinion, adopted the language of *Michels v. Olmstead,* 14 Fed. 219: The parol evidence rule "does not prevent parties to a written agreement from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of the written agreement is to depend."

In *Norman v. Waite,* however, the only consideration upon which the notes and mortgage were given was the promise of Rittenhouse to remain in the partnership, and his withdrawal brought about an entire failure of consideration. There was no written agreement as to consideration except presumably the usual words, "For value received," in the notes and the expressed consideration of $1,500 in the mortgage. The rule is well settled that, in the case of instruments acknowledging the receipt of a consideration, and where the consideration expressed is not contractual, it is competent to show by parol that no consideration was in fact paid. 10 R. C. L. 1042, sec. 236.

In *Barnett v. Pratt,* 37 Neb. 349, also cited in the opinion in *Wehnes v. Roberts, supra,* there was a sale of a livery stable by A. to B., and A. gave B. a receipt for the money and other consideration representing the purchase price. This paper acknowledged the receipt of $350 in cash from B. and recited that B. agreed to pay a certain note and mortgage on file, "in all making $1,950 for the following property" (describing the property included in the sale). The receipt was signed only by A. It appears that A. was at the time of the sale indebted to C. for wages, and C. brought the suit against B., alleging that B. had made an oral agreement with A. to pay C.'s claim as part of the consideration for the purchase of the livery stable. This court held that parol evidence was admissible to prove this agreement, and that, as it

had been made for the benefit of C., the latter might maintain an action directly against B. Irvine, C., in the opinion says: "We cannot regard the instrument referred to in the petition as a contract complete in itself. It purports only to be a receipt. It is signed only by W. J. Pratt, and not by the party assuming these obligations, and its whole effect is that of an informal memorandum, and not the expression of a complete contract."

Reference is also made in the opinion in *Wehnes v. Roberts, supra,* to *De Laval Separator Co. v. Jelinek,* 77 Neb. 192. In that case Jelinek was the selling agent of the plaintiff company for separators within a specified territory. The plaintiff sued for the price of a certain number of separators furnished to Jelinek for which he had not paid. He counterclaimed by setting up an agreement by which the company had given him the exclusive right to sell its separators within the territory, alleging that the company had violated this agreement by refusing to furnish him with separators and by furnishing them exclusively to another party, and claiming damages for breach of the contract. Jelinek offered parol evidence to prove the agreement, and the plaintiff company objected on the ground that the contract between the parties was in writing, and the parol evidence offered would vary it.

The writing referred to was in the form of a letter from the company to Jelinek, acknowledging receipt of the order for separators, and saying: "We also have advice from Mr. Graham (an agent of the plaintiff) of his verbal arrangement with you for the sale of our baby machines in that section. * * * We take pleasure in confirming Mr. Graham's arrangement." In the opinion Ames, C., refers to the fact that the letter does not purport to express the agreement of the parties, and is, in effect, a confirmation of a previous oral agreement, the nature of which the letter does not disclose. Alluding to the failure of the letter even to purport to express the agreement, he says: "If it does so purport, it is doubtless as conclusive in that respect as it is with regard to any

other matter concerning which it speaks; but if it does not so purport, then the question whether it does contain the entire agreement, and, if not, what are the omitted terms of the contract, are questions of fact to be determined in like manner as any other fact that is or might be put in issue by the pleadings."

The foregoing analysis of the Nebraska cases cited and relied upon in the opinion in *Wehnes v. Roberts, supra,* is for the purpose of showing that this court has not, in any of those cases, denied or taken exception to the principle that where a written contract, signed by both parties, is complete in itself, and contains and expresses the mutual covenants and promises of both, without ambiguity or apparent omission; where the statement of the consideration therein is of a contractual nature, and not a mere acknowledgment of receipt, parol evidence is not admissible to contradict, vary or add to the consideration expressed in the instrument itself. The rule announced in the syllabus in *Wehnes v. Roberts, supra,* does not support the position of the plaintiff in the instant case, when interpreted in the light of the prior decisions of this court.

In *Wessell v. Havens,* 91 Neb. 426, there was a written contract of sale of a general store and the good-will of the business. The contract contained a stipulation as to the invoice of the stock to arrive at the amount of the purchase price and an agreement on the part of the purchasers to pay the same on completion of the inventory; an agreement by the purchasers to lease the place of business at a stipulated rental, and a provision that the good-will of the business was included. The consideration was paid and the purchasers took possession under a bill of sale of the stock and lease of the premises. They conducted the business for more than a year, then sold out and retired. After their retirement they sued the man who had originally sold them the stock on the ground that, at the time of the sale, he had orally agreed not to re-engage in the same business at the same place,

but that he had conducted a similar business at that place in violation of said agreement. Judge Rose, in the opinion, says: "On a record presenting the situation outlined, two well-established rules of law defeat the plaintiffs' case: (1) In a duly-executed, formal, written contract containing the terms under which a stock of general merchandise is sold, a provision that the good-will of the seller's mercantile business is included in the sale does not imply an agreement that the seller shall not re-engage in such business. (2) Where the good-will of a mercantile business is included in a duly-executed, formal, written contract of sale, without any restriction on the right of the seller to re-engage in the same business, oral evidence that he agreed not to do so is inadmissible as varying the terms of the written instrument."

The rule against parol evidence applied in that case is equally pertinent in the instant case. The principle that underlies it is that when a writing, upon its face, imports to be a complete expression of the whole agreement, and contains therein all that is necessary to constitute a contract, it is presumed that the parties have introduced into it every material item and term, and parol evidence is not admissible to add another term to the agreement, although the writing contains nothing on the particular item to which the parol evidence is directed. 10 R. C. L. 1030, sec. 222.

Counsel for plaintiff lay stress upon the language quoted in the opinion in *Wehnes v. Roberts, supra,* from *Norman v. Waite,* 30 Neb. 302, to the effect that the existence of a written contract "does not prevent parties to a written agreement from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of the written agreement is to depend." It has been shown that the admission of parol evidence in *Norman v. Waite, supra,* came within the well-established rule that such evidence is receivable to

show a failure of consideration, the consideration expressed in the notes and mortgage being a mere recital of the receipt of money. The "distinct oral agreement" was the promise of Rittenhouse to continue as a partner in the business, and the parol evidence simply showed what the consideration was and that it had failed. But the fact that the language was employed in a case where the facts unquestionably justified the admission of parol evidence will not warrant an extension of that language to cover a case in which the consideration expressed in the written contract is of a contractual nature, is clear, definite and unambiguous, and where the effect would be to add another term to the express agreement of the parties.

The test which most of the courts have applied to determine whether parol evidence is admissible to prove a collateral agreement is whether or not the writing appears upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, and whether or not the parol evidence is consistent with, and not contradictory of, the written instrument. See note appended to the report of *Wehnes v. Roberts, supra,* Ann Cas. 1914A, 452.

Counsel for plaintiff have cited several cases from other states, notably *Downey v. Hatter,* 48 S. W. (Tex. Civ. App.) 32, in which some of the courts seem not to have applied the test referred to, and in which the conclusion reached is that a collateral agreement may be shown by parol even though it adds another term to the consideration expressed in the written contract, on the theory that it operated as an inducement to the making of the written contract. Obviously, the unlimited application of the rule contended for by plaintiff would put an end to the parol evidence rule and to the sanctity of written contract.

Parties negotiate and presumably discuss and agree upon everything to be done by either party pertaining to the subject of the negotiations. They put the result of

their negotiations in writing and the writing covers and includes everything necessary to make a binding contract. Its covenants are mutual and it sets out in detail the precise contractual obligations which each party assumes in consideration of the obligations assumed by the other. One agrees to sell and deliver, the other agrees to purchase and pay a certain definite price for the thing sold. Afterwards the seller asserts that he was induced to sign the contract not on account of the consideration moving to him by the terms of the writing itself, but by an agreement made by the buyer that, in addition to the payment of the stipulated price, he would release an existing obligation of the seller under another contract, and that the promise to release formed the condition upon which he entered into the contract in question. If permitted to show such an alleged preliminary agreement in this case, in which there is no question of the completeness and definiteness of the contract on its face, no case could be imagined in which it would not be possible for one party or the other by parol evidence to insert new conditions into the contract, or for one party to impose added burdens upon the other.

The rule contended for by the plaintiff has been applied by some courts to the facts in certain cases for reasons that are impossible to reconcile with the parol evidence rule. It would be impracticable to attempt to examine and distinguish all, or any considerable number, of these cases. Suffice it to say that we think a reasonable construction of that rule, in consonance with the prior decisions of this court, requires us to hold that the admission of the parol evidence complained of was erroneous.

Turning now to the question arising upon the plaintiff's second cause of action, it will be recalled that after a certain quantity of iron, amounting to $5,159.30, had been delivered by the plaintiff under the June, 1917, contract, the defendant refused to pay therefor unless the plaintiff would allow him a credit thereon of $3,200 for damages alleged to have accrued to the defendant for

breach of the November, 1916, contract. The plaintiff claims that the refusal of the defendant to pay the full amount due, without the deduction of $3,200, was a breach of the defendant's part of the contract of June, 1917, and that plaintiff was thereby excused from tendering the remainder of the iron included in that contract, and was entitled to damages for the breach, as prayed for in the second cause of action. The defendant, on the other hand, maintains that his refusal to pay for the iron already delivered, except upon the condition that the claimed credit be allowed, did not excuse the plaintiff from making delivery of the remainder of the iron; that the defendant was ready and willing to receive and pay for it, and was entitled to the delivery thereof even if he had failed to pay for previous deliveries under the contract.

The first question to be considered is whether the defendant's refusal to pay for the iron already delivered, without deduction, constituted a breach of the contract. The contract was for the sale of a definite quantity of iron, to be delivered by the car-load, the defendant agreeing to pay for each car-load as delivered, the delivery of all the iron to be completed by a definite date. The amount due for each car-load was to be determined by railroad weights.

"In this country the broad view taken in the majority of cases, in the absence of statute to the contrary, is that where a contract of sale provides for deliveries in instalments and the payment of the price of each instalment as delivered or within a stated time thereafter and before the delivery of the following instalment is due default in the payment is made, the seller may rescind the contract, and if he does so cannot be held liable for damages for the failure to make delivery of subsequent instalments. * * * Likewise it is immaterial that the refusal to pay is put on the ground of a claim by the buyer for damages for breaches by the seller of other contracts or

with respect to default in prior instalments." 24 R. C. L. 280, sec. 559.

In opposition to the foregoing view, which is approved by a majority of the courts in the United States, the defendant cites *Myer & Dostal v. Wheeler & Co.*, 65 Ia. 390, and other Iowa cases in which a contrary view is expressed. We adhere, however, to the majority view, as supported not only by the weight of authority but by the better reasoning. In accordance with that view, it must be determined that the defendant's refusal to pay for the iron previously delivered except upon condition that a credit be allowed him was a breach of the contract for which the plaintiff was entitled to maintain the second cause of action. This conclusion is consistent with the rule laid down by this court in *Funke v. Allen*, 54 Neb. 407: "If a vendee in an executory contract of sale, or where the title of the property has not passed to him, refuses to perform, a right of action for damages arises in favor of the vendor for the injury or loss he has sustained by reason of the breach of the contract, and this is ordinarily or generally the difference between the market value of the property at the time and place of delivery, and the price fixed by the contract."

Mundt v. Simpkins, 81 Neb. 1, is cited by defendant on the proposition that plaintiff cannot at the same time rescind the contract of sale and sue for damages for its breach. In that case the defendant was sued on a note which he had given for a traction engine. He set up that he had rescinded the contract and returned the engine because it failed to fulfil a warranty, and at the same time counterclaimed for repairs, loss of time, etc., arising from the breach of warranty. The court held that, as a general rule, a party who counterclaims for damages for breach of a contract will be held to have affirmed it, and cannot be heard to assert its nonexistence.

The case is not parallel with the case at bar, in which the delivery of the entire quantity of iron had not been completed, and the seller claimed the right to rescind

and that he was relieved of the duty to make further deliveries because of the purchaser's breach. In *Mundt v. Simpkins, supra,* the contract of sale was fully executed on the seller's part by delivery of the engine, and the question was whether the purchaser could disaffirm and rescind the sale and defeat an action for the purchase price because the engine failed to fulfil the warranty, and at the same time maintain his counterclaim for repairs purchased and time lost in the effort to make the machine work. It was held that, as a general rule, one cannot rescind an executed contract and thereby assert its non-existence, and at the same time affirm it for the purpose of asserting a counterclaim for damages for its breach. This court, however, decided in *Mundt v. Simpkins, supra,* that the purchaser was entitled to maintain his counterclaim under an exception to the general rule, but reversed the case because of failure of proof to establish rescission. In the instant case the question is whether the seller may rescind an executory contract of sale for failure of the buyer to pay an instalment of the purchase price and recover damages for the buyer's breach. Of his right so to do there can be no doubt under the authorities hereinbefore cited. See, also, 35 Cyc. 131 *et seq.*

There was no error prejudicial to the defendant in the instructions of the court relative to the plaintiff's second cause of action except in the reference therein to the alleged parol release of defendant's claim under the November, 1916, contract; and defendant's requested instruction No. 5 was properly refused.

It follows from the error in the admission of parol evidence of the alleged release of defendant's claim under the November, 1916, contract, that instructions Nos. 3, 4 and 5, given on the court's own motion, are erroneous in so far as they permit the jury to consider such evidence. On a retrial the question is still presented, by the pleadings on defendant's counterclaim, whether or not the November, 1916, contract was, in fact, breached

by the plaintiff and, if so, the amount of the defendant's damages. We recommend that the judgment appealed from be reversed and the cause remanded for a new trial.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings, and this opinion is adopted by and made the opinion of the court.

REVERSED.

MAGGIE A. GOODRICH, APPELLANT, V. GRAND LODGE, BROTHERHOOD OF RAILROAD TRAINMEN: MARIE GOODRICH, APPELLEE.

FILED NOVEMBER 26, 1921. No. 21730.

1. **Appeal:** MOTION FOR NEW TRIAL. Where, in an action on a beneficiary certificate, the society admits liability and pays the amount of the certificate into court, and the action proceeds as a suit in equity between contesting claimants for the insurance, only equitable considerations being involved, no motion for a new trial in the lower court is necessary to entitle this court to review the entire record.

2. **Insurance:** CHANGE OF BENEFICIARY. Where the insured fills out and signs the printed blank on the back of a beneficiary certificate, changing the beneficiary, and causes the delivery of the certificate to the local secretary while the insured is still alive, and the local secretary sends the certificate to the home office of the order, and the general secretary and treasurer certifies the transfer on the back of the certificate and returns it to the local secretary, and where the by-laws and directions on the back of the certificate leave not a particle of discretion to any one, the certification, by the general secretary and treasurer, relates back to the time of delivery to the local secretary. *Held*, that the change of beneficiary is complete, although insured dies before the general secretary and treasurer receives the certificate, as his duties are ministerial only, and all rights under the certificate vest in the new beneficiary upon the death of the insured.

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

J. P. Palmer, for appellant.

Macfarland & Macfarland and *Gray & Brumbaugh, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., BUTTON and COLBY, District Judges.

BUTTON, District Judge.

In this action Maggie A. Goodrich, mother of Rollo Goodrich, deceased, seeks to recover from the Grand Lodge of the Brotherhood of Railroad Trainmen and Marie Goodrich, wife of Rollo Goodrich, on a certain beneficiary certificate issued by said order to Rollo Goodrich. Rollo Goodrich died October 20, 1918. Prior to his death, he and his wife, Marie Goodrich, had trouble, and a divorce action was pending between them at the time of his death. Marie Goodrich was named in the beneficiary certificate as beneficiary. On October 15, 1918, Rollo Goodrich, being very ill from pneumonia, attempted to change the beneficiary from his wife to his mother. There is a sharp conflict in the testimony as to just what occurred following the 15th of October, 1918, and the death of Rollo Goodrich on October 20, 1918. The evidence is sufficient, however, to support the findings of the trial court as to what occurred between said dates, and it will serve no useful purpose to examine the testimony as to such findings. The trial court found: That the grand lodge had admitted its liability and had paid the amount of the certificate, $600, into court, and that the contest was between the wife and mother, as to which one was entitled to the money. And the court further found: That Rollo Goodrich died October 20, 1918; that on October 15, 1918, Rollo Goodrich filled out the printed transfer on the back of said certificate and signed the same; that on October 19, 1918, said certificate was delivered to John J. O'Donnell, local secretary of the lodge, and by him transmitted on October 21, 1918, to the grand lodge at Cleveland, Ohio, where it arrived on

October 24, 1918. The general secretary and treasurer of the grand lodge, on the 24th day of October, 1918, made a transfer of said certificate, as requested, upon the books, and certified the fact on the back of the certificate, and returned the same to John J. O'Donnell, with instructions to deliver it to Maggie A. Goodrich, mother of Rollo Goodrich, deceased. The trial court found in favor of Marie Goodrich, and decreed the $600, paid into court by the lodge, to her. The object of this appeal is to reverse said judgment.

No motion for a new trial was filed within three days after judgment, as our statutes require in law actions, and appellee stoutly contends that this is a law action, and that the court ought not to consider the bill of exceptions at all. The grand lodge did not answer, but paid the amount of the certificate into court, leaving the contest to Marie Goodrich, the wife, and Maggie A. Goodrich, the mother, as to which one was entitled to the money. To settle this contest the trial court had to determine whether Rollo Goodrich had done all required of him, under the by-laws of the order and the certificate, to cause a change of beneficiary, and whether or not what remained for the officer of the lodge to do was merely a ministerial act, and, as a matter of equity, the change was actually complete. The action proceeded as one in equity, and as between Marie Goodrich, the wife, and Maggie A. Goodrich, the mother, only equitable considerations were involved, and no motion for a new trial was necessary to entitle this court to review the entire record.

Section 62 of the by-laws provide: "All transfers of beneficiary certificates shall be made upon the books of the grand lodge, under the direction of the general secretary and treasurer, and any and all transfers made in any other manner shall be null and void. Any member desiring to transfer his beneficiary certificate shall fill out the printed transfer on the certificate and sign his name thereto, and send the same to the general secretary and treasurer, through the secretary of a lodge of the

brotherhood. It shall be the duty of the general secretary and treasurer, immediately upon its receipt, to certify to such transfer in the form provided therefor in the certificate, and until so certified by the general secretary and treasurer the transfer will not be complete."

Rollo Goodrich filled out the form on the certificate, named Maggie A. Goodrich beneficiary, and signed it on October 15, 1918, and caused its delivery to the local secretary on the 19th day of October, 1918, while he, Rollo Goodrich, was still living. Manifestly, this was all he was required to do. The local secretary sent the certificate to the grand lodge, all that was required of him. The by-laws do not provide that the grand lodge shall do anything upon receipt of the certificate. The grand lodge was not required to call a meeting and vote upon such transfer. The by-laws provide that the general secretary and treasurer shall certify the transfer as directed by the insured on the back of the certificate. The by-laws provide that the transfer shall not be complete until certified upon the back of the certificate, but direct the general secretary and treasurer to do this immediately upon receipt of the certificate with the transfer properly filled out and signed by the insured. The general secretary and treasurer has no choice; there is nothing for the grand lodge to do; the general secretary and treasurer must do as commanded in the by-laws and directed on the back of the certificate by the insured. This is a ministerial act, and, when done, relates back to the time of delivery—in this case, October 19, 1918. And there is a good reason why this is true. There is but one order, and the home of the society is Cleveland, Ohio. Had Rollo Goodrich lived in Cleveland, his change of beneficiary would have been certified to by the general secretary and treasurer on October 19, 1918, at the home office. Since the order has branches in widely located places throughout the country, this ministerial act of the general secretary and treasurer relates back to the time of delivery to the local secretary. *Supreme Conclave,*

Royal Adelphia v. Cappella, 41 Fed. 1; *Wandell v. Mystic Toilers,* 130 Ia. 639; *Luhrs v. Luhrs,* 123 N. Y. 367, 9 L. R. A. 534.

"So, where a member of a benefit society has complied with all the requirements necessary to effect a substitution of a proper person as beneficiary in place of the one originally designated by him, and has surrendered his certificate to the proper officer of the local lodge for the purpose of having the change made, and all that remains to be done is the purely formal matter of making the change, without a particle of discretion remaining in any one, the right of the substituted beneficiary attaches, and the new certificate, when issued, will relate back to the time of such surrender, so that his claim will not be defeated by the death of the member before the change is actually made." 2 Joyce, Law of Insurance (2d ed.), sec. 751.

"Equity does not demand impossible things, and will consider as done that which should have been done, and, when a member has complied with all the requirements of the rules for the purpose of making a substitution of beneficiaries within his power, he has done all that a court of equity demands." 14 R. C. L. 1392, sec. 556.

We do not believe the foregoing is at variance with any of our own decisions, when rightly understood. In *Counsman v. Modern Woodmen of America,* 69 Neb. 710, the by-laws involved in that case provided: "No change in the beneficiary shall be of effect until the delivery of the new certificate, and until then the old certificate shall be held in force." Here was something for the association to do. The old policy was to remain in force until the new one was delivered. Manifestly the new policy could not be delivered to the insured after his death. No provision of this kind is in the case before us. The association in the case at bar had nothing to do. Only a ministerial act remained, and the grand lodge had delegated performance of this act to its officer by the terms of the by-laws. The case of *Adams v. Police & Firemen's*

Ins. Ass'n, 103 Neb. 552, in so far as applicable to the facts in the case at bar, is in line with our reasoning herein.

It seems plain from the foregoing that upon the delivery of the certificate signed by Rollo Goodrich to John J. O'Donnell on October 19, 1918, the beneficiary was changed from Marie Goodrich, the wife, to Maggie A. Goodrich, the mother, for when the general secretary and treasurer certified to the transfer, this act related back to the date of delivery to the local secretary, and Rollo Goodrich was still living at that time. It follows, therefore, that upon the death of Rollo Goodrich on October 20, 1918, his mother was his beneficiary and all rights under the certificate that instant vested in appellant.

The judgment of the trial court is reversed, with instructions to render judgment for appellant for the amount due under the certificate.

REVERSED.

WILBUR S. BOURNE, RECEIVER, APPELLANT, V. HIRAM F. BAER ET AL., APPELLEES.

FILED NOVEMBER 26, 1921. No. 21634.

1. **Statutes:** CONSTRUCTION: PENALTIES. A liability which is created by statute to follow as a consequence of the doing or omission of some act required by law, the extent of which liability is not measured or limited by the damage caused by the act or omission, is in the nature of a penalty, the statute penal in its character, and the liability imposed by the statute is a penalty. *Kleckner v. Turk,* 45 Neb. 176.
2. **Limitation of Actions:** ACTION TO ENFORCE PENALTY. An action to enforce a liability imposed by statute, which is a penalty, must be brought within one year, as provided by section 7570, Rev. St. 1913.
3. **Corporations:** LIABILITY OF STOCKHOLDERS. A liability imposed by statute, which is incurred as a necessary consequence of becoming a stockholder in a corporation, partakes of the nature of a contract to which the stockholder assents, and such liability is contractual in its nature, and not a penalty.

4. **Limitation of Actions:** STATUTORY LIABILITIES. An action to enforce a liability created by statute, which is not penal, may be brought within four years from the time the cause of action accrues. Rev. St. 1913, 7568.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed in part, and reversed in part.*

Hazlett, Jack & Laughlin, for appellant.

Kretsinger & Kretsinger and *Sackett & Brewster, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., GRAVES and WELCH, District Judges.

WELCH, District Judge.

Appellant, in September, 1919, commenced this action against all of the owners of stock in the Cortland Creamery Company, a corporation organized under the laws of the state of Nebraska, to recover from said stockholders their liability as such stockholders imposed by section 577, Rev. St. 1913, for failure of the corporation to publish notice annually of all its indebtedness.

The petition alleged that said corporation was organized in January, 1912, and from that date to March 4, 1915, transacted business as a corporation; that on the latter date it became insolvent and ceased doing business; that on March 18, 1916, said corporation was, by order of court, dissolved, the plaintiff herein appointed receiver to take charge of the assets of said corporation, sell the same, and distribute the funds of the corporation under the order of the court; that thereupon plaintiff qualified as such receiver and ever since has been so acting.

The petition also sets forth the names of all persons who ever owned stock in said corporation, with the respective amount of stock owned by each, and makes all stockholders then living, and the legal representatives of such as were deceased, defendants.

The petition also alleged that there were unpaid subscriptions for stock of the corporation by the defendant C. F. Luthey, in the sum of $100, by the defendant Rudolph A. Boesinger, $100, and by the defendant Sylvester Bonebright, $50.

The petition also alleges facts showing that on January 31, 1917, the court allowed all claims against said corporation, and entered judgment decreeing the several sums due from it to its several creditors, amounting in the aggregate to the sum of $4,397.25, which amount was all the obligations of the corporation, and that by September 17, 1917, all of the assets of said corporation had been sold under orders of the court; that the debts against said corporation, so allowed and decreed by the court, exhausted all of the proceeds of the sale of the assets of said corporation, and would leave a large amount of said indebtedness, to wit, more than $3,500, unpaid.

The petition further alleged that said corporation never at any time during its existence gave notice by publication of its existing indebtedness, and alleged all other facts necessary to state a cause of action based upon said section 577, Rev. St. 1913; provided, however, the facts above set forth, as alleged therein, do not show that the action is barred by the statute of limitations.

The defendant Klaas Slote answered, alleging, among other things, that plaintiff's cause of action did not accrue within one year next before filing said petition, and that said petition did not state facts sufficient to constitute a cause of action. All other defendants, except Henry Poppe, Sr., who was served with summons, and James A. Shell, summons for whom was returned "not found," demurred to the petition by general demurrers, and for defect of parties defendant.

The court found for the defendant Slote and dismissed the action as to him. The court sustained the demurrers by the other defendants, and plaintiff elected to stand

upon his petition. Thereupon the court dismissed the action as to all defendants thereto.

By this petition two causes of action were sought to be stated: First. To recover from all the stockholders of said corporation their liability to the amount of capital stock owned, as provided by section 577, Rev. St. 1913, for failure of the corporation to give annual notice of its indebtedness. Second. To recover also from the defendants C. F. Luthey, Rudolph A. Boesinger, and Sylvester Bonebright their liability for unpaid subscriptions to the capital stock of said corporation.

In support of their demurrers, the appellees herein contend that the liability imposed by section 577, Rev. St. 1913, is a statutory penalty imposed on the stockholders of the corporation for failure of the corporation to perform a duty required by that section of the statute, and that therefore the action is barred by section 7570, Rev. St. 1913, at the expiration of one year from the time the indebtedness of said corporation is judicially determined and assets thereof exhausted. This court held in *Globe Publishing Co. v. State Bank,* 41 Neb. 175, that the liability imposed by the statute upon stockholders of a corporation for failure to give annual notice of its indebtedness was a penalty, and overruled *Howell v. Roberts,* 29 Neb. 483, and *Coy v. Jones,* 30 Neb. 798, holding otherwise. The plaintiff contends that by reason of the amendment of 1891, being our present section 577, Rev. St. 1913, the decision in *Globe Publishing Company v. State Bank, supra,* is not applicable, and that by this amendment the liability is made contractual in its nature. The amendment of 1891 in no manner changed the character of the liability imposed therein. The only changes made by the amendment are simply a limitation of the liability, to the amount of unpaid subscriptions for stock, and, in addition thereto, the amount of capital stock owned by such individuals, and postponement of the liability until the assets of the corporation were exhausted.

"A liability which is created by statute to follow as a consequence of the doing or omission of some act, and the extent of which is not measured or limited by the damage caused by the act or omission, is in the nature of a penalty and the statute penal in its character." *Kleckner v. Turk,* 45 Neb. 176.

The petition in the case at bar does not allege any facts tending to show that any creditors of the corporation were induced to extend credit to it or damaged by the failure of the corporation to publish notice of its indebtedness. The liability upon which appellant herein bases his cause of action comes, therefore, within definition of a penalty set forth in *Kleckner v. Turk, supra.*

A statutory liability incurred as a necessary consequence of becoming a stockholder in a corporation, and not as the consequence of doing or omitting some act specified in the statute, partakes of the nature of a contract to which the stockholder assents, and is not a penalty.

If said section 577 creates a liability contractual in its nature, then it creates a liability of stockholders in a corporation, extending and adding to their liability imposed by sections 4 and 7, art. XIb of the Constitution. It was held in *State v. German Savings Bank,* 50 Neb. 734, and *Van Pelt v. Gardner,* 54 Neb. 701, that these sections of the Constitution, "not only determines what the liability of a stockholder in a corporation, for the corporate debts thereof, shall be, but it limits this liability, and it is not within the power of the legislature to extend it." If, therefore, the statutory liability in question herein is, as contended by appellant, in the nature of a contract liability, then the statute creating it would be in conflict with said sections of the Constitution, and for that reason would be void. This court, however, holds in *Spear v. Olson,* 104 Neb. 139: "Section 577, Rev. St. 1913, is not in violation of section 4, art. XIb of the Constitution, providing for the liability of stockholders." From the opinion in that case, by Letton,

J., it appears that this court came to that conclusion because that section of the statute imposed upon the stockholders penal obligations for failure to comply with regulations affecting corporate duty prescribed by the statute.

Since this amendment of 1891, which appellant claims changed the character of the statutory liability in question, it has also been held by this court in *Singhaus v. Piper,* 103 Neb. 493, that "the liability of a stockholder in a corporation for failure of the corporation to publish notice of indebtedness required by section 577, Rev. St. 1913, is in the nature of a penalty for neglect of duty." The liability imposed upon stockholders by the statute for failure of the corporation to give annual notice of its indebtedness is a penalty, and an action therefore is therefore barred in one year, under the provisions of section 7570, Rev. St. 1913.

As to the liability of the defendants Luthey, Boesinger, and Bonebright on account of their unpaid stock subscriptions; while the liability therefor imposed by said section 577 of the statute is a penalty, section 4, art. XIb of our Constitution, also imposes a liability on stockholders of a corporation for unpaid subscriptions to the capital stock thereof. The liability imposed by this section of the Constitution is incurred as a necessary consequence of becoming a stockholder, and not by reason of doing or omitting some act required by statute. It, therefore, is contractual in its nature, and is not barred in one year, but is controlled by section 7568 of the statute, which bars an action for statutory liability in four years. This section of the Constitution is self-executing, does not require an act of the legislature to put the same into force, and is enforceable without special supplementary statutory enactments. *Farmers Loan & Trust Co. v. Funk,* 49 Neb. 353. The allegations of the petition are sufficient to sustain an action based on this section of the Constitution. The court, therefore, erred in sustaining the demurrers as to the defendants C. F. Luthey,

Rudolph A. Boesinger, and Sylvester Bonebright.

Appellees herein argue that their demurrers for defect of parties defendant were good, for the reason that the defendant James A. Shell was not brought into court and is not shown to be a nonresident of the state. He was, however, made a defendant in the petition, and summons was issued for him and returned that he was not found. Section 7648, Rev. St. 1913, provides: "Where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows: * * * Second. If the action be against defendants, severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants." The liability imposed by section 577, Rev. St. 1913, is by that section made joint and several. The action, therefore, could proceed as to the defendants served, and this contention of the appellees is groundless, and there was no defect of parties defendant.

The sustaining of the demurrers and judgment of the lower court is therefore affirmed as to all defendants below, except said C. F. Luthey, Sylvester Bonebright, and Rudolph A. Boesinger. And the judgment, dismissing this action as to said defendants Luthey, Bonebright, and Boesinger, is reversed and this cause remanded for further proceedings, if desired by appellant, to enforce the alleged liability under said provision of the Constitution of said last-named defendants for unpaid subscriptions to the capital stock of said corporation.

JUDGMENT ACCORDINGLY.

JOHN ZAITZ, APPELLANT, V. DRAKE-WILLIAMS-MOUNT COMPANY, APPELLEE.

FILED DECEMBER 1, 1921. No. 21671.

Master and Servant: ASSAULT: LIABILITY OF EMPLOYER. The employment of a foreman in a factory or shop, with authority to direct the method of doing the work and with power to engage and discharge employees, does not bring within the scope of such employment the right or duty to inflict corporal punishment upon an employee, and, if following the discharge of an employee, but before his departure from the premises, the foreman makes an assault upon him, the employer will not be held liable for the injury received, in the absence of proof that the foreman was a person of violent temper, or dangerous character, and that the employer knew, or ought to have known, of his infirmity, unless it be shown that the employer either directed or authorized the assault.

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

J. E. Von Dorn, for appellant.

Lambert, Shotwell & Shotwell, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., BROWN and ELDRED, District Judges.

MORRISSEY, C. J.

Plaintiff brought this action for damages alleged to have been received while an employee of defendant Drake-Williams-Mount Company, a corporation. He also joined as a defendant one Otto Starr. The defendant Drake-Williams-Mount Company was engaged in the business of manufacturing tanks and boilers. Defendant Starr was the foreman at the plant at which plaintiff was employed. In the performance of his labors plaintiff took a position in one of the tanks under construction which, according to the view of the foreman, was disadvantageous. The foreman directed plaintiff to take a different position, which the foreman indicated. Plain-

tiff appears to have resented the suggestion, or direction, of the foreman, and the foreman discharged plaintiff, directing him to report at the office for the money that was due him. Plaintiff thereupon stepped aside from the work, and he claims that, while in the act of putting on his coat preparatory to reporting to the company's office, he was struck by the foreman and severely injured. It is clear that plaintiff was struck by the foreman, but it is claimed on behalf of defendants that the assault was not made in connection with the work or with a view of disciplining plaintiff, but that plaintiff had been angered because of his discharge and called the foreman a vile name, thus provoking the assault. At the close of plaintiff's evidence the court instructed the jury to return a verdict in favor of defendant Drake-Williams-Mount Company, but permitted the case to proceed as against defendant Starr. As between plaintiff and defendant Starr the jury disagreed, and this appeal involves only the ruling of the court on the motion to direct a verdict for defendant Drake-Williams-Mount Company.

For the purpose of this review, we give full credence to the testimony offered by plaintiff. Having done so, does it establish a liability against the employer? Plaintiff contends that the employer is liable for the acts of the foreman, who was in charge of the plant with power to hire and discharge employees. The employer denies that any direction or order to discipline employees had been given, and insists that, if the foreman attempted to do so, he was acting outside the scope of his authority, and without the sanction or approval of his employer. Plaintiff also undertook to prove that the foreman was a man of quarrelsome disposition, and that this fact was known to the employer. The evidence offered, however, is entirely insufficient to prove the foreman either quarrelsome or vicious. Indeed, the testimony of plainitff's witnesses on this point affirmatively shows otherwise.

Was the act of the foreman in making the assault within the scope of his employment or so connected with

his duty as to make his employer responsible for his acts? It is well settled that, when the act complained of is within the scope of the agent's employment, the master may be liable if the servant performed the act with a view to the service for which he was employed, and in such cases whether the servant did the act with a view to his master's service or to serve his own private ends is generally a question of fact for the jury.

The foreman had authority to direct the actions of the employees in and about the performance of their work and to discharge them either with or without explanation. As the representative of the employer, he had, of course, the right to maintain order and preserve discipline, but this did not carry with it the right to inflict corporal punishment. It is true that employees, such as railway guards and street car conductors, as a necessary part of their employment, are called upon to use force under special circumstances in preserving the peace and good order and in removing from the premises, or cars, of the employer undesirable and dangerous characters, and, in certain instances, the employer may be liable for the misconduct of the employee. But no such duty devolved upon the foreman in this instance. Indeed, the facts presented bring the case clearly within the rule announced by this court in *Allertz v. Hankins*, 102 Neb. 202. No doubt the trial court had that holding in view when he made the order from which this appeal is prosecuted. The record is free from error, and the judgment is

AFFIRMED.

ALFRED C. WALTON, APPELLANT, V. ROBERT W. PORTER, APPELLEE.

FILED DECEMBER 1, 1921. No. 21740.

1. **Appeal:** REVIEW. Equity cases on appeal are required, under the law, to be tried here *de novo*, without reference to the findings of the trial court. But when in a case of that character

the testimony is so conflicting on material facts that both versions cannot be accepted as true, we will consider the fact that the trial court had an opportunity to observe the witnesses and their demeanor, and when witnesses, who are apparently of equal credibility, disagree with respect to material facts, the circumstances in the case which tend to verify one version rather than the other will also be carefully considered. *Shafer v. Beatrice State Bank*, 99 Neb. 317.

2. **Evidence** examined and in part set out and discussed in the opinion, *held* that the trial court did not err in dismissing plaintiff's petition.

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

Jacob Fawcett, J. F. Green and *W. A. Meserve,* for appellant.

D. O. Dwyer, contra.

Heard before LETTON, DEAN and ALDRICH, JJ., CLEMENTS (E. P.) and DILWORTH, District Judges.

DEAN, J.

This action was brought for an accounting. Whether plaintiff and defendant were engaged in a joint enterprise arising out of an oral contract, for the purchase of a 200-acre tract of farm land for $19,000, in which the parties were obligated to share the burdens incident to the purchase, and privileged to participate in the profits arising from a resale of the land, is the main question in the case. Plaintiff contends that it was a joint enterprise, and defendant contends that he was the sole purchaser, and that plaintiff, a land agent in the vicinity, has no interest whatever in the transaction. The court found against the plaintiff on all points and dismissed the action at his costs. Plaintiff appealed.

It seems that plaintiff and defendant were friends and neighbors. Defendant testified that in a conversation with plaintiff he told him that, under the terms of purchase of the farm on which he was living as a tenant under a three-year lease, it would be necessary for him

to raise $2,000 in cash to make the first payment. He said that plaintiff thereupon volunteered to go with him to a local bank and join him in a note for that amount. The note was duly executed and a cashier's check for $2,000 payable to the order of defendant was obtained and delivered to defendant and was used by him in making the initial payment. Plaintiff's version of the transaction is that when the $2,000 was obtained he told the bank cashier that he wanted to borrow $2,000; that he and defendant had bought the 200-acre tract in question; that the cashier wrote the note, and that he signed it first and that defendant signed it, and that when the note was signed he told the cashier to give defendant a draft for $2,000 to pay on the land, and that the cashier did so. On this point the cashier testified that the parties came to the bank together, and that plaintiff seemed to be the spokesman, and that one of the parties, he was not sure which, said that they wanted a cashier's check payable to the order of defendant. The cashier further testified that the $2,000 note was paid in about two months thereafter by defendant's check in the sum of $2,018.05, which included the interest.

W. H. Crandall, a bank president at Winnetoon, was the agent of Mrs. Book from whom the land was purchased, and it was at his place of business that the contract of purchase by defendant from Mrs. Book and the contract of sale to Smolek, who purchased the land from defendant, were both made. With respect to both transactions Crandall testified that he never saw or heard of plaintiff while either transaction was pending, and that he did not discover that plaintiff was claiming any interest in the land or in the proceeds arising from the sale until several months after the transactions were closed. In answer to interrogatories by the court, Mr. Crandall testified that plaintiff was not present when defendant made arrangements with him for the purchase of the land, nor was he present when the sale was made to Smolek.

Vincent Frank, as agent for defendant, sold the land to Mr. Smolek. He testified that defendant paid him his commission of $800 on the day of the sale, and that afterwards he had a talk with plaintiff and that plaintiff said he ought to have half of the commission, or that he ought to get something out of the sale. To this Frank replied that he got another man to help him to sell the place. Defendant's evidence is to the same effect. He testified that after the sale was made plaintiff asked him if Frank had sold the place, and that he asked him if he would not go with him to see Frank to find out if he could get half of the commission for him. He said that was the only complaint he made and the only talk that the defendant had with him in regard to the sale. He further testified that he refused to go to Mr. Frank because he had agreed to give Frank $800 if he sold the land, and that he paid him what he agreed to pay him, and that he would not ask him to divide it with any other person. It sufficiently appears that defendant executed a $10,000 note and mortgage that were given in part payment for the land, and that he paid $9,000 in cash, and that plaintiff was not a party to any of the transactions. Defendant testified that plaintiff told him on one or more occasions that he based his claim to a share in the profits on the ground that he had taken a number of buyers out to look at the place.

Plaintiff contends that certain materials used in making repairs on the premises, in preparing it for sale, were charged to plaintiff and defendant by the dealer from whom they were bought. Defendant denied all of plaintiff's evidence on this point. A bill for goods charged to defendant, which included paints and oils, apparently for the material so purchased, and his check in payment therefor appear in the record. Counsel for plaintiff frankly concede that the material evidence of their client was contradicted by defendant. The record bears out this statement. While we have not discussed all of the conflicting evidence that is before us, we have tried the

case *de novo* and conclude that the weight of the evidence is on the side of defendant. He testified that plaintiff, in his capacity of real estate agent, solicited his patronage as selling agent for the property, and, as noted herein, he promised to give him $1,000 if he sold the farm.

We are required under the law to try equity cases on appeal *de novo,* without reference to the findings of the trial court. *Greusel v. Payne, ante,* p. 84. But when in a case of that character the testimony is so conflicting on material facts that both versions cannot be accepted as true, we will consider the fact that the trial court had an opportunity to observe the witnesses and their demeanor, an opportunity that is denied a court of review. It may be added that when witnesses, who are apparently of equal credibility, disagree with respect to facts that are material, the circumstances in the case which tend to verify one version rather than the other will also be carefully considered. *Shafer v. Beatrice State Bank,* 99 Neb. 317.

The judgment of the district court is in all things

AFFIRMED.

ECKMAN CHEMICAL COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 1, 1921. No. 21737.

1. **Carriers:** DAMAGE TO GOODS SHIPPED: PRESUMPTION. Where a party delivers goods to a common carrier for shipment in good condition and the goods arrive at destination in a damaged condition, a *prima facie* case is made against the carrier by reason of a presumption that the damage resulted from some cause other than one which would exempt the carrier from liability.
2. ———: ———: ———. A party relying upon such a presumption has a right to rest secure, until *prima facie* evidence has been adduced by the opposite party; but the presumption should never be placed in the scales to be weighed as evidence.
3. **Prima facie evidence** means sufficient evidence upon which a

party will be entitled to recover if his opponent produces no further testimony.

4. **Evidence:** JUDICIAL NOTICE. Spontaneous combustion means the ignition of a body by the internal development of heat without the action of an external agent, and the court will not take judicial notice that charcoal is predisposed to generate internal heat, sufficient to start fire.

5. **Trial:** INSTRUCTIONS. There is no evidence in this case tending to support the theory of spontaneous combustion, and the instruction complained of was rightly given and those requested properly refused.

6. **Attorney's Fees.** The attorney fee allowed is in the nature of reimbursement of costs, and the law authorizing it is not unconstitutional as providing a penalty.

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

Wymer Dressler, Robert D. Neely and *Paul S. Topping,* for appellant.

A. H. Murdock, contra.

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., BUTTON and COLBY, District Judges.

BUTTON, District Judge.

May 27, 1919, the appellee shipped over the railroad, then being operated by appellant, a car-load of charcoal. Said shipment began in Chicago, Illinois, and ended in Omaha, Nebraska. The charcoal was delivered to the appellant in Chicago, Illinois, in good condition, and when it arrived in Omaha, Nebraska, it was on fire. A portion of the charcoal was salvaged; but a large part of it was ruined, and appellee seeks to recover its damages for the loss.

The case was tried to a jury, and a verdict was returned for appellee in the sum of $201.38. A motion for a new trial was overruled and judgment was rendered for $201.38. The court also allowed an attorney fee for appellee in the sum of $100 and ordered the same taxed as costs against appellant.

"A common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, except only the act of God, the public enemy, or some other cause which would exempt it from liability at common law, and where loss or injury to freight while in a carrier's possession is shown, a *prima facie case* is established, and it then devolves upon the carrier to bring itself within one of the exceptions allowed by the common law." *Nelson & Co. v. Chicago & N. W. R. Co.*, 102 Neb. 439. See, also, *Duncan v. Great N. R. Co.*, 17 N. Dak. 610.

It seems to be established by the evidence that the charcoal was delivered to the carrier in Chicago in good condition. The bill of lading recites that the charcoal was delivered in good condition, except as noted, and no notations appear. When the charcoal arrived in Omaha, it was on fire. This is sufficient to raise a presumption that the damage resulted from some cause other than one which would exempt the company from liability. This presumption, however, is not evidence and expires when sufficient evidence is introduced of facts, out of which the damage grew, to support a finding that the damage was from a cause for which the company would not be liable.

Appellant contends sufficient evidence was introduced to overthrow this presumption. If this be true, the trial court erred in the instruction complained of and in refusing the two offered on this subject by appellant. In fact, this presumption is the basis of nearly all alleged errors. Appellant, to sustain his position, cites Nebraska cases and many other authorities. We will examine only a few of the decisions, for when the principle upon which these decisions rest is rightly understood appellant's contentions are fully met.

First let us examine *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151. This was a shipment of live stock. There was evidence in the above case of the disposition of hogs to pile up to get fresh air, and

of the presence of cholera, and that some of the hogs died from congestion of the lungs, and other evidence tending to rebut the presumption, and the court said: "Such presumption, however, is not evidence and is destroyed when actual evidence is introduced of the facts out of which the damage occurred. When evidence of such facts appears and is sufficient to sustain a finding, the presumption expires."

Appellant also cites *Wente v. Chicago, B. & Q. R. Co.*, 79 Neb. 175. In this case a stallion was shipped and there was a caretaker. It is disclosed in this case that the horse was shipped in a box car suitable for the purpose. The horse was provided bedding, hay, grain, and water. There is no dispute that a horse might be confined in a car during a journey of from a week to ten days without danger from confinement. There was no request that the horse be unloaded *en route*. Under such circumstances the court held that the presumption under consideration has no weight as against such facts.

"A presumption of law is a rule of law announcing a definite probative weight attached by jurisprudence to a proposition of logic. It is an assumption made by the law that a strong inference of fact is *prima facie* correct, and will therefore sustain the burden of evidence, until conflicting facts on the point are shown. Where such evidence is introduced, the presumption at law is *functus officio* and drops out of sight." 22 C. J. 124, sec. 61.

"The presumption, when the opposite party has produced *prima facie* evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponent's *prima facie* evidence with evidence, and not presumptions. A presumption is not evidence of a fact, but purely a conclusion." *Peters v. Lohr*, 24 S. Dak. 605. See 1 Eliott, Law of Evidence, secs. 91-93; Wigmore, Evidence, secs. 2490, 2491.

"There is a presumption of ownership from the possession of property; but this obtains only in cases where

there is no actual evidence of ownership. A presumption means a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference be disproved. * * * When evidence of actual ownership is introduced, the fact of possession loses its presumptive character." *First Nat. Bank v. Adams,* 82 Neb. 801.

Prima facie evidence means sufficient evidence upon which a party would be entitled to recover, providing his opponent produced no further testimony. 4 Wigmore, Evidence, sec. 2494.

From the foregoing authorities, we adduce the test or principle to be that, where the party having the burden in the first instance proves facts and circumstances that raise a presumption of law, rebutable in its nature, in his favor, he has made a *prima facie* case and is entitled to recover, unless the other party offers *prima facie* evidence to the contrary as to the facts out of which the presumption grows. When he has done this, the presumption expires.

In the case at bar appellee proved the charcoal was delivered to the carrier in Chicago in good condition and arrived in Omaha in bad condition. Hence, the appellee had a right to rest on the legal presumption thus raised, as he had made a *prima facie* case. Now, appellant could meet this condition by showing the charcoal was not received in good condition, or that it did not arrive in bad condition; or appellant might prove, as he alleged in his answer, that the fire "was caused solely by spontaneous combustion or other natural causes inherent in the goods." However, appellant offered no evidence of spontaneous combustion. No evidence was offered to the effect that charcoal is liable or predisposed to spontaneous combustion. We cannot presume that charcoal is predisposed to spontaneous combustion. Indeed, the writer believes that, since charcoal is produced by driving

out the gases, and moisture content, by means of heat, the contrary is the fact.

Appellant complains of instruction No. 6, given on the court's own motion. Appellant says that this instruction entirely eliminated from the consideration of the jury certain fundamental defenses offered by well-established rules of law, and authorized a finding in favor of the plaintiff, regardless of any showing on behalf of the defendant that the fire was due to spontaneous combustion, or, in other words, to the inherent nature of the goods. The court was right in giving this instruction, for the reason that there was no evidence in support of appellant's contention as to spontaneous combustion. The court was also right in refusing the instructions offered by appellant as to spontaneous combustion for the same reason.

Appellant seems to think that his evidence, that the shipment was made under seal and arrived with the seal intact, that the car was a new car and in first-class order, and did not leak and had an iron roof, and that the charcoal burned a hole through the car, and that the charcoal was on fire near the centre of the car and two feet above the floor, established the fact that the charcoal must have burned by spontaneous combustion. But not so. Such proof simply showed that the common carrier, an insurer of the goods it shipped, was making an honest effort to do its duty. But such proof does not meet the presumption at all. There must be sufficient evidence introduced of the facts, out of which the damage grew, to support a finding that the damage was from a cause for which the appellant would not be liable.

Appellant's contentions all revolve around this presumption upon which appellee relies. We are satisfied his position is untenable. He cites many cases, but we are unable to find any not in accord with the foregoing, and conclude the record is without substantial error.

Appellant also contends that the court erred in allowing appellee an attorney fee. He claims this allowance is

in the nature of a penalty. In this he is wrong. We have held that it is a matter of costs, and that the statute authorizing it is constitutional. *Marsh & Marsh v. Chicago & N. W. R. Co.*, 103 Neb. 654; *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151.

In view of the very liberal allowance for attorney fee in the trial court, no attorney fee is taxed in this court.

We are satisfied the judgment of the trial court is right, and it is

AFFIRMED.

AL KOYEN, APPELLEE, V. CITIZENS NATIONAL BANK, APPELLANT.

FILED DECEMBER 1, 1921. No. 21783.

Damages. Where property, a part of the realty to which it is attached, is destroyed without damage to the realty itself, and where the nature of the thing destroyed is such that it is capable of being replaced at once, and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent destruction is the reasonable cost of replacing the property in like kind and quality.

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

Barnhart & Stewart, for appellant.

Kelsey & Rice, contra.

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., BUTTON and COLBY, District Judges.

BUTTON, District Judge.

Appellant held a chattel mortgage upon the property of one Craig, lessee of a building owned by appellee in the city of Norfolk, Nebraska. Craig's property, consisting of a stock of automobiles and automobile equipment and accessories, was located in the first floor rooms of appellee's building. Appellant took possession of this

property under its mortgage and also took and held possession of the ground floor of appellee's building without the knowledge or consent of appellee. During some very cold weather appellant permitted the fires to go out in said building, and the water in a boiler, used to heat the building, was frozen and the boiler ruined. Appellee sued appellant for the damages, and alleged appellant was negligent in permitting the fires to go out without first draining the boiler. Issue was joined and trial had, resulting in a verdict for appellee for $1,125. Motion for a new trial was overruled and judgment rendered for appellee. Appellant contends for a reversal on the question of damages.

The only matter seriously argued is with reference to the measure of damages. Complaint is made of the evidence and instruction No. 4 given by the court on its own motion. The first paragraph of instruction No. 4 is as follows:

"If you find by a preponderance of the evidence that said boiler was injured by reason of the negligence of defendant's agents while in the possession of defendant and also find by a preponderance of the evidence that said boiler was injured beyond repair, that is, that it could not be repaired and made as good as it was before it was injured by replacing injured parts thereof with new parts of like character, then you will find for the plaintiff and find the amount of his damages to be such sum as you find from a preponderance of the evidence would be the reasonable cost of replacing said boiler with one of like kind and quality in such building to take the place of the one injured by such negligence."

Property such as fences, parts of buildings, and machinery, and furnaces, is capable of being replaced, and the proper measure of damages for the destruction thereof is the cost of restoring or replacing such property. 8 R. C. L. 484, sec. 46. If the property destroyed has no value separate and apart from the realty, the measure of damages for property destroyed is the difference between

the value of the real estate before the injury and after the injury. But as to the destruction of property which is a part of the real estate, whose destruction does the realty itself no damage and is capable of being repaired or replaced, the measure is the cost of repairing or restoring the same.

"In an action for damages to growing trees, evidence showing the effect the destruction of the trees had on the value of the land is admissible when the nature of the trees destroyed is such that they have no value, except with reference to and as a part of the real estate." *Alberts v. Husenetter,* 77 Neb. 699.

Here the court held the measure of damages was the difference in value of the trees before and after the fire, and not the value of the realty with the trees and without the trees, but the value of the trees with reference to the land as the trees were before the fire and their value for practical purposes after the fire. Where trees have a value separate from the land, the measure of damages is the difference in their value before and after the fire. *Hart v. Chicago & N. W. R. Co.,* 83 Neb. 652. Trees cannot be replaced except by waiting for the processes of nature to grow and develop them. The boiler, like the trees in the above case, was part of the realty. But if the measure of damages is the difference in the trees' value with reference to the land before and after the fire in the one case, and, where they possess a value separate from the land, the difference between their value before and after injury by fire in the other case, why should not the measure of damages of this boiler, which was destroyed and was capable of being replaced at once, be, as this instruction says, "the reasonable cost of replacing said boiler with one of like kind and quality?" If it were possible to replace trees at once, the measure of damages would be the cost of doing so.

But appellant says the testimony with reference to replacing the boiler and reference to a new boiler, while the one destroyed was eight years' old. But boilers are

liable to last 50 years, the witnesses say, and, if this be true, the boiler was comparatively new. Besides, the evidence shows no second-hand boilers were available. And, what is more, it served the purpose as well as a new one.

"Where a bridge owned by a county was so injured by the wrongful act of defendant that a portion had to be rebuilt, the county is not to be denied recovery of damages in substantially the amount expended, because the rebuilt structure may be of greater value than the old and it is impossible to make a nice estimate of the difference in value." *Paxson Co. v. Board of Chosen Freeholders,* 201 Fed. 656.

The damages returned by the jury were much less than the difference between the value of the building and property before and after the destruction of the boiler. The undisputed testimony places this at about $2,000. The cost of replacing a new boiler exactly like the one destroyed was conclusively shown to be $1,250. The jury returned a verdict for $1,125. Probably as men they took into consideration the difference in value of the new and the old boiler.

We find no error in the record, and the judgment of the lower court is

AFFIRMED.

OTIS W. CRISS, APPELLANT, V. LESLIE BARIGHT ET AL., APPELLEES.

FILED DECEMBER 1, 1921. No. 21793.

Evidence examined, and found insufficient to sustain a verdict against defendants Hixenbaugh, and *held* that the trial court was right in dismissing them from the case.

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

John O. Yeiser and *J. B. Randolph,* for appellant.

Carl E. Herring and *J. R. Dykes, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., BUTTON and COLBY, District Judges.

BUTTON, District Judge.

On November 1, 1919, Frank Hixenbaugh was driving a black Ford automobile on Twenty-fourth street, Omaha, Nebraska, and was going south. When a short distance from Sprague street he noticed a small boy start to run across the street in front of him. Hixenbaugh was slowing down at the time, as he was about to turn west on Sprague street. His car did not strike the boy; but another automobile, painted red, was passing him just as the boy ran in front of his car, and the red car did strike and injure the boy. The plaintiff is the father of this boy, and claims the boy was injured by the concurrent negligence of the two automobile drivers. Plaintiff claims the two cars were racing, and as a direct result of the concurrent negligence of both drivers the boy was injured, and this action is for the damages flowing therefrom. Leslie Baright drove the red car, and the car was owned by Irving Baright; and Walter A. Hixenbaugh and W. A. Hixenbaugh & Company owned the black car, and the car was used in the company's business and was so engaged on the day of the accident. All were made parties defendants in the lower court. There is but one allegation of negligence in the petition. The petition alleges that the proximate cause of the boy's injuries was the concurrent negligence of the two drivers of the automobiles in racing together and while running at a high rate of speed. This allegation is put in issue by the several answers. After plaintiff rested his case, the court dismissed all of the Hixenbaughs from the case, for the reason the evidence was insufficient, in the mind of the trial court, to show any negligence on the part of the driver of the black automobile. Thereupon the action proceeded against Leslie Baright, but was later dismissed by plaintiff without prejudice to a future action. The

case is here on appeal from the judgment dismissing the Hixenbaughs and a reversal of the judgment is sought.

The specific question in this action is: Is there sufficient competent evidence that defendants were operating their cars in competition, or engaged in a contest of speed, to require submission of the case to a jury? Plaintiff complains because the court struck out statements of certain witnesses that the drivers of the two cars were racing. These statements were mere conclusions. But suppose we consider them. We must examine the facts all the witnesses relate to ascertain whether or not these conclusions are justified. The evidence is very unsatisfactory and inconsistent. It is surely insufficient to go to a jury. It not only fails to show any racing or contest of speed between the drivers, but rather seems to establish the contrary. There is no proof Frank Hixenbaugh ever knew the red car was trying to pass him, until a few feet before the accident, when he looked out of the side of his car and saw the red one pass him. At the same time he saw the boy running across the street and already he was slowing down preparatory to turning into Sprague street. The boy ran into the red car and Hixenbaugh saw the accident. He says the boy looked neither to the right nor the left. This agrees with the boy's statement that he did not see either automobile approaching before he was struck. Hence, the boy was not confused by the presence of the two automobiles.

Witness Condon says the cars were less than 100 feet away when the boy started across the street. He thinks the red car was going 30 miles and the black one 25 miles an hour. He says the black car was on the right side of the street where it belonged and the red one passed on the left of the black one. Witness Farrell says the red car passd the black one before the collision. This is undoubtedly correct, for the black car was slowing down to turn into Sprague street. Witness Bussaman says the red car was a half block behind the black one at the railroad crossing, a short distance from where the accident

occurred. Witness Barentsen was riding in the red car, and says the red car was turned out, not to pass the black car, but to avoid hitting the boy, whom he and the driver saw running across the street.

There is no evidence of any race between the two cars. If the black car was moving faster than the laws permit, or faster than was consistent with the traffic then on the street, such negligence of itself does not create a liability. The black car did not collide with the boy. There is no evidence that the negligence, if any, of Frank Hixenbaugh contributed in the slightest degree to the collision of the boy with the red car. Indeed, it would seem that the accident would have occurred just the same if the black car had not been taken from the garage at all that day.

The judgment of the trial court is right, and is

AFFIRMED.

A. E. HOCKMAN, APPELLEE, V. ELLIOTT & MYERS, APPELLANT.

FILED DECEMBER 1, 1921. No. 21702.

1. **Bailment.** Under the facts in this case, the property received by the defendant from the estate represented by plaintiff as trustee in bankruptcy, for the purpose of cooling and drying the grain and putting it in condition for market, was a bailment of the property, and not a sale.

2. **Bankruptcy:** SET-OFF. A creditor is not entitled to set off against the trustee in bankruptcy, representing the bankrupt's estate, a sum retained by such creditor representing the value of grain received by the creditor from the debtor, as a bailment, with knowledge of the debtor's insolvency, and within four months of the filing of the petition in bankruptcy.

3. ———: CONVERSION. A bailment of grain received by the creditor, under the circumstances disclosed in this case, cannot be considered as a portion of the mutual credits and debts which a creditor is entitled to set off against the debtor. And the act of the creditor in retaining the grain, under such circumstances,

constitutes a conversion of the grain, and the trustee in bankruptcy is entitled to recover its value for the benefit of all of the creditors of the bankrupt estate.

4. **Case Distinguished.** The case of *Tootle-Weakley Millinery Co. v. Billingsley*, 74 Neb. 531, is distinguished.

APPEAL from the district court for Nuckolls county: RALPH D. BROWN, JUDGE. *Affirmed on condition.*

F. H. Stubbs, for appellant.

R. M. Tibbets and *P. E. Boslaugh, contra.*

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

CORCORAN, District Judge.

In the month of August, 1917, the Superior Corn Products Company and Elliott & Myers were each quite extensively engaged in the grain business at Superior, Nebraska. Each of these firms bought and shipped grain in large quantities, at times dealing with each other, and in that way generally had a running account with each other. At the times involved herein the Corn Products Company had no elevator of its own, but had started the erection of a building for that purpose. Its business appears to have been largely buying grain and such products upon track and shipping to other markets, being probably considered in the trade as wholesale dealers. In the early part of the month of August this firm had contracts open for the purchase of corn and oats in the neighborhood of 300,000 bushels. About the 9th of August there occurred a great break in the market; corn falling in price about 70 cents a bushel and oats about 10 cents. This terrible drop in market prices brought about the financial ruin of the Corn Products Company, and on August 18 it filed its petition in bankruptcy, and was later adjudged a bankrupt. The plaintiff in this suit is the trustee in bankruptcy appointed by the bankruptcy court. On July 27 this company received a carload of oats shipped from Aurora, which, when it reached

Superior, was found to be heating and in bad condition for the market. An arrangement was made with the defendant firm, under the terms of which this car-load was turned over to the defendant to be run through its elevator, which was well equipped for the purpose, to be cooled and dried and put in condition for the market. On August 10 another car-load was received by the company from the same place and in the same condition, and was delivered to the defendant firm under the same arrangement and for the same purpose. While these two car-loads of oats were in the possession of the defendant firm, and on August 11, the Corn Products Company found itself to be hopelessly insolvent, and stopped the payment of drafts drawn upon it for grain shipped to it by its customers. Knowledge of this condition was at once sent by wire to its several customers, and on the 14th a general letter was sent by the company to all of its customers and those interested in its business, disclosing in detail the insolvent condition of the company caused by the great and sudden change in market conditions. A copy of this letter was received by the defendant firm about this time. On August 15 the defendant firm sent the Corn Products Company an account sales for the two car-loads of oats, indicating that it had purchased the two car-loads at the prevailing price and credited the Corn Products Company with the amount upon its open account with that company. The trustee claims that this was not a sale of the grain to the defendant firm, but that the defendant received the grain as bailee for the purpose of putting it in condition, and brings this suit for conversion of the two cars of grain, claiming them as an asset of the bankrupt estate. The petition also sought to recover for three other small items, which will be noticed later. This action was tried in the district court for Nuckolls county to a jury, but at the conclusion of the trial the court directed the jury to return a verdict for the plaintiff trustee for the sum of $2,574.46, which was done, and, after the overruling of

the defendant's motion for a new trial, judgment was entered upon the verdict. The defendant brings the cause to this court upon appeal.

The question presented for decision is whether the answer of the defendant and the evidence taken at the trial were sufficient to require the submission of the controversy to a jury. A careful examination of the record reveals little, if any, dispute in the evidence. Upon the main facts there is no controversy, the difference being only upon minor details, and not of a controlling nature. The defendant firm filed a claim with the referee in bankruptcy against the bankrupt estate, covering the months of July and August, the two principal items being for losses upon contracts for grain sold to the bankrupt, which it was unable to receive and pay for, amounting to $3,262.50, and a number of small items, in all amounting to $3,493.89. Against this amount the defendant credited the bankrupt with a number of small items, the two cars of oats in dispute at $2,018.51, and the items above referred to, leaving a balance of $832.49, which it asked to have allowed against the bankrupt estate. The referee allowed this amount upon condition that the oats in dispute and the items of preference be restored to the bankrupt estate. Upon a hearing in the United States district court this order was reversed, and the referee directed to allow the claim, but granting permission to the trustee to bring suit for the items here in dispute, if he was so advised by his counsel. This the trustee has done, bringing this suit for the conversion of the oats and to recover the other three items as unlawful preferences.

Counsel have favored us with very exhaustive and elaborate briefs. Many questions are argued which have little bearing upon the real issue. It is claimed by appellant that the adjudication before the referee and the bankruptcy court has foreclosed the matter and that the controversy cannot further be inquired into. Many cases are cited in support of this theory; the leading case being *Clendening v. Red River Valley Nat. Bank,* 12 N. Dak.

51. The principal question determined in that case was the question of what was adjudicated by the referee; it being claimed that certain matters necessarily involved in the litigation were not in fact adjudicated. The North Dakota court held that all such matters as were necessarily involved were in fact adjudicated. These matters can have no bearing here, where in the very order made by Judge Munger directing the referee to allow the claim, and almost in the same breath, figuratively speaking, was the permission to the trustee to prosecute this very suit. Under this state of the record the question of *res judicata* cannot be relied upon here.

The determination of the question of whether the defendant firm had a right to credit the bankrupt upon its running account with the value of the two car-loads of oats, which it has taken into its possession under the circumstances before detailed, must control and determine the decision in this case. If the defendant had such right, then the judgment of the lower court is wrong and must be reversed. If the defendant had no right to thus secure a preference in its favor, then the judgment is correct and must be affirmed. The question is purely one of law, and there was no question of fact for the jury to consider.

The different bankruptcy acts are, of course, acts of the congress of the United States. The construction placed upon these several acts by the courts of the United States must control the rights of litigants in the courts of the several states. If it is a case of mutual credits and debts it is settled by the statute, which provides that one shall be set off against the other and the balance only will be allowed and paid. *Libby v. Hopkins,* 104 U. S. 303. In the case of *Western Tie & Lumber Co. v. Brown,* 196 U. S. 502, a leading case upon the subject, it was held (25 Sup. Ct. Rep. 339), Mr. Justice White writing the opinion: "A corporate creditor is not entitled to set off, in proving its claim against the bankrupt debtor's estate, a sum retained by it with knowledge of the debtor's in-

solvency, and within four months of the filing of the petition in bankruptcy." This is the rule almost universally adhered to by the supreme court of the United States, among the leading cases being: *New York County Nat. Bank v. Massey,* 192 U. S. 138; *Hanover Nat. Bank v. Suddath,* 215 U. S. 122; *Cook County Nat. Bank v. United States,* 107 U. S. 445; *Sawyer v. Hoag,* 17 Wall. (U. S.) 610, 622. To these might be added a long line of cases to the same effect in the lower federal courts. In this connection reference is made to the opinion of Judge Munger when this controversy was before the United States district court, and it is of more than ordinary interest in this discussion:

"The claim of the trustee in this case is * * * of a conversion of property delivered by the bankrupt to the creditor as a bailment; that is, of oats delivered to be returned, and which the creditor sold for its own use. The bankruptcy act, by section 70 (a) 6, grants to the trustee the title of the bankrupt to 'rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.' If there has been a breach of contract of bailment or conversion of property by the claimant, by reason of its dealings with the oats delivered to it by the bankrupt, the trustee may recover for the benefit of the estate the amount of its damages, and this fund would be assets for the benefit of all creditors."

If the defendant firm may retain the oats received by it as a bailment from the bankrupt, and credit the bankrupt with the proceeds upon its account, then the defendant has collected its debt against the bankrupt 100 cents on the dollar, so far as the value of the two carloads would extinguish the debt of the bankrupt to the defendant firm. Other creditors would be deprived to that extent of payment upon their demands. This is what the law, as interpreted by the supreme court of the United States, declares cannot be done.

In the case of *Tootle-Weakley Millinery Co. v. Billings-*

ley, 74 Neb. 531, cited and relied upon by the appellant, the court permitted an allowed claim of the plaintiff in the same bankruptcy proceedings to be offset in equity against a default judgment, peculiarly obtained, in favor of the trustee in bankruptcy. The court evidently was of the opinion that the judgment was not a *bona fide* asset of the estate, and that, under the unusual circumstances of the case, a grave wrong would be perpetrated against the plaintiff unless this was done. The proposition in the fourth paragraph of the syllabus in that case is not an authority, as applied to the facts now before us, and has no application, except in cases peculiarly calling for the interposition of a court of equity. The case is therefore distinguishable from the one now under consideration.

There is no pretense that the oats, when received by the defendant firm, were received as a purchase. The evidence is undisputed that the oats were received by the defendant as a bailment for the sole purpose of running the grain through their elevator to cool and dry the grain and put it in condition for market. The oats were still in the possession of the defendant when the crash came and the bankrupt firm was forced to the wall. The defendant had knowledge of the failing condition of the Corn Products Company on August 14, if not the week previous. Yet on August 15 they send to the bankrupt firm the account sales and attempt to close a sale of the grain to themselves, which sale had never even been contemplated between the parties. The further attempt to credit the value of the grain upon the open account with the bankrupt firm is clearly an attempt to evade or avoid the force of the bankruptcy laws. Under the circumstances shown by the undisputed evidence in the record, the transaction did not constitute a case of mutual credits and debts. It was clearly a conversion of the grain, and the trustee in bankruptcy is entitled to recover its value for the benefit of all creditors of the bankrupt estate. To this extent the order of the trial court in directing the

verdict is sustained by the law and the evidence and should be affirmed.

A different situation exists with reference to the items of $172.18 and $237.85, credited to the bankrupt on August 15, and $83.33 credited on the 23d, amounting with interest at the time of the trial to $584.19, and which items constituted the third cause of action and a part of the verdict directed to be returned. These items represented balances due the Corn Products Company from the defendant firm upon three several cars of corn sold by the Corn Products Company to the defendant at some time prior. The amounts of these balances were not known until final returns were received by the defendant firm from the market to which the grain had been shipped. The evidence does not show the dates upon which the grain in these cars was received by the defendant, but it appears that these returns were received by them shortly before August 15. The grain represented by these particular cars was received by the defendant at a time long before that firm had any knowledge of the failing condition of the Corn Products Company. And while it may be a fair inference from the evidence that this particular grain was received by them within four months of the filing of the petition in bankruptcy, still if the defendant had no knowledge of the approaching insolvency of the bankrupt, it would not constitute an unlawful preference. These items should be considered "mutual credits and debts," within the meaning of the statute. As such, the defendant would have a legal right to offset the money represented by them against the indebtedness of the bankrupt to the defendant firm. This being true, it follows that it was error to direct the verdict for this amount. The appellee probably anticipated that there was doubt about the correctness of the order of the court in this particular respect and suggested in his brief that if this court so found that, instead of reversing the judgment, it should order a remittitur of that amount. The invitation to require the

appellee to remit is accepted by the court, and, upon condition that the plaintiff below remit the sum of $584.19 from the verdict within 20 days from the date of this opinion, the judgment for the balance will be affirmed, but, otherwise, the judgment of the district court will be reversed. Upon the filing of this remittitur, the judgment will be

AFFIRMED.

JOHN C. WHARTON, APPELLEE, V. EARL E. JACKSON ET AL.: MINERVA A. JACKSON ET AL., APPELLEES AND CROSS-APPELLANTS: WILLIAM MADISON, APPELLANT AND CROSS-APPELLEE.

FILED DECEMBER 1, 1921. No. 21697.

1. **Divorce:** ALIMONY: FINAL DECREE. A decree of the trial court in a divorce case in favor of the wife, granting $15 a month during the minority of a daughter, aged five, and of a son, aged three, or of either of them, where the term of court has ended and there have been no proceedings to review nor revise, is a final judgment and became a lien upon the real estate owned by the husband in another county as soon as a transcript of the judgment was filed there.
2. ———: ———: COLLATERAL ATTACK. Such a judgment, unless affected by some jurisdictional infirmity, cannot be attacked collaterally by one who ignored the lien and purchased the real estate of the husband, and, in a foreclosure suit of a mortgage upon the property, seeks to defeat the lien of the judgment on the ground that it is not a final judgment.
3. ———: ———: DECREE: LIEN. Such a judgment is for a definite amount and is a lien, not only for the amount of the matured unpaid instalments and interest thereon, but also as security for the payment of those instalments yet to become due during the minority of the younger child.
4. **Evidence:** PRESUMPTION. In the entire absence of facts upon which might be based a contrary inference, the natural presumption is that a boy 10 years' old will live to be 21 years' old.

APPEAL from the district court for McPherson county:

HANSON M. GRIMES, JUDGE. *Affirmed in part, and reversed in part, with directions.*

Hoagland & Carr, for appellant.

Halligan, Beatty & Halligan, M. O. Cunningham and *W. E. Shuman, contra.*

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

GOSS, District Judge.

This is an action to foreclose a mortgage on a section of land in McPherson county. The controversy is over the question as to whether a decree for alimony is a lien, to what extent it is a lien, and its rank. Earl E. Jackson homesteaded the land, made final proof, received his receiver's receipt August 14, 1913, recorded it January 3, 1914, received his patent March 4, 1914, and recorded it November 8, 1915. In Douglas county on April 23, 1913, Minerva A. Jackson was granted a decree of divorce from Earl E. Jackson, in which it was provided that he should pay $40 then due on a previous order, $25 counsel fees, and, as permanent support and maintenance, the sum of $15 a month, beginning May 1, 1913, during the minority of the children, Ellen O. Jackson, aged five, and Leslie E. Jackson, aged three. August 3, 1913, a transcript of the decree was filed in McPherson county. Nothing has been paid or recovered on the decree. Minerva A. Jackson has become insane, but she and the two children are represented by guardians and are cross-appellants. January 3, 1914, Earl E. Jackson made a $500 mortgage on the land; it was recorded January 5, 1914; and came by assignment to plaintiff. On January 27, 1915, Jackson conveyed the land, subject to the mortgage, to William Madison, the appellant. May 24, 1920, the trial court entered a decree giving cross-appellants a first lien for the $65 and for $85 due and unpaid instalments of alimony of $15 each, with interest, and gave plaintiff a second lien for the amount due on his mortgage. Plain-

tiff does not appeal. William Madison appeals because he thinks the court erred in allowing any lien on account of the decree for alimony, and cross-appellants appeal on the theory that the court erred in not including in the decree the present worth of the 131 instalments not then due but yet to become due before Leslie E. Jackson would reach his majority on December 12, 1931.

Counsel for appellant Madison, in their brief and oral argument, waived consideration of all minor errors claimed, and narrowed the case to these two points: First. Was the decree for alimony in the sum of $15 a month during the minority of the children such order as could be a lien upon the land? Second. Even if the amount already due may be a lien, can those instalments not yet due be a lien?

The chief points urged against the decree for alimony are that it was not a final judgment and was not for a definite amount. This is a matter requiring the application of our own statutes. We are not helped much by cases from other jurisdictions. To save space we abstract the pertinent statutes from our Revised Statutes of 1913: Section 7994 defines a judgment to be the final determination of the rights of the parties in an action; section 8575 says decree means judgment; section 8176 defines a final order as an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; section 1585 provides that judgments and orders for payment of alimony or maintenance shall be liens upon property and be enforced as in other actions; section 1589 specifically provides that all decrees for alimony or maintenance shall be liens upon the property of the husband; section 1590 provides that the court may, on the petition of either party, revise and alter the decree respecting the amount of alimony or allowance, or the payment thereof; and section 1606 provides that the decree shall at the expiration of six months become final without any further action of the court.

The divorce decree affected the substantial rights of

Earl E. Jackson and prevented him from obtaining a judgment in his favor, within the contemplation of section 8176. It was therefore a final order on which he could obtain a review. It was not only apparently but really a final determination of the rights of the parties, as suggested in the language of section 7994, for the evidence in this case shows no attempt to review or to revise the decree. The only thing that would defeat this conclusion would be a construction of section 1590 withdrawing from a decree of divorce the attribute of finality because of the statutory reservation of the right to revise or alter such a decree in the matter of alimony. Section 1590 has been considered by this court, and it has been held that, unless it be waived, a petition must be filed and summons served before a decree can be revised after the term. *Ellis v. Ellis,* 13 Neb. 91. The petition to revise must be based upon facts or circumstances arising subsequent to the decree, or a good reason must be shown why the issues now tendered were not litigated, else the decree will be deemed *res adjudicata. Chambers v. Chambers,* 75 Neb. 580; *Cizek v. Cizek,* 76 Neb. 797.

Also jurisdiction of the court in matters relating to divorce and alimony is given by statute, and every power exercised by the court in reference thereto must look to the statute or it does not exist. *Cizek v. Cizek,* 69 Neb. 800, 76 Neb. 797. We cannot change it; we must therefore take the decree as we find it, inasmuch as the interested parties have made no move to change it but have treated it as final.

Moreover, this is in effect a collateral attack upon the integrity of the finality of the decree of divorce. A judicial order or judgment cannot be attacked in a collateral proceeding, unless affected by some jurisdictional infirmity. It will be conclusive upon the litigants and those in privity with them, unless reversed, vacated, or modified in an appellate or other proceeding instituted for that purpose. *Dryden v. Parrotte,* 61 Neb. 339; *Beard v. Beard,* 57 Neb. 754.

Appellant Madison urges that the decree was not for a fixed amount, and, therefore, even if sustained for the amounts now due, it cannot be enforced for the instalments to become due. The ages of the two children were given in the decree in terms of years, and it was proved at the trial that Ellen was born in March, 1908, and Leslie was born December 12, 1910. The decree provided that the payment of $15 a month should be made during the minority of either of the children. It is a simple matter of computation, no more difficult than to figure interest on any judgment, to arrive at the gross amount that would be paid. It seems to us as definite in that respect as if the sum had been stated to be $3,240 payable in 216 instalments of $15 each. The only contingency that would affect this definiteness would be the death of the boy, but there is a presumption that he will outlive his minority. 17 C. J. 1165, sec. 2. In such a case if the one entitled to the annuity should die, further payments on the judgment would be defeated as easily as past payments, when pleaded and proved in a suit, defeat their recovery and prevent double payment. The reason why alimony judgments for payments to be continued indefinitely do not become liens for unpaid payments rests in the fact that the owner of property or those dealing with it cannot ascertain how much to pay to discharge the property from such a lien. Such infirmity does not inhere in this decree.

We conclude that the judgment in the divorce action was a first lien on the land, not only for the amounts due with interest, but also for the security of future payments: and that the decree should be modified, on the evidence already taken as preserved in the bill of exceptions, so as to protect such lien. The divorced wife and her children are asking for the present worth of future payments to be included in the decree of foreclosure. If plaintiff and appellant Madison are willing, we see no objection to such a course; but if they prefer to have the land sold to satisfy the liens now matured, leaving the

remainder of the judgment as to the immatured payments as a first lien on said land, a decree may be entered to that effect, provided they manifest their election in writing filed in the district court within 30 days after the mandate is filed there. Otherwise, the distirct court will entere a decree giving a first lien for the amount due on the alimony judgment, with interest to the date of the decree, and for the present worth of all payments to come due up to and including December, 1931. As the judgment bears 7 per cent. interest, the present worth should be computed on that basis. Upon sale and distribution, the decree will direct the clerk to credit on the execution docket, in the divorce judgment, the amount of the proceeds distributed to cross-appellants.

We affirm the decree of the trial court in so far as it allowed a first lien for the past-due alimony payments, reverse it wherein it failed to allow a lien for the present worth of future instalments, and remand it for the entry of a decree in accordance with this opinion.

JUDGMENT ACCORDINGLY.

STANLEY BARTOS, ADMINISTRATOR, APPELLANT, V. MARY SKLEBA, APPELLEE.

FILED DECEMBER 21, 1921. No. 21839.

1. **Annuities:** RENT CHARGE. A reservation in a deed which binds the grantee, her heirs and assigns, to deliver to the grantor during his natural life a one-third part of all grain annually raised on the land conveyed, and makes the same a charge upon the land, creates a rent charge, as distinguished from an annuity, notwithstanding that the parties designate the reservation an "annuity."

2. **Executors and Administrators:** RENT CHARGE. A reservation in a deed providing that the grantee shall deliver to the grantor a fixed portion of all crops annually raised on the land conveyed during the lifetime of the grantor, and creating a lien therefor upon the land, and providing that the reservation shall *be null and void at the death of the grantor*, shows an intention on the

part of the contracting parties that the rent charge shall continue to the death of the grantor, and, in such case, the personal representative of the deceased grantor is entitled to recover the part reserved in any crop actually severed from the soil before the death of the decedent.

APPEAL from the district court for Saline county: RALPH D. BROWN, JUDGE. *Reversed.*

Bartos & Bartos, for appellant.

Glenn N. Venrick, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

MORRISSEY, C. J.

Plaintiff is the administrator of the estate of Anna Vrbsky, deceased, and brings this suit to recover from defendant what he alleges to be the one-third value of the crops grown by defendant during the year 1916 upon a certain farm, which plaintiff's intestate and her husband, Joseph Vrbsky, had conveyed to defendant. The deed, which is dated March 3, 1909, a copy of which is set out in the petition, conveys the 160 acres of land described therein to defendant in consideration of $5,000, "and other valuable consideration." It provides for specific payments to be made by the grantee to certain of the grantors' children after the death of the grantors, and "upon further condition that the grantee herein, her heirs and assigns shall give and deliver to the grantors herein, or either of them, annually during their natural life, one-third of all the crops annually raised on the above-described land, all of said provisions to be a first and valid lien against said land until fully complied with and paid, the last proviso as to annuity to be null and void at death of both grantors herein." This suit is based upon the conditions quoted.

It is alleged that Joseph Vrbsky departed this life February 14, 1915, and that Anna Vrbsky departed this life September 13, 1916; that the latter was during her

lifetime entitled to an undivided one-third of all of the crops raised on the premises during the year 1916, and that the crops were as follows: "1,247 bushels of wheat, all of which was threshed out prior to the date of the death of the said Anna Vrbsky, 584 bushels of oats which was all in stack at the time of the death of the said Anna Vrbsky, but which was not threshed out until about two weeks after the date of the death of the said Anna Vrbsky, and 900 bushels of corn which was in the field, growing and maturing, but cultivated and laid by at the time of the death of the said deceased."

It is alleged that all of this crop was wrongfully appropriated by defendant to her own use on or about May 20, 1920, and that at the date of the conversion the wheat was worth $2.85 a bushel, the oats 95 cents a bushel, and the corn $1.65 a bushel, aggregating $1,864.57. It is further alleged that plaintiff made proper demand for the grain, or for the value thereof; that the demand was refused; and judgment is prayed for its alleged value.

To this petition defendant interposed a demurrer; the point relied upon being: "The petition does not state facts sufficient to constitute a cause of action against the defendant." The demurrer was sustained by the court, and plaintiff has appealed.

It is the contention of plaintiff that the rents reserved, notwithstanding the use of the term "annuity" in the deed, were not, strictly speaking, an annuity within the old common law definition of that term, and, therefore, the nonapportionment rule so long applied to annuities can have no application here.

"In its technical meaning, an annuity is defined as 'a stated sum, payable annually,' or as a yearly payment of a certain sum of money granted to another in fee, for life, or for years, and chargeable only on the person of the grantor." 3 C. J. 200, sec. 1.

Appellee submits that in the construction of deeds the intention of the grantor, as manifested by the words of the writing taken in connection with the surrounding

circumstances, must be carried into effect, provided in so doing no rule of law is violated or sound policy disturbed, and if the deed is ambiguous it should be construed most strongly against the grantor. This observation may be conceded. It is also said that the common-law definition of an annuity has been broadened so that the provision of the deed may properly be termed an annuity. In support of this statement appellee cites *In re Kohler's Will,* 183 N. Y. Supp. 550; but, as we read this opinion, it is not at variance with the definition we have quoted, nor does the rent reserved fall within any recognized definition of an annuity.

The parties in drawing the deed used the term "annuity" in connection with the rent reserved, but whether it was inadvertently used or used in ignorance of its legal significance cannot change the contract. The contract did not provide for a fixed and stated sum payable annually, or otherwise, but provided for an indefinite amount, varying according to husbandry, weather conditions, and the fluctuations of the market. It fixed no definite sum as a charge upon the grantor, nor upon the land.

Subject to certain well-defined exceptions, it was the rule of the common law that annuities were not apportionable in respect of time, and, if the annuitant died before, or even on the day of, payment, his representative could claim no portion of the annuity for the current year. Appellee contends that this rule should be applied in the instant case, and asserts that it has been applied to rents due from land, as well as to annuities generally. The leading case cited in support of this contention is *Haynes v. McDonald,* 158 Ill. App. 294. In that case however, the matter in controversy was a fixed and determined sum to be paid in cash. The court found that under the contract the rent was not due and payable until the end of the term of the lease, which was almost four months after the death of the lessor, and held that rent accruing after the death of the owner of the demised

premises was a chattel real and went to the heir, or devisee, and not to the administrator. The facts in that case differ materially from those presented here.

Appellee also urges the clause in the deed which reads: "All of said provisions to be a first and valid lien against said land until fully complied with and paid, the last proviso as to annuity to be null and void at death of both grantors herein." It is said that this proviso should be construed to mean that at the death of the last of the grantors the provision for the delivery of a share of the crop should then lose its legal efficacy and be ineffectual to bind appellee or serve as a foundation for any claim whatsoever.

In *Lynch v. Houston,* 138 Mo. App. 167, the court had under consideration a clause in a deed very similar to the clause we are now discussing. In that case the deed called for the payment of a definite sum on the first day of March of each year until the death of the grantor, when all payments should cease. In its discussion of this phase of the instrument the court said: "In directing our attention to the above-quoted terms of the deed in this case, we find that they do not stop at a mere provision for an annual payment to the father until his death, but add that at his death 'all payments cease.' Now, we have already stated that a provision for annual payments to the annuitant at a stated time 'during life' is interpreted to mean as long as he shall live to such time of payment. But when such usual mode of annuity contract is departed from and there is added thereto the provision 'and at his death all payments shall cease,' * * * it alters the entire meaning and the provision is referable to the time of death instead of time of payment. If this view of the contract is correct, it follows that the trial court was right in deciding that the annuity was apportionable by force of the contract itself."

This question was again considered by the court on rehearing, where it was urged that the phrase in the con-

tract providing that all payments should cease at the death of the grantor was declaratory only of what the law would have implied, and, therefore, the contract should not be given this interpretation because of its insertion. But the court said: "The fact that the law would imply a thing unsaid does not necessarily affect the question of what was intended by saying it. Keeping within bounds of fact, as distinguished from presumption, it is safe to say that these parties knew nothing of the rule of law that annuities were not apportionable, and when they inserted in the contract the additional phrase that payments should cease at death, it seems to clearly show that they intended they should continue up to the death."

Holding, as we do, that the rent reserved was not an annuity, it may be argued that the language quoted is not applicable, but to us it seems otherwise. It being persuasive even though dealing with what was held to be an annuity, it may surely be applied where the thing dealt with is not an annuity but only a rent charge. We are convinced that the representative of the last surviving grantor should receive the one-third part of any crop which had been produced on the premises and severed from the soil prior to such grantor's death. "Crops and products of whatever character, actually severed before the death of the decedent, go to the representative." 23 C. J. 1142, sec. 340.

The administrator is entitled to recover for intestate's share in the wheat and oats, they being severed from the soil, but he has no claim upon, or interest in, the corn which was not matured.

It follows from what has been said that the district court erred in sustaining the demurrer to plaintiff's petition, and its judgment is reversed and the cause remanded.

REVERSED.

F. E. HURLEY, APPELLEE, V. I. A. MANCHESTER, APPELLANT.

FILED DECEMBER 21, 1921. No. 21767.

1. **Statute of Frauds:** PAROL CONTRACT: MOTION TO DIRECT VERDICT. Where no objection is made to evidence of an oral contract claimed by defendant to be within the statute of frauds, and there is evidence tending to prove a part payment on the contract, a motion made at the close of the evidence for plaintiff to direct a verdict for the defendant on the ground that the contract was within the statute was properly overruled.
2. **Appeal:** OBJECTIONS TO EVIDENCE. In order to save a question as to the reception of evidence for review by the supreme court, objection to such evidence must be made in the trial court.
3. **Landlord and Tenant:** ACTION BY TENANT. Where a landlord and tenant, on the share rent plan, were the owners of a crop of corn, and the tenant alone brought an action to recover for damages for a breach of a contract to purchase the whole crop, and the landlord testified that the tenant was authorized to sell the crop, and that he had authorized the action to be brought in the name of the tenant for both interests, a motion to dismiss the suit, as not being brought by the real party in interest, was properly overruled.

APPEAL from the district court for Valley county: BAYARD H. PAINE, JUDGE. *Affirmed.*

E. L. Vogeltanz, for appellant.

Davis & Davis, contra.

Heard before LETTON, DEAN and DAY, JJ., ALLEN and BEGLEY, District Judges.

LETTON, J.

Action for damages for breach of contract. Plaintiff recovered judgment and defendant appeals.

Plaintiff alleges that he and defendant in May, 1919, entered into a verbal contract whereby defendant agreed to furnish plaintiff White Champion sweet corn for seed and to purchase from plaintiff all corn of that variety grown by him from said seed during the season of 1919, and plaintiff agreed to sell and deliver to defendant all

such corn raised by him during that year; that defendant agreed to pay $5 a hundred pounds for such corn, payable when the corn was ready for market; that in October, 1919, defendant paid plaintiff $50 on the contract price; that plaintiff sacked the corn in sacks furnished by defendant and offered to deliver it according to the terms of the agreement, but defendant refused to accept the corn or any part thereof; that the market price was much less at that time than $5 a hundred, and the difference between the market value and the price defendant agreed to pay was $419.65, for which sum plaintiff prays judgment.

The answer is practically a general denial.

A number of errors are assigned; the complaints in substance being that the verdict is not supported by the evidence, that the action was not brought by the proper party, and that the alleged contract was within the statute of frauds.

1. The evidence is directly conflicting with respect to the making of the contract. If we were sitting as triers of fact we might take the contrary view from that taken by the jury, but there was sufficient evidence to carry the case to the jury. The conflict was resolved by it in favor of the plaintiff. The verdict depended upon the credibility of the witnesses. Under these circumstances we cannot interfere with it.

2. The evidence showed that the plaintiff was a tenant of one Jackman, who was entitled to a one-half interest in the crop or its proceeds. Jackman testifies, however, that the contract was made for their joint benefit, and that he had authorized plaintiff to bring the action in his own name to recover for the interest of both. This testimony was undisputed. Under these circumstances plaintiff had the right to maintain the action.

3. With respect to the statute of frauds, no objection was made by defendant to the introduction of proof of the oral contract. Furthermore, if the facts are as related by plaintiff, the contract was partly performed by

the payment of $50 upon the contract by defendant in October. It may be questioned whether a contract of the nature of that entered into by plaintiff is a contract of sale, or a contract for work and labor, but it is unnecessary to decide this question.

We find no reversible error in the record. The judgment is therefore

AFFIRMED.

CYRUS E. SMITH ET AL., APPELLANTS, V. CHARLES BERTRAND, APPELLEE.

FILED DECEMBER 21, 1921. No. 21835.

1. **Brokers:** SALE OF LAND. A letter which merely states the terms upon which the owner is willing to sell his land does not empower the person addressed to execute a contract in the owner's name for the sale of the land. *Ross v. Craven*, 84 Neb. 520.
2. ———: ———: OFFER: ACCEPTANCE. It is elementary that an acceptance of a written offer to sell land, in order to create a contract, must conform strictly to the terms of the offer. *Ross v. Craven*, 84 Neb. 520.
3. **Ratification** by defendant of an alleged contract for the sale of land is not shown in the record.

APPEAL from the district court for Franklin county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

John F. Cordeal, for appellants.

J. L. McPheely, contra.

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS (E. P.), District Judge.

DEAN, J.

Plaintiffs sued for the specific performance of an alleged contract for the sale of land. The court dismissed the suit, and they appealed.

Substantially these facts were developed at the trial: In 1918 defendant was the owner of a quarter section of

farm land in Hitchcock county. September 16, 1918, W. S. Graves, a real estate agent, sent this letter to Bertrand:

"Palisade, Neb. Sept. 16, 1918. Mr. Charles Bertrand, Upland, Neb. Dear Sir: Do you own or control the S. W. ¼ of 7-3-32? If so, is it on the market? Would like to have it on my list, as I am making out a new list. Inclosed find stamp and a description card. Please return card and I will try and get your price. My commission will be $1.00 per acre. Please mention terms. Yours truly, W. S. Graves."

To which Bertrand replied:

"Upland, Neb. Sep. 17-1918. Mr. W. S. Graves, Palisade, Neb. Dear Sir: Your letter inquiring of my land, the S. W. ¼ 7-3-32 at hand. Will say I will sell for $4,000 net to me, 2,000 down, balance 5 years at 7% This offer is for 90 days. Resp., Charles Bertrand."

September 19, 1918, plaintiffs offered $4,500 for the land, through Graves, who drew up a sale contract. The contract is a lengthy instrument. It provides, *inter alia,* that plaintiffs shall pay $500 earnest money as a part of the purchase price, and $2,500 on approval of abstract and deed, the remaining $2,000 to be paid by a $2,000 note and mortgage due on or before five years, with 7 per cent. annual interest. It provided, too, that defendant should have 30 days in which to procure and furnish an abstract and execute a deed. A reasonable time was reserved in the contract for plaintiffs to examine the title. Provision was also made "that all papers and money in connection with this transaction shall be deposited in escrow with the Frenchman Valley Bank of Palisade, Nebraska, and both parties hereof authorize said bank to deliver money and papers" to the respective parties as designated in the contract. Graves signed defendant's name by himself as "special agent." Plaintiffs also signed the instrument.

September 19 Graves wired defendant that he had sold the land in suit pursuant to defendant's letter of Septem-

ber 17. The next day Graves wrote defendant requesting him to send the abstract "to the Frenchman Valley Bank, Palisade, Neb., and we will have extended." September 24, 1918, defendant wrote Graves that his wife "insists on not wanting to sign the deed." December 21, 1918, Graves went to Upland and saw defendant. This was two or three days after the expiration of the offer contained in defendant's letter of September 17, 1918. On that date Graves tendered the $2,000 payment which is referred to in the contract. Respecting this interview Graves testified that, with respect to the tender, defendant said "he would not take it, he would not accept it," and that in the same conversation defendant said, "My wife won't sign the deed." Graves did not tender a note or a mortgage to defendant. The record does not disclose any authority given by defendant to Graves to do anything with respect to the land other than that contained in his letter of September 17, 1918.

It is argued that defendant's letter of September 17 authorized Graves to enter into a written contract with plaintiffs, in defendant's behalf, for the sale of the land. We do not think so. It plainly appears from a comparison of the letter, and the contract as prepared by Graves, that the latter far exceeded the terms submitted in Bertrand's letter. The contract assumed to provide that the unpaid purchase price should be payable on or before five years, and it provided for a deposit of the papers in escrow. All of this and other provisions in the contract, as prepared by Graves, were unauthorized by defendant. And, besides, no tender of a note or mortgage was made at any time to Bertrand. In passing, it may be noted that the alleged tender was not made within the time specified in the letter of September 17, 1918. As pointed out in the decree of the learned trial court, the instrument purporting to be a contract between plaintiffs and defendant was not an acceptance of defendant's offer, but was in fact a counter offer, which was refused by defendant.

It is elementary that an acceptance of a written offer to sell land, in order to create a contract, must conform strictly to the terms of the offer. A letter which merely states the terms upon which the owner is willing to sell his land does not empower the person addressed to execute a contract in the owner's name for the sale of the land. *Ross v. Craven*, 84 Neb. 520. Ratification by defendant of an alleged contract for the sale of land is not shown in the record.

The judgment of the district court is right, and is in all things

AFFIRMED.

LEVI FOY CARPENTER, APPELLANT, V. FRANK BENNETT, APPELLEE.

FILED DECEMBER 21, 1921. No. 21878.

1. **Notes: DEFENSE: FAILURE OF CONSIDERATION.** Absence or failure of consideration of a bill or note is a matter of defense as against any party who is not a holder in due course.
2. **Failure of Proof.** The conduct and demeanor of the witnesses and their testimony failed to convince the jury that there was any consideration for the note or that the plaintiff was a holder in due course.
3. **Appeal: REVIEW.** On a clear statement of fact being detailed and submitted to a jury, this court will not disturb their finding unless it is clearly wrong.
4. ———: ———. When plaintiff has his entire theory on the facts submitted to a jury, he cannot be heard in complaint of the verdict rendered upon sufficient competent evidence, and is bound thereby.

APPEAL from the district court for Dodge county: A. M. POST, JUDGE. *Affirmed.*

Abbott, Rohn & Robins and *John L. Cutright*, for appellant.

Joseph E. Daly, contra.

Heard before MORRISSEY, C. J., ALDRICH and FLANSBURG, JJ., HOSTETLER and MORNING, District Judges.

ALDRICH, J.

This is an action at law upon a certain promissory note executed and delivered by the defendant to Brandt C. Carpenter, at Chicago, Illinois, on or about May 8, 1919, payable six months after date, which note was indorsed in blank by Brandt C. Carpenter, and plaintiff alleges that he is a holder in due course. Judgment and verdict for defendant. Plaintiff appeals.

There are two main issues tendered for consideration in this case: First. What was the consideration for the note as between the original parties? Second. Was the plaintiff a holder in due course? Upon these issues will be determined the liability of the defendant.

The defendant was induced to sign and execute the note in question in order to become a branch agent of the National Honor Roll Company. Instead of making the note payable to the company, Brandt C. Carpenter was named as payee. The plaintiff is the father of Brandt C. Carpenter, the payee, and holds the note as indorsee.

The National Honor Roll Company was organized to collect photographs and information of the men in the military service during the late war, publish a book for each county containing such material, and distribute the same through its branch managers for the price of $12.50, of which $2.50 was to be a commission by the provisions of the contract between the company and the branch manager. The latter was to purchase at the time of the contract 100 books at the price of $10 each, which amount was to be paid in cash. An examination of the record, which sets forth the facts in this regard, discloses that the National Honor Roll Company rendered no consideration for this note.

The defendant called at the offices of the National Honor Roll Company, and there met the secretary of the company, who introduced him to one Brandt C. Car-

penter, a branch officer in the company. Mr. Carpenter represented that the company was financially responsible and in good condition, but that he could not act in the absence of Mr. Whiting, the sales manager. It will be noted that the defendant claims and introduced evidence tending to prove that the note and mortgage were executed contemporaneously and were given in consideration of the appointment of defendant as managing agent of the National Honor Roll Company for Dodge county, Nebraska. Brandt C. Carpenter was named as payee at the request of Mr. Whiting, the sales manager. The jury found on this issue in favor of the defendant. From the record presented in this case, the jury have the right to determine from the appearance and demeanor of the witnesses on the stand and from all the surrounding circumstances of the case which witnesses are worthy of credit and which are not. Estimated by this standard, the jury evidently did not believe the testimony of the witnesses for the plaintiff in this regard. We do not feel warranted in disturbing that finding. *Murphey v. Virgin,* 47 Neb. 692. Where there is an issuable fact as to how a case should be determined, it is error to refuse to submit it to the jury. *McKinney v. Hopwood,* 46 Neb. 871; *Van Etten v. Edwards,* 48 Neb. 25. "Where there is competent testimony tending to support a defense properly pleaded, it is error for the trial court to direct a verdict for the plaintiff." *Continental Lumber Co. v. Munshaw & Co.,* 77 Neb. 456.

Other issues have been discussed by counsel for plaintiff, to which we have not referred. We did not discuss them for the reason that it did not appear there was any consideration for the note, and for the further reason that the evidence and circumstances did not show the plaintiff to be a holder in due course. The parties had the benefit of a trial by jury on these matters and they were determined in defendant's favor. We have examined the record and instructions given by the court and find

there were no prejudicial errors occurring at the trial. The verdict and judgment are sustained by the law and the facts.

AFFIRMED.

ELMONT PRESTON V. STATE OF NEBRASKA.

FILED DECEMBER 21, 1921. No. 22279.

1. **Adultery: EVIDENCE.** Mere disposition and opportunity to commit adultery are not alone sufficient to justify a conviction, but there must be circumstances inconsistent with any other reasonable hypothesis.
2. **Evidence** examined and *held* not to justify a conviction of adultery.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

John A. Miller and *Thomas F. Hamer,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., ALDRICH and FLANSBURG, JJ., ALLEN and MORNING, District Judges.

ALDRICH, J.

In a prosecution by the state in the district court for Buffalo county, Elmont Preston, the defendant, was convicted of sustaining adulterous relations with one Margery Hays, an 18-year-old girl, and was sentenced to imprisonment in the county jail for 60 days. The defendant below, plaintiff in error here, presents the record of his conviction to this court for review.

After a careful and painstaking examination of the record in this case, we are unable to find any evidence sufficient to justify the verdict of guilty rendered by the jury. It is admitted that Margery Hays gave birth to an illegitimate child on January 6, 1921; then she must

necessarily have had illicit relations with some one on or about the 1st of April, 1920. The information does not charge that defendant sustained adulterous relations at that date, but charges such acts were committed between September 1, 1920, and February 25, 1921. The defendant is not charged with the paternity of the child. The fact that an illegitimate child was born as a result of intercourse had before the time charged in the information tends to show the girl's adulterous disposition, but it is not charged or proved that defendant was in any way responsible for her misfortune. The record also shows that defendant was seen walking and riding with Margery Hays on several different occasions, and that he visited her home during the fall of 1920, but there is no testimony by any witness that any misconduct was noticed.

We are aware of the rule of this court that it is not necessary, to establish adultery, to have the testimony of a disinterested eye-witness. "Adultery, like any other fact, may be established by circumstantial evidence." *Reinhardt v. State,* 101 Neb. 667. In *Blue v. State,* 86 Neb. 189, this court held: "Without determining whether in all cases in a prosecution for adultery the unsupported evidence of one of the parties will justify the conviction of the other party when fully and circumstantially contradicted by the defendant and another apparently credible witness, under the circumstances shown in the record in this case, it is held that the wholly unsupported evidence of the complaining witness will not justify the conviction of the defendant."

Margery Hays did not testify at all in the instant case, when her testimony seems to have been necessary to make a record containing sufficient evidence to sustain the conviction.

In connection with the rule quoted from *Blue v. State, supra,* we would go further and hold that mere disposition and opportunity to commit adultery are not alone sufficient to justify a conviction, but there must be cir-

cumstances inconsistent with any other reasonable hypothesis. *State v. Trachsel,* 150 Ia. 135. See, also, *State v. Taylor,* 160 Ia. 328; *State v. Wiltsey,* 103 Ia. 54. "The circumstances must be such as will lead the guarded discretion of a reasonable man to the conclusion that the offense has been committed (here *State v. Way,* 5 Neb. 283, is cited in the note), and should be so cogent as to exclude every reasonable hypothesis of guilt. If the facts shown can be reconciled with innocence, they are insufficient to sustain a conviction." 2 C. J. 22, sec. 44.

We are fully convinced that the verdict rendered in this case was based on suspicion, or, perhaps, prejudice, and it should not be allowed to stand.

Counsel for defendant cite as error alleged misconduct of the prosecuting attorney during the trial of the case. In passing, we will say that there was some misconduct which is highly reprehensible, and was no doubt prejudicial; but, in view of our decision of the case, it need not be considered.

The case is

REVERSED.

Morrissey, C. J., dissents to the conclusion.

WILLIAM J. MCGINLEY, APPELLANT, V. MARTHA FORREST, APPELLEE.

FILED DECEMBER 21, 1921. No. 21763.

Vendor and Purchaser: DESTRUCTION OF BUILDINGS: LIABILITY. Where a contract for the sale of land is entered into containing no express provision as to who should bear the loss in case of the destruction of the buildings thereon, or that the vendor should deliver the land with the buildings thereon in the same situation as when the contract was made, or words of similar import, and the buildings on the land, through no fault of either party, are accidentally destroyed by fire pending the contract and before conveyance, the vendor having at the time of the sale a fee simple title and there being no default on the part of the purchaser, the loss in equity will fall upon the purchaser, he being regarded as the real owner.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

Claude S. Wilson and *Albert S. Johnston,* for appellant.

C. C. Flansburg, contra.

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

DAY, J.

This is an action for specific performance of an executory contract for the sale of certain lands, brought by the assignee of the purchaser against the vendor. The plaintiff prayed for a decree of specific performance, with an abatement of the purchase price to the extent of the value of a house upon the premises, which had been destroyed by fire after the date of the contract. The plaintiff also prayed that, should specific performance with abatement from the purchase price be denied, the defendant be decreed to return to the plaintiff the purchase money which had theretofore been paid upon the contract. The trial court entered a decree for the plaintiff for specific performance, and allowed him an abatement of the purchase price to the extent of the insurance money which the defendant had collected. From this judgment the plaintiff appeals. He now asks that this court, upon a trial *de novo,* grant specific performance of the contract, and that it decree the loss occasioned by the destruction of the house to fall upon the vendor, and that the purchase price be abated to the extent of the full value of the house.

The facts out of which the controversy arises are as follows: On July 2, 1919, the defendant, Martha Forrest, who was the fee owner of the W.½ of the N. W.¼ of section 11, township 9, range 7 east of the sixth p. m., in Lancaster county, Nebraska, entered into a written contract wtih one Jacob M. Miller, by the terms of which she agreed, upon the payment of the purchase price by

said Miller in accordance with the provisions of the contract, to convey to him said lands by warranty deed free and clear of all encumbrance. The contract provided that the purchase price to be paid by Miller was $16,400, payable as follows: $1,000 cash at the time of the making of the contract, $5,400 on or before March 1, 1920, and Miller to execute a mortgage for $10,000 upon the lands due in ten years with interest at 5½ per cent. payable semi-annually from March 1, 1920, with the privilege of paying instalments thereof on any interest paying date. The contract further provided that its covenants and agreements should be binding upon the heirs, executors, administrators, and assigns of the respective parties. The contract was assigned by Miller to William J. McGinley, the plaintiff herein. At the time of the making of the contract the land was leased to a tenant until March 1, 1920, and full possession was not to be given to the purchaser until that date. He was, however, accorded the privilege of entering upon the stubble land and sowing fall wheat. This right he exercised. At the time of the execution of the contract there was on said premises a frame house, estimated to be worth, by the plaintiff's witnesses, from $2,000 to $3,500, and by defendant's witnesses as low as $500. The defendant had insurance upon the building in the sum of $500, which, after the destruction of the house by fire, was paid to the defendant. The house was destroyed by fire on January 15, 1920, through no fault or neglect of either of the parties. The defendant at the time was the owner of a fee simple title, and was in position to convey the land in accordance with the terms of his contract, and, at the time, there was no default of the contract on the part of the purchaser. The sole question presented by the record is as to which of the parties, vendor or purchaser, shall suffer the loss of the building destroyed by fire. Of course, it would be competent for the parties to agree as to which of them should bear the loss in case of an accidental destruction of the property, but in the case before

us the contract is silent upon that subject.

While the authorities are not entirely uniform, the great weight of judicial decisions, as well as text-writers, upon this subject support the view that where a contract for the sale of land contains no express provision as to which party shall bear the loss in case of destruction of the buildings thereon before the final delivery of the deed, or that the vendor should deliver the land with the buildings thereon in the same situation as when the contract was made, or words of similar import, and the buildings on the land are accidentally destroyed by fire, through no fault of either party, pending the contract and before conveyance, the vendor having at the time of the sale a fee simple title and there being no default on the part of the purchaser, the loss in equity, as upon a bill for specific performance, will fall upon the purchaser, he being regarded as the real owner. All of the decisions agree that the loss should be borne by the owner, but there is some diversity of opinion upon the question as to which party, vendor or purchaser, is to be regarded as the owner. The cases supporting the majority rule are based upon the theory that equity regards that as done which ought to be done, and that, when a valid and enforceable contract for the sale of land has been made, equity will regard the vendor as holding the title for the benefit of the purchaser, and the purchaser as holding the unpaid purchase money for the benefit of the vendor, and that, therefore, the purchaser must be regarded in equity as the real owner.

The leading case in which the rule is announced is *Paine v. Meller,* 6 Ves. Jr. (Eng.) *349, and this rule has been followed by many state decisions in this country, among them the following: *Marks v. Tichenor,* 85 Ky. 536; *Skinner & Sons Co. v. Houghton,* 92 Md. 68; *Thompson v. Norton,* 14 Ind. 187; *Lombard v. Chicago Sinai Congregation,* 64 Ill. 477; *Manning v. North British & Mercantile Ins. Co.,* 123 Mo. App. 456; *Marion v. Wolcott,* 68 N. J. Eq. 20; *Sutton v. Davis,* 143 N. Car. 474; *Dunn*

v. Yakish, 10 Okla. 388; *Woodward v. McCollum,* 16 N. Dak. 42; *Reed v. Lukens,* 44 Pa. St. 200; *Wetzler v. Duffy,* 78 Wis. 170; *Brewer v. Herbert,* 30 Md. 301; *Sewell v. Underhill,* 197 N. Y. 168, also, note under *Sewell v. Underhill,* 27 L. R. A. n. s. 233; 39 Cyc. 1641; 27 R. C. L. 555, sec. 293.

In *Lombard v. Chicago Sinai Congregation, supra,* the court pointed out that there is a difference in the rights and relations of the parties in the ordinary case of an executory contract for the sale of land at law and in equity, and it was held that in law the contract conferred upon the vendee a mere right of action, the estate remaining in the vendor and the unpaid purchase money remaining that of the vendee. In equity, however, the estate from the making of the contract is regarded as the real property of the vendee, attended by most of the incidents of ownership, and the purchase money as that of the vendor. Whether there is a sound distinction to be drawn between the rights of the parties in law or in equity, it is not necessary to determine, but it is proper to note that in some of the decisions in which the minority rule is announced the actions were at law.

The rule above announced is not applicable unless there is an ability, as well as a willingness, on the part of the vendor to convey, and it has been held that where the vendor is in a position where he cannot make title according to the contract, and the property is damaged, the loss will fall upon the vendor. The case of *Kinney v. Hickox,* 24 Neb. 167, cited by the appellant, falls within the exception to the rule. In that case at the time of the loss the vendor was not in a position to convey good title. There were certain liens upon the premises which he could or would not remove, among them being taxes, a judgment, and a mechanic's lien. Other cases cited by appellant were either law actions, or within the minority rule.

No claim is made by the defendant that there was an improper application of the money collected on the insurance policy, and that question will not be discussed

further than to say that, under the circumstances established, it would seem that the trial court was correct in abating the contract purchase price to the extent of the insurance money collected.

The decree of the district court is right, and the judgment is

AFFIRMED.

Dean, J., dissenting.

While the authorities conflict, in respect of the sole question which is presented by the record, it does not appear that the great weight of authority supports the rule adopted by the majority. I respectfully submit that a drastic rule, which is admittedly based on a legal fiction, has been adopted, and a reasonable and well-recognized rule of law, which is applicable to the facts, has been ignored.

When the rule, adopted by the majority, is applied in the present case to the facts before us, its injustice is apparent. The contract, as made by the parties, is so simple in form and so clear in expression that it affords no room for strained and technical interpretation. It should be enforced only as made. An element should not be interpolated that was not in the minds of the parties when the contract was made. When the buildings were destroyed, the time fixed by the parties for the delivery of the deed and property to the vendee had not yet arrived. True, as the opinion suggests, the parties might have agreed, in their contract, as to which of them should suffer the loss of the building in case of fire or other casualty. A sufficient answer is that they made no such agreement. In the language of the opinion, "the contract is silent upon that subject." Is not the law fulfilled when the contract is enforced to which the parties themselves gave voice? The main opinion, after observing that the contract contains "no express provision as to who should bear the loss," straightway proceeds to impose the loss, for which the parties made no provision, upon the vendee. This was done by the grace of a legal

fiction which is said to have originated in England, and which has been adopted in some of the states. The rule is not properly applicable to the facts before us, nor is it supported by the cited English case.

It is elementary that, in the absence of fraud or of mistake or of ambiguity in the terms of a contract, the duty of the court is fully accomplished when it enforces contractual obligations according to the plainly expressed provisions of the contract. The court should not supply material stipulations nor in any case make a contract for the parties. Clearly, the vendor, who was in possession, should be compelled to account to the vendee for the reasonable value of that which he contracted to deliver but did not deliver. From the viewpoint of natural justice, as some law-writers express it, and from a practical viewpoint and for reasons that are obvious, the party in possession should be holden for the loss. I respectfully submit that the rule to which the majority opinion commits the court has been adopted, not because it appeals to the reason or to the conscience, nor because it is right, but merely because the weight of authority is said to be on that side. The weight of evidence is not determined by counting the witnesses, and by the same token the better rule is not always determined by counting the authorities.

When the authorities conflict as between two opposing rules of law, the court should choose the rule that more nearly accords with reason and with settled principles of equity. The question before us is new in this state, but it has been discussed at some length in other states. In *Wicks v. Bowman*, 5 Daly (N. Y.) 225, it was held that, while it may be equitable and just that the vendee should bear the loss where the building is burned down after he enters upon the possession, "it is not just nor equitable to impose it upon him whilst the vendor is in possession of the premises."

Sewell v. Underhill, 197 N. Y. 168, cites and approves the rule of law announced in the *Wicks* case. But the decision in the *Sewell* case turned on another point, as

the discussion of the facts in the body of the opinion discloses. It is there said: "The title was accepted and the contract was consummated, prior to the fire, and what was deferred was the matter of placing the deed and the mortgage upon the records; a formality which it was agreed should operate as a delivery, on either side. There is the further feature of this case that the plaintiff, as vendee, went into the possession of the premises upon the execution of the contract, not as a tenant paying rent, but as their equitable owner and entitled to their beneficial enjoyment." The *Sewell* case is cited in the majority opinion, but, in view of the facts in that case, it plainly appears that it does not support the views adopted by the majority in the present case.

Thompson v. Gould, 20 Pick. (Mass.) 134, involved a parol agreement for the purchase of land with its appurtenances. Before a deed was given or tendered the house was destroyed by fire, and it was expressly held, as disclosed in the syllabus, that the vendee "was entitled to recover back the money, on the ground of a failure of the consideration." In the body of the opinion it was observed that the contract could not be enforced by the vendor, even though it had been commenced in a court of equity, because, the house having been destroyed, the vendor was no longer able to perform his part of the contract. The court then made the terse observation that no reason has been given, nor can be given, why the same principle that applies to the sale and purchase of personal property, that has been destroyed before delivery, should not be applied to real estate. It was declared that there can be no distinction between the two classes of property in this respect.

Wells v. Calnan, 107 Mass. 514, involved facts similar to those before us. Judge Gray, who wrote the opinion for the court, held that the vendee's agreement to pay the purchase price contemplated the tender of a deed of the whole estate, including both the land and the buildings, and, the latter having been wholly destroyed by fire be-

fore the day agreed upon for the conveyance, the vendor did not and could not tender such a conveyance as he had agreed to make or as the defendant vendee was bound to accept, and could not therefore maintain any action against the vendee upon the agreement.

In *Phinizy v. Guernsey,* 111 Ga. 346, 50 L. R. A. 680, it was held that to require a vendor to pay damages to his vendee, for a failure to convey property which subsequent to the execution of the contract of sale was destroyed by fire, is no greater hardship than to require a vendor to pay damages on account of his having ignorantly, though honestly, sold something which he did not own, but which he believed was his own. In *Conlin v. Osborn,* 161 Cal. 659, it was held that where improvements are destroyed by fire, while in the vendor's possession, he is excused from further performance of the contract, but in such case he can neither retain purchase money paid nor can he enforce the collection of money remaining unpaid, and the vendee may rescind the contract and recover back money that has been paid or deposited under the contract. The court further observed that, whatever may be the rule in other states, the rule is settled in California. Besides the foregoing authorities the following cases seem to support the, so-called, minority rule: *LaChance v. Brown,* 41 Cal. App. 500; *Wilson v. Clark,* 60 N. H. 352; *Powell v. Dayton, S. & G. R. R. Co.,* 12 Or. 488; *Good v. Jarrard,* 93 S. Car. 229; *Huguenin v. Courtenay,* 21 S. Car. 403, 53 Am. Rep. 688; *Smith v. Cansler,* 83 Ky. 367; *Gould v. Murch,* 70 Me. 288, 35 Am. Rep. 325.

Paine v. Meller, 6 Ves. Jr. (Eng.) *349, the leading English case, as announced in the majority opinion, is discussed by Chief Justice Daly in the *Wicks* case, and it is there pointed out by the distinguished chief justice that the English rule, announced by Lord Eldon in the *Paine* case, was "where the purchaser had expressed himself satisfied with the title, but before the conveyance was prepared the houses were destroyed by fire." Lord Eldon, with respect to the premises, and the purchaser's

relation thereto, expressly declared: "They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heir." And that: "The houses being burnt before a conveyance, the purchaser is bound, if he accepted the title." It appears that in England the vendee prepares the deed, instead of the vendor, as with us, and presents it to the vendor for execution. So that, if the vendee was "satisfied with the title," it was incumbent on him at once to prepare and present the title deed to the vendor for execution. If he did not do so but delayed, and, in the meantime, loss occurred, such loss was rightfully his. In that view of the facts, and in view of the following English citation, it appears that the *Paine* case is not an authority that may properly be invoked in support of the main opinion. Taking the language of the *Paine* case, in its usually accepted sense, it plainly appears that the vendee was the owner of the real estate for every purpose known to the law.

Stent v. Bailis, 2 P. Wms. (Eng.) 217, 220, is the English case above referred to. It bears date as of 1724. The head note, and the opinion throughout, both bear the imprint of blunt and rugged honesty. The head note reads: "Against natural justice that any one should pay for a bargain which he cannot have." In the body of the opinion is this observation: "If I should buy an house, and, before such time as by the articles I am to pay for the same, the house be burned down by casualty of fire, I shall not in equity be bound to pay for the house, and yet the house may be built up again."

I fear the opinion of the majority contains possibilities of substantial embarrassment to those who may hereafter buy real estate in any form, whether it be a home, a business property, or lands, that have not heretofore obtained in this state. If the vendee must suffer loss by fire, after execution of the contract and while the property is in possession and under control of the vendor, unless he protects himself in advance by his contract, it may be that

the ingenuity of those who delight in legal fictions will bring about a condition which will compel the vendee, not only to protect himself, in advance, against such loss by fire, but as well from loss arising from judgment liens that may be obtained after the execution of the contract and before delivery of the deed and of the land, and perhaps, too, from claims of a spouse or of heirs, where a vendor dies in the interval between the date of the contract and the date of such delivery.

Some legal writers refer to the so-called English rule as a legal fiction. It is well named. Legal fictions are the bane of the law. They should not be permitted to propagate further in this state. Why should we lift the lid from a Pandora box of legal plagues? There is a better way pointed out in the wholesome rule that prevails in Maine, New Hampshire, Massachusetts, New York, California, Oregon, South Carolina, Georgia, and Kentucky. I submit the "great weight of authority" in this country can scarcely be claimed for a rule of law which does not find support in the jurisdictions just cited. Nor should *Stent v. Bailis,* 2 P. Wms. (Eng.) 217, be lost sight of. We should adhere to the reasonable rule of law there announced. Where a vendor contracts to deliver an entire estate, it is clear that his obligation is unfulfilled if he delivers only a part of it. Lord Bacon said: "Chancery is ordained to supply the law, not to subvert the law." 2 Story, Equity Jurisprudence (14th ed.) title page.

An argument that is advanced in support of the conclusion of the majority opinion is that, if a man buys real estate for an agreed price and pays a part of the earnest money and agrees to pay the remainder on a given date, he is entitled to his bargain, even though in the meantime the value of the land should have appreciated. Even so. The thing is in existence. The land contracted for is there for delivery, and under the contract the buyer is, of course, entitled to that which he bought. If the land depreciated in value he would, of course, be compelled to

pay for it, no matter what the depreciation, because the commodity that he bought, all of it, is there for delivery. The argument is not formidable. It is not even plausible, and much less is it conclusive. To illustrate: A. sells to B. for sufficient consideration land bordering on the Missouri river. The contract provides that B. shall pay the purchase price, or the unpaid part thereof, as the case may be, on a future named date, and on that date delivery of the deed and the land is to be made to B. On the day fixed for delivery A. sets out with B. to the farm to deliver to him his purchase. Upon arrival they find that on the preceding day the river changed its course, as is its wont at times, and where the land was, there is now nothing but a gurgling swirl of yellow water. Upon whom shall fall the loss by this act of God? Shall it be the loss of A. who was in possession and who contracted to deliver and now has nothing to deliver and therefore cannot fulfil his contract? Clearly the loss will fall on A., the vendor, because every vestige of that which he agreed to deliver, the *res,* has been destroyed. But if only that part of the land upon which the buildings were situate was destroyed, and if the vendee did not provide against loss from so calamitous an event in the contract, under the rule announced by the majority, the loss of the engulfed buildings would be his. Reduced to its last analysis there is something about the rule, as applied to the facts in the present case, that makes it appear almost ridiculous. Clearly a doctrinaire's rule of law, a legal fiction its progenitor, has been ingrafted upon the jurisprudence of Nebraska.

A contract to deliver an entire estate can no more be fulfilled by delivery of a part of the estate than it can be fulfilled by failing to deliver any part of the estate. It is nowhere asserted that the contract is ambiguous. But, even if it were, the construction that the parties themselves placed upon it would prevail. It appears, in the majority opinion, that the vendor collected the insurance, a trifling sum, thereby asserting an act of ownership.

But, by the grace of judicial compulsion, he paid the insurance money to the vendee, who was not a party to the insurance policy. In view of the fact, however, that, as announced in the main opinion, the sole question is, as to which of the parties shall suffer the loss, the question of insurance is a mere passing incident.

For the reasons herein expressed, I respectfully dissent from the judgment of the majority of the court.

MAMIE BRISTOL, APPELLEE, V. CLARENCE M. BRISTOL, APPELLANT.

FILED DECEMBER 21, 1921. No. 21834.

1. **Divorce:** EXTREME CRUELTY. "There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty." *Myers v. Myers*, 88 Neb. 656.
2. ———: ALIMONY. Alimony, as that term is technically understood, may not be allowed to the husband out of the wife's separate property, in an action for dissolution of the marriage; but where it is shown that the accumulated property in the name of the wife is the result of the joint earnings of the parties, the court will inquire as to the source of the accumulated property, and, in the exercise of a reasonable discretion, will divide the property between the parties, awarding to the husband his equitable portion thereof, and may enter a judgment in favor of the husband for the equitable amount found to be due him.

APPEAL from the district court for Keith county: CHARLES E. EDRED, JUDGE. *Affirmed as modified.*

Beeler, Crosby & Baskins and *L. A. DeVoe*, for appellant.

Halligan, Beatty & Halligan, contra.

Heard before LETTON, DEAN and DAY, JJ., DILWORTH and CLEMENTS (E. P.), District Judges.

DAY, J.

This is an action for divorce by Mamie Bristol against

Clarence M. Bristol, on the ground of extreme cruelty. The answer of the defendant denied the charges against him, and prayed that a divorce be denied. The answer also alleged that the plaintiff's property had been greatly enhanced in value as the result of the joint earnings of the parties during the marriage, and prayed that, in the event a divorce was granted, an accounting be taken of the property in the possession of the plaintiff representing the joint efforts of the parties during the marriage, and that he be awarded his equitable portion thereof. The trial court granted the plaintiff a divorce, and also found that a certain automobile truck, carpenter tools, and liberty bonds of the value of $400, all of which were in the possession of the defendant, belonged to the defendant; and, in addition to the above-mentioned items, the trial court awarded the defendant a judgment for $600, and decreed the same "a charge upon the said property of the plaintiff." From this judgment the defendant appeals, complaining that the evidence is not sufficient to support a decree of divorce, but also asking that, if the decree of divorce be sustained, this court upon a trial *de novo* award him a much larger sum as his equitable share of the joint earnings of the parties than that allowed by the trial court. The plaintiff filed a cross-appeal, in which she complains that the evidence is not sufficient to sustain a judgment awarding the defendant any sum whatsoever out of the joint earnings of the parties, and further complaining that in any event the court should not have decreed the amount to be a lien upon her property.

The main questions presented by the record involve an examination of the evidence. It appears that the parties were married on May 4, 1914, and lived together for a period of a little more than five years. For the first two years of their marriage everything went satisfactorily, and they got along well together and prospered.

At the time of the marriage the defendant was 48 years of age, and divorced from a former wife. The plaintiff

was a widow, the mother of several children, two of whom, Robert and Vina, aged, respectively, 15 and 11 years, lived with their mother, and after the marriage made their home with the plaintiff and the defendant. The children, according to the claim of the defendant, were the cause, directly or indirectly, of most of the trouble. The testimony indicates that the defendant, without any apparent good reason, formed a great dislike to Vina, the most serious objection being that she talked too much; that she would continually "butt in" to every conversation. Defendant testifies: "I got tired of it, and couldn't bear to have her around me." From matters which appear in the record as trivial in the extreme, he carried his eccentric dislike to Vina to the extent of refusing to eat anything she had cooked, and on one occasion refused to eat pop-corn which she had prepared. He treated her as an entire stranger; refused to ride in the automobile with her; and on one occasion, when the roads were muddy and she was unable for that reason to use her wheel in going to school, he refused to allow her to ride with him, and, although he passed her about a mile from the schoolhouse, trudging through the mud, he did not invite her to ride with him. The conduct of the defendant toward the daughter was a source of great mortification to the plaintiff, and led to some remonstrance on her part as to his actions. As time went on the defendant manifested a sullen and grouchy disposition toward the plaintiff. He refused to take her to town, or to church, or any place else, especially if the children were to go along. In one of his sullen moods defendant took his gun and announced that he was going to kill himself. On another occasion, following some words, he went out after dark, saying he was going to kill himself and end it all. He fired off his revolver, and remained out all night, appearing, however, the next morning for breakfast. The conduct of the defendant towards the plaintiff and her children grievously wounded the plaintiff's feelings, and so preyed upon her mind that she became

nervous and sick, and was confined to her bed for a period of more than six weeks.

We deem it unnecessary to go into further detail as to the actions of defendant, as enough has been said to illustrate the general condition of the home life. There is no testimony that the defendant was guilty of physical abuse to either the plaintiff or the children, but we are entirely satisfied from the record that his unjustifiable conduct was such as to utterly destroy the legitimate ends and objections of matrimony, and constitute extreme cruelty as that term has been defined by the repeated decisions of this court. For cases involving this principle, see, *Myers v. Myers,* 88 Neb. 656, and *Miller v. Miller,* 89 Neb. 239.

We come now to a consideration of that branch of the case affecting the property rights of the parties. It appears that at the time of the marriage the plaintiff was possessed of considerable property. She was the owner of a farm of 320 acres in Keith county, an 80-acre farm in Deuel county, a house with 2 acres of ground in the town of Big Springs, a school land lease on 160 acres, 27 head of cattle, 12 horses, and household goods of moderate value. She was indebted in the sum of $200. The defendant, who had been conducting a garage, owned two second-hand automobiles of the aggregate value of $500. After the marriage, and with the full approval of the plaintiff, the parties made their home upon the plaintiff's properties. By common consent the defendant assumed the complete management of the farms, buying and selling as his judgment dictated, and using the earnings in the support of the family, in making improvements on the farms, and in buying necessary machinery for use thereon. In addition to work performed upon the farms, the defendant earned $1,300 by outside work, all of which went into the common fund. While the ultimate result of the defendant's efforts did not show a very marked success, it is not denied that he worked diligently and faithfully, and exercised his best judgment in the management of

the properties. It is impossible to strike anything like an exact balance showing the net result of the defendant's efforts in enhancing the value of the plaintiff's properties. His testimony places it in excess of $8,000, but, in doing this, he overlooks the fact that during the existence of the marriage a portion of the plaintiff's property was sold and the proceeds used in furtherance of their farming enterprises, and that also the plaintiff had become responsible for debts in excess of $3,600 for materials which went to the improvement of the properties, and for living expenses. From a careful analysis of the testimony, we conclude that the defendant contributed to the community property approximately $1,650. The trial court sought to give the defendant this amount by decreeing to him the automobile truck and tools, valued at $650, and the liberty bonds, worth $400, and rendered a judgment for the defendant for the balance of $600.

It is urged by the plaintiff that there is no authority in law for the court to allow the defendant alimony out of the plaintiff's property. At common law, upon a dissolution of the marriage, the husband could not obtain alimony out of the wife's separate property, and our statute in this respect has not enlarged the common-law rule. In this case, however, the defendant does not seek alimony out of the plaintiff's property, as that term is technically understood. He seeks rather to recover his equitable share of the accumulated property in the possession of the plaintiff which accrued through their joint efforts. This he may do, where it is shown that the accumulated property in the name of the wife is the result of the joint earnings of the parties, and in such case the court will inquire as to the source of the accumulated property, and in the exercise of a reasonable discretion will divide the property between the parties, awarding the husband his equitable portion thereof, and may enter a judgment in favor of the husband for the equitable amount found to be due him. This principle has been recognized in *Myers v. Myers,* 88 Neb. 656, and in *Miller*

v. Miller, 91 Neb. 500. In the *Miller* case, it was held that the trial court should consider all of the facts in evidence as to the property rights of the parties, the source from and the manner in which their property was accumulated, and should exercise a reasonable discretion in dividing the property between them.

From an examination of the testimony, we are of the opinion that the judgment of the trial court upon the issue of divorce, as well as the division of the property rights, is sustained by the evidence. But we think that the court erred in decreeing that the amount of $600 should be "a charge upon the said property of the plaintiff." Literally speaking, the decree of the trial court would be a lien upon the plaintiff's personal as well as her real property, including the homestead. The language of the decree is too broad, and should not be extended beyond such lien as the law creates in an ordinary judgment. That part of the decree, "and the same is decreed a charge upon the said property of the plaintiff," should be eliminated. As so modified, the judgment is affirmed; costs to be taxed to appellant.

AFFIRMED AS MODIFIED.

HARRY T. HULL ET AL., APPELLANTS, V. CITY OF HUMBOLDT ET AL., APPELLEES.

FILED DECEMBER 21, 1921. No. 21892.

1. **Municipal Corporations:** CITY CLERK: DIRECTORY DUTIES. Section 5147, Rev. St. 1913, prescribing generally the duties of the city clerk of a city of the second class and requiring him to "keep a correct journal of the proceedings of the council," so far as it covers the matter of recording the reading of a city ordinance, is directory merely, and not mandatory.
2. ———: ORDINANCES: PRESUMPTION. Where the minutes of the city council show that an ordinance was adopted, and set forth the record of the yea and nay vote thereon, the silence of the record on the matter of the reading of the ordinance, not required by the statute to be recorded, does not prove that the

ordinance was not read, but, on the other hand, the presumption is that the ordinance was properly enacted.

3. ———: ———: ———. Where the municipal record of such a city does not affirmatively show that the ordinance was not read the third time before final passage, but it does appear that the ordinance was passed and the vote thereon is spread upon the record, it will be presumed that the ordinance was duly read before it was adopted.

4. **Evidence:** LEGISLATIVE RECORD: PAROL EVIDENCE. Though parol evidence may be admissible to supply that part of a legislative record which is lost or destroyed, it is not admissible to supplement the record upon matters as to which the record is merely silent.

5. ———: ———: ———. Where the municipal record shows that an engineer's estimate was filed and approved and adopted, parol evidence is admissible to prove such estimate where it is shown that it has been lost.

6. **Municipal Corporations:** PAVING: NOTICE. Section 5113, Rev. St. 1913, providing that personal notice may be given to property owners in a paving district, and which does not prescribe the length of time of such notice, construed to require that the notice be given so as to allow a party a reasonable time to prepare for the hearing and to arrange matters so as to enable him to attend.

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

F. N. Prout, for appellants.

J. E. Leyda, contra.

Heard before MORRISSEY, C. J., ALDRICH and FLANSBURG, JJ., HOSTETLER and MORNING, District Judges.

FLANSBURG, J.

This was an action to enjoin the city of Humboldt from collecting certain paving assessments. The injunction was denied, and plaintiffs appeal.

The first contention made is that the ordinance, upon which the proceedings were based, is void, for the reason that the municipal records do not show that it was read the third time before its final passage.

The city charter provides that ordinances shall be read

on three different days unless, by a three-fourths vote of the council, that rule is dispensed with, and shall require for their adoption the vote of a majority of the members of the council (Rev. St. 1913, sec. 5154); and it is further provided that, "on the passage or adoption of every by-law or ordinance, the yeas and nays shall be called *and recorded*" (Rev. St. 1913, sec. 5156).

The municipal records show that the ordinance in question was read on two different days. It does not appear that the rules were suspended. The only record of proceedings on the third day is that a motion was made and seconded "that ordinance No. 213 (the ordinance in question) be placed on third and final reading, the same to be adopted as one of the ordinances of the city of Humboldt, to take effect and be in force from and after its passage, approval and publication according to law, and the clerk is hereby instructed to have same published." This is followed by the entry: "Cope, 'yea,' Kotouc, 'yea,' Smith, 'yea,' Vertiska, 'yea.' Carried." The plaintiffs contend that this does not affirmatively show that the ordinance was read before its final passage and adoption, and contend that oral testimony, introduced to supplement the record and to show that the ordinance was in fact read, was incompetent and must be disregarded, and that the omission of any record evidence to show the reading of the ordinance the third time is fatal to the enactment.

Parol evidence has been held admissible to show steps taken in the enactment of laws, where a portion of the record covering such steps has been lost, and where the record is in that sense, incomplete (*State v. Frank,* 60 Neb. 327); or, where the legislative records are ambiguous or contradictory, parol evidence has been allowed to be given to make explanation of them (*State v. Junkin,* 79 Neb. 532); and the rule has been announced that an ordinance itself may be proved by the "common-law method," as well as by the method, specifically provided by statute, of introducing the certified and published ordinance (*Johnson v. Finley,* 54 Neb. 733; *Van Valken-*

berg v. Rutherford, 92 Neb. 803; *Shaw v. Alexander,* 94 Neb. 774); but none of these cases goes so far as to hold that where a record is made of legislative proceedings, and where no part of the record is lost, destroyed or missing, parol evidence may be admitted to show that certain steps were taken upon which the record is silent. On the other hand, we take it to be the rule that where the record is intact such evidence is not admissible to fill out its omissions. *People v. Rhodes,* 231 Ill. 270; *City of Covington v. Ludlow,* 1 Met. (Ky.) 295; *Stevenson v. Bay City,* 26 Mich. 44; 36 Cyc. 1248.

We are therefore confined to the determination of the validity of the ordinance upon the record as it stands. The record must be found sufficient in itself to show that the statutory provisions have been duly complied with.

It will be noted that the statute requires that a record of the yeas and nays on final passage shall be recorded. The statute does not affirmatively declare that the reading of the ordinance on three different days must also be recorded. The council record, showing that the ordinance was adopted and setting forth, in full, the vote taken on its passage, meets the specific requirement of the statute. Such a record raises a presumption that the statutory steps required for the passage and adoption of the ordinance have been complied with. The record does not affirmatively show that the ordinance was not read, and, that being the case, it appearing that the ordinance was passed and the vote taken thereon spread upon the records, a presumption arises that it was read. *Town of Ruston v. Lewis,* 140 La. 777; *State v. Cox,* 105 Neb. 75; *State v. Wagener,* 130 Minn. 424; *Emmons v. Southern P. R. Co.,* 97 Or. 263; *Harrison v. City of Greenville,* 146 Ky. 96; *Monett Electric Light, P. & I. Co. v. City of Monett,* 186 Fed. 360; 28 Cyc. 396.

By section 5147, Rev. St. 1913, prescribing the duties of the city clerk, it is provided that the city clerk "shall keep a correct journal of the proceedings of the council or board of trustees." This section does not specifically de-

scribe what the journal shall contain, nor does it make clear just how complete and detailed shall be the record of the council proceedings. There is no specific direction that the reading of ordinances shall be recorded. This general statutory provision, as we view it, so far as it may be involved here, is only directory, and a failure on the part of the city clerk to record the reading of the ordinance the third time, which reading, in our view of the law, is here presumed to have taken place, is not fatal.

A further objection is that the record does not affirmatively show the filing by the city engineer of an estimate of the cost of the proposed improvement before the letting of the contract, though such an estimate was a requisite to the validity of the proceedings. The council record, however, does show that the engineer's estimate of the cost of the improvement was approved and adopted. The estimate itself had been lost, but its substance was supplied by parol. Parol testimony was clearly competent for that purpose.

The further contention is made that notice to property owners had not been given of the meeting of the city council, when it convened as a board of equalization to fix assessments. The statute (Rev. St. 1913, sec. 5113) provides: "Notice of the time of holding such meeting, and the purpose for which it is to be held, shall be published in some newspaper published or of general circulation in said city or village, at least four weeks before the same shall be held or, in lieu thereof, personal service may be had upon persons owning or occupying property to be assessed."

Notice of this meeting was published, but it is conceded by both parties to this litigation that the notice was insufficient, both in point of substance and as to time.

It appears that personal notice was also given. The validity of the assessments must, then, depend entirely upon that. But it is contended that the personal service was bad. The property owners in the district were personally served with written notices, setting forth the time,

place and purpose of the meeting, the description of the lot or tract of land owned or held by the party served and the amount of tax proposed to be assessed against it. These notices were served from seven to ten days prior to the date of the meeting, which was held on July 13, 1920. Some of the notices, it is true, were, through mistake, dated July 23, but in each of them the time specified as the date for the meeting of the council was correctly set forth. The testimony in behalf of defendants and the town marshal's return upon the notices, showing the date of service, stand as uncontradicted proof that all notices were served at least seven days prior to the holding of the meeting. It is the plaintiffs' contention that these notices were insufficient for the reason that they were not served at least four weeks before the meeting. It is argued that the statute requires a four weeks' notice by publication and that a proper interpretation clearly indicates that, where personal service should be resorted to, it was intended that the notice should be served at least four weeks prior to the holding of the meeting. We do not so interpret the statute. The statute does not say that service may be had by publication and that four weeks must elapse after the completion of publication before the meeting may be held, but, on the other hand, says that the notice shall be published in some newspaper at least four weeks before the meeting shall be held, which, as we interpret it, means a publication once each week for four weeks. *Cook v. Gage County,* 65 Neb. 611. It is evident that the statute contemplates that the meeting may be held immediately after the four weeks' notice by publication has become completed. Whether that notice became complete immediately after the fourth publication or not until four full weeks had elapsed after the first publication, we find it unnecessary here to decide. The decisions of this court on that question are collected and discussed in *Pohlenz v. Panko,* 106 Neb. 156. However that may be, in the case of personal service, the notice is complete as soon as served. Neither in the case

of published notice, nor in the case of personal service, does the statute prescribe that any certain period of time shall elapse after the service is completed. Where no such time is prescribed by statute, we understand that a reasonable time will be implied. We take it, therefore, that the statute should be interpreted to mean that, where personal notice is resorted to, it must be served so that a party will be allowed an ordinarily reasonable time to prepare for the hearing and to arrange matters so as to enable him to attend. *People v. Frost,* 32 Ill. App. 242; *Burden v. Stein,* 25 Ala. 455.

In this case the notice seems to have adequately served the purpose. The meeting of the board of equalization was largely attended by the property owners in the district. None of the property owners appeared and objected that they had received no timely notice of the meeting, and we are unable to say, under the facts in this case, that the personal service, given from seven to ten days prior to the meeting, did not give reasonable notice in point of time.

For the reasons given, the judgment of the district court is

AFFIRMED.

BANK OF COMMERCE & SAVINGS, APPELLEE, V. CHARLES C. RANDELL, APPELLANT.

FILED DECEMBER 21, 1921. No. 21724.

1. **Notes:** "HOLDER IN DUE COURSE." A payee who receives a negotiable instrument in good faith, for value, before maturity, and without notice of any infirmity therein, from a holder, not a maker or drawer, to whom it was negotiated as a completed instrument, is a holder in due course within the purview of the negotiable instruments law (Rev. St. 1913, secs. 5319-5513) so as to preclude the defense of fraud and failure of consideration between the maker or drawer and the holder to whom the instrument was delivered.

2. ———: FRAUD AND GOOD FAITH: QUESTIONS FOR JURY. Evidence

examined, and *held* that different minds might draw different conclusions therefrom as to whether or not there was fraud in the inception of the note, and, if so, whether or not appellee had knowledge thereof at the time it purchased the note; and, therefore, the case should have been submitted to the jury under proper instructions.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Montgomery, Hall & Young, contra.

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., BUTTON and COLBY, District Judges.

BUTTON, District Judge.

In November, 1918, W. A. McClaran and C. A. Lanagan sold the note of one Randell for $10,000 to the Bank of Commerce & Savings, of Duluth, Minnesota. The original note obtained from Randell by McClaran and Lanagan was in payment of certain shares of stock in the Onahman Iron Company. Randell claimed this note was obtained by fraud and without consideration, and also claimed the bank had notice of these facts at the time it purchased the note. The sale was made to one Locher, acting president of the bank, and Locher claimed he had no knowledge of any infirmity in the note at the time of purchase. Locher furnished McClaran and Lanagan a blank note of the bank, and the note was made direct to the bank as payee, and, at the request of Locher, the shares of stock in the Onahman Iron Company were deposited with the bank as collateral.

The bank claimed to be a holder of the note in due course, and that the defense of fraud was not available to the defendant as against it. We are confronted with three questions: Can the payee named in a negotiable promissory note, under the negotiable instruments law, ever be a holder in due course? If so, was the original note, obtained by McClaran and Lanagan from Randell,

fraudulent and without consideration? And, if so, did the bank have notice of said facts?

Taking up the first question, we believe it is necessary to consider certain sections of the negotiable instruments law in order to answer it intelligently. We shall refer to the sections considered as contained in the Revised Statutes of Nebraska for the year 1913.

Section 5370. "A holder in due course is a holder who has taken the instrument under the following conditions: First, that it is complete and regular upon its face; second, that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; third, that he took it in good faith and for value; fourth, that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 5348. "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery. If payable to order it is negotiated by the indorsement of the holder completed by delivery."

In subdivision 4, sec. 5370, the word "negotiated" is used. Under this section the instrument must be negotiated if the one who receives it is to be a holder in due course. We must, therefore, ascertain the meaning of the word "negotiate" as used in the statute, and also whether it is any different than in the law merchant. The first sentence of section 5348 appears to be a complete definition of "negotiate" and harmonizes with its meaning in the law merchant. In the case of *Liberty Trust Co. v. Tilton,* 217 Mass. 462, L. R. A. 1915B, 144, it is held that the provision of the negotiable instruments law that an instrument is negotiated by delivery if payable to bearer, while if payable to order it is negotiated by the indorsement of the holder completed by delivery, was not intended to include all the ways in which an instrument

might be negotiated. The second sentence of the section simply recites the two usual and ordinary ways of negotiating an instrument. In the case at bar McClaran and Lanagan signed their names on the back of the note with their guaranty at the time they delivered it to the bank. By reference to sections 5377 and 5507 it appears that the above definition is in harmony with the legislative intent. Section 5507 says: "'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." Section 5377 says: "Every holder is deemed *prima facie* to be a holder in due course." Even a payee who gets the note direct from the maker is a *prima facie* holder in due course. Of course, this presumption is rebutted by proof of the fact. But, if every holder is deemed a *prima facie* holder in due course, then a payee who got the note from a holder, other than the maker or drawer, is also a *prima facie* holder in due course. Substituting in section 5370 the equivalent of holder, the section would read: "A holder in due course is a payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof, who has taken the instrument under the following conditions," etc. The statute, then, recognizes that a payee may be a holder in due course. This meaning is so obvious that the legislature must have intended it, or it would have said otherwise in plain language. Any other construction of the statute takes away a common-law right, and such a construction should not be adopted unless the plain words of the act compel it. The word "negotiate" is properly defined in the first sentence of section 5348, and is in perfect harmony with the other sections, which, to say the least, recognize that a payee may be a holder in due course. And this definition is not materially different from the common-law definition.

We conclude, therefore, that a payee who receives a negotiable promissory note, in good faith, for value, before maturity, and without notice of any infirmity, from a holder, not the maker, to whom it was negotiated as a

completed instrument, is a holder in due course within the purview of the negotiable instruments law, so as to preclude the defense of fraud and failure of consideration between the maker and the holder to whom the instrument was delivered.

This conclusion is supported by a long line of authorities also holding the negotiable instruments law has not changed the law merchant in this respect.

"A promissory note, complete as to form, and payable to a named person, may be negotiated to that person by being sold to him or taken by him for value. This is the common and popular signification of the word. It was the sense in which it was used in the law merchant before the negotiable instruments act. Its meaning has not been changed by the act. * * * The word 'negotiate' being defined thus in the act, and being given a definition in conformity to that attached to it by the common law before the passage of the act, it must be held to have the same meaning throughout the statute, in the absence of a strongly countervailing context requiring a different signification." *Liberty Trust Co. v. Tilton,* 217 Mass. 462, L. R. A. 1915B, 144. See, also, *Merchants Nat. Bank v. Smith,* 59 Mont. 280; *Redfield v. Wells,* 31 Idaho, 415; *Johnston v. Knipe,* 260 Pa. St. 504; *Brown v. Rowan,* 154 N. Y. Supp. 1098; *Figuers v. Fly,* 137 Tenn. 358; *Dixon v. Dixon,* 31 Vt. 450; *White-Wilson-Drew Co. v. Egelhoff,* 96 Ark. 105.

In the case of *Ex parte Goldberg & Lewis,* 191 Ala. 356, we find the court, speaking of the law merchant, using the following very appropriate language: "The law merchant is essentially the creation of the business world, whose practices have hardened into principles, and these principles have been shaped and polished for centuries by the lapidaries of the law, all to one supreme end, viz., the protection of a *bona fide* holder for value who has acquired a negotiable instrument in the due course of trade or business. Only such protection can give confidence, and only confidence can give free currency to any

medium of exchange. This is the capstone of the structure known as 'commercial law.' Its codification into a uniform negotiable instruments law has been accomplished, not for the purpose of altering any of its essential principles, and certainly not for the purpose of destroying or weakening its cardinal principle, but for the purpose of harmonizing certain minor differences existing in the various jurisdictions."

Some courts seem to hold that the whole of section 5348 must be read together in reaching a definition of the word "negotiated" as used in the negotiable instruments law. Appellant cites numerous cases, some holding to this view, others, when rightly understood, not sustaining such contention. We shall notice a few of them herein.

The main case is *Vander Ploeg v. Van Zuuk,* 135 Ia. 350, 13 L. R. A. n. s. 490. In this case the two defendants, Van Zuuk, were to have been joint makers with one Pothoven. The note was signed by the two defendants in blank. The blank was turned over to Pothoven, who filled it out payable to plaintiff, or order, for $2,000, and, being indebted to plaintiff in said amount, delivered it to him. The plaintiff had no knowledge of the facts. Pothoven never was the holder of a completed instrument, neither did he give any consideration for it. Indeed, he would have been a joint maker had he done as he agreed with the defendants. He never possessed an instrument he could negotiate. Pothoven defrauded the plaintiff and defendants. He was not the holder of a promissory note, for it was a blank as delivered to him. The statutory definition, "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof," contemplates an instrument and a holder. Pothoven was neither, within the meaning of the negotiable instruments law. He was in possession of a blank only. The statutory definition of "holder" is: "'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." Pothoven was not the

bearer of a completed note. Under the law merchant the plaintiff would have been a holder in due course. The negotiable instruments law has changed the law merchant in this respect, as it deals with a completed instrument only. The Iowa court was right in holding plaintiff was not a holder in due course under our negotiable instruments law. However, the Iowa court say: "We do not mean to say that in no case can the person named as payee in a negotiable instrument be the holder thereof 'in due course.' If A., purchasing a draft to be transmitted to B., in payment of A.'s debt to B., causes the draft to be drawn payable to B., no doubt A. is the holder of such draft, and B. taking it for value becomes a holder in due course." As this hypothicated case is not different in principle from the case at bar, we feel the Iowa case is not an authority against our conclusion herein.

The case of *Britton Milling Co. v. Williams,* 44 S. Dak. 525, seems to sustain appellant's contention, and is the last expression of any court on the subject, so far as we have been able to ascertain. We are constrained to the belief that this case is based upon a misunderstanding of the Iowa case, and also the *Herdman* case, cited therein, and is contrary to the weight of authority.

The Oregon case cited, under the facts existing therein, is not an authority against our position herein. This seems clear from a later decision of that court, *Simpson v. First Nat. Bank,* 94 Or. 147, 159, where it is stated: "Nothing said in the opinion rendered in *Bank of Gresham v. Walch,* 76 Or. 272, should be construed to mean that this court is committed to the doctrine that under the negotiable instruments law the payee is never a holder in due course."

It will serve no useful purpose to discuss any more of the authorities cited. Some of them seem to sustain appellant's position, others, we believe, do not, when rightly understood. We are satisfied a payee in a negoti-

able instrument may, under our negotiable instruments law, as he could at common law, be a holder in due course, and that the great weight of authority so holds. We also believe, upon principle, this is the logical position.

The settled law is that, where the defense interposed is fraud in the inception of the note, and there is evidence to support such defense, the burden is upon the plaintiff to prove that he is a *bona fide* holder for value. There is no question but that appellee was entitled, in the case at bar, to have gone to the jury on this proposition. Therefore, the only question remaining is: Did appellant furnish evidence sufficient on the question of fraud and failure of consideration, and appellee's knowledge thereof, to have entitled him to have gone to the jury?

As to the question of fraud it is necessary to examine the proof. Randell was told by McClaran, Lanagan, and Lyons, that there was an abundance of ore, that there were many tons being mined daily, that a great deal of ore had been marketed and the money for it would be paid at once, and that dividends would be paid almost from the start at 10 per cent. a quarter and would soon pay the note. Randell was further told that many carloads of ore were being mined daily, and that 60 men were at work in the mines, that there was a good demand for the ore, and that ore sales were contracted for five years ahead, so that their profits were assured, even if the war closed; that there were millions of tons of ore untouched, that they knew, as drillings had been made, that they had the best of machinery, and they were selling $500,000 of stock to obtain money to operate the mine and to develop new ones.

These statements, in the main, were false. There never was a 40 per cent. dividend, and, in fact, no dividends of any importance, certainly insufficient to pay any part of the note. The mine closed down in the fall of 1919, and this is when Randell discovered the truth for the first time. Randell had no experience in the mining business,

and, of course, trusted to these men, McClaran, Lanagan, and Lyons. Randell testified that these men sort of hypnotized him. One cannot read this record without concluding that Randell's mind was controlled by these men, and that they dictated the contract on both sides and there never was a meeting of the minds, the first requisite of every valid contract.

Section 5373 of the negotiable instruments law provides: "The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

It would seem, therefore, from what has been said, that it was a question of fact for the jury to determine whether or not McClaran and Lanagan obtained the first note from Randell by fraud, within the meaning of section 5373, above quoted. The jury might well have found that the representations were made as statements of facts, that they were untrue, and known at the time to be untrue, or else made recklessly upon insufficint information; that they were made with intent to defraud and for the purpose of inducing Randell to act upon them; and that he did so act and was thereby damaged. If the jury so found, surely there was sufficient evidence to have sustained the verdict. And this was the test, although the court might have thought the finding should have been otherwise. To say the least, it seems to us there was sufficient evidence to have gone to the jury on the question of fraud.

Section 5374. "To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

McClaran stated in his testimony that he thought he told Locher what the note was given for; that is, what Randell received for the note. Lanagan, in his testimony, seemed to think Locher was told all about the deal, but insisted on giving his conclusions. Locher himself would not say unequivocally he was not told what the note was given for. Locher held a contract for the sale of Onahman Iron Company ore and must have known little ore was being mined and sold. Locher testified he knew at the time he delivered the blank note to McClaran and Lanagan that they already held Randell's note. He knew, therefore, he was to get a renewal note. He testified he did not know the note was at the First National Bank at the time he gave the blank to McClaran and Lanagan, so that the renewal note might run to the bank as payee. He requested McClaran and Lanagan to have Randell put up the shares of stock he held as collateral. He knew a note was at the First National Bank McClaran and Lanagan had to meet, presumably because Randell had failed to pay it. Under these circumstances the jury might well have concluded that Locher knew the original Randell note was given for these shares of stock in the Onahman Iron Company, and that the note was obtained by fraud and without consideration. Indeed, the jury might well have concluded that Locher made McClaran and Lanagan the agents of the bank to obtain this renewal note and the shares of stock as collateral for the bank. If the jury so found, then the bank could not have been a holder in due course. These were conclusions the jury might have drawn from the evidence, and, if they had, a verdict based thereon would have been sustained by the evidence. If different minds could have drawn different conclusions from the evidence, then the case should have gone to the jury. 8 C. J. 496, secs. 706 *et seq.; Lahrman v. Bauman,* 76 Neb. 846; *Central Nat. Bank v. Ericson,* 92 Neb. 396; *Arnd, Admr. v. Aylesworth,* 145 Ia. 185, 29 L. R. A. n. s. 638; *Mee v. Carlson,* 22 S. Dak. 365, 29 L. R. A. n. s. 351.

Under the evidence, facts, and circumstances in this case, it should have been submitted to the jury under proper instructions, and the judgment of the lower court is wrong, and the case is reversed and remanded.

REVERSED.

E. C. KLINCK, APPELLEE, V. DAN REEDER: E. ROLLEN SMITH, APPELLANT.

FILED DECEMBER 21, 1921. No. 21805.

1. **Infants:** ESTOPPEL IN PAIS. While generally the doctrine of estoppel *in pais* is not applicable to infants, yet where an infant of so mature an age and appearance as makes his statement of being of age plausible, while actually transacting business for himself, makes fraudulent and false representations that he is of age to another for the purpose of transacting business with him, and such other person believes such statements to be true and relies and acts thereon and parts with his property because thereof, the doctrine of estoppel *in pais* will apply, and such infant will not be permitted to set up his minority as a defense to an action to enforce the performance of the contract so entered into.

2. ———: ———. Appellant, who was between 19 and 20 years of age, and was of so mature appearance as to bear out his statement that he was of sufficient age to do business for himself, and had been for some time and was then engaged in business for himself in breaking and plowing land of others with a tractor, went to appellee to buy an additional tractor to be used in his business, which tractor was owned by appellee and in use on his farm. During the pendency of negotiations appellee asked appellant how old he was, and if he was old enough to do business for himself, and appellant represented to appellee that he was of sufficient age to do busines for himself, and had been so doing business for himself for quite awhile, which statements as to his age were false and fraudulent. Appellee relied on such statements as being true, and believed them to be true, and because thereof sold the tractor to him and took his notes for the purchase price thereof. *Held*, that the doctrine of estoppel *in pais* applies, and appellant will not be permitted to defeat recovery on the notes because of his infancy.

APPEAL from the district court for Perkins county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Beeler, Crosby & Baskins, for appellant.

Hastings & Hastings, contra.

Heard before LETTON, DEAN and ALDRICH, JJ., CLEMENTS (E. P.) and DILWORTH, District Judges.

DILWORTH, District Judge.

The appellee, E. C. Klinck, instituted this action in the district court for Perkins county, Nebraska, against the appellants, Dan Reeder and E. Rollen Smith, to recover the remainder due on three promissory notes, executed by the defendants in favor of the plaintiff.

One L. O. Pfeiffer, as friend of E. Rollen Smith, applied to the court for the appointment of a guardian *ad litem* for Smith, stating that he was a minor, and the court thereupon duly appointed one John B. Beveridge as such guardian *ad litem.* The guardian *ad litem* filed an amended answer on behalf of said minor, E. Rollen Smith, wherein he admits the signing of the notes set forth in plaintiff's petition, and alleges that he signed said notes jointly with the defendant Dan Reeder; and as a defense alleges that, at the time of signing said notes, he was a minor, and that he would not attain his majority until July 1, 1920, the day the said amended answer was filed; and that said notes were not given in payment for necessaries of life for said defendant, but were in part payment of the purchase price of a certain tractor; that, at the time of the execution of said notes, said Smith and the codefendant Reeder were operating tractors as partners, but that at about two weeks after the execution of said notes said partnership was dissolved, and the said minor defendant disposed of his interest in the machine so purchased of appellee to the defendant Dan Reeder, and that the partnership between the two defendants was dissolved; that the plaintiff had full knowledge of these facts, and of the turning over of

said tractor to said Reeder, and also of the fact that said Reeder traded said tractor for a larger tractor, but that the minor defendant had no interest therein; that, at the time of trading said tractor for the larger tractor, the plaintiff promised to release said minor defendant and take his name from said notes, and that the plaintiff knew all that time that the defendants had made settlement of all their partnership interests, and had full knowledge that the defendant Dan Reeder had assumed the obligation as represented by said notes, and consented thereto.

The plaintiff filed a reply, denying each and every allegation of new matter contained in said amended answer of the defendant, and further alleged that the said minor defendant had for many years been engaged in active business for himself, and had for several years prior to the execution of the notes sued upon transacted business both as an individual and as a full partner of the defendant Dan Reeder; that the consideration for the notes sued upon was a tractor, sold by the plaintiff to the defendants, and that shortly after getting possession of said tractor the defendants disposed of the same and took the proceeds thereof, and have never tendered the plaintiff either the tractor or the proceeds therefor. Later the plaintiff filed an amended reply, in which he alleged, in addition to the facts set forth in his original reply, that at the time of said original transaction, and prior to the exchange of said notes and tractor, the plaintiff asked the said defendant E. Rollen Smith if he was doing business for himself, and that said defendant told the plaintiff that he was doing business for himself and had been for some time past; that said representations were fraudulently made, and were so known by the said E. Rollen Smith at the time, and that plaintiff believed said statements to be true and acted and relied upon said statements so made, and, so relying thereon, sold the defendants the tractor and took their notes therefor; and that said minor defendant E. Rollen Smith, by reason of said false and fraudulent statements so made at the time

of said transaction, believed, acted upon, and relied upon by the plaintiff, is now estopped from asserting or claiming that at the time of the execution of said notes he was a minor under the age of 21 years.

No service was had on the defendant Reeder. The case was dismissed as to him and proceeded against the minor defendant E. Rollen Smith, alone. The case was submitted to the jury, which returned a verdict in favor of the plaintiff and against said minor defendant for the remainder due on said notes.

It is urged that the verdict is not supported by the evidence. While there was a conflict in the evidence upon some of the matters in dispute, yet, from an examination of the record, we consider that the jury were well justified in returning the verdict which it did, and that there was sufficient evidence to support it. The verdict of the jury determined all questions of fact in the case and controversies arising therefrom. This leaves but one question to be determined; that its, whether the minor defendant is estopped from denying his liability.

The appellant relies for a defense almost entirely upon the fact that he was not of age at the time he executed the notes sued upon, and strongly urges that the doctrine of estoppel *in pais* does not apply to infants. This court in 1896 had this question before it, and declared at the time that, under certain conditions, the doctrine of estoppel *in pais* does apply to infants. In the case of *Cobbey v. Buchanan,* 48 Neb. 391, this court said: "Generally the doctrine of estoppel *in pais* is not applicable to infants"—but further declared: "For a representation made by an infant as to his being of age to estop him from asserting infancy as a defense, the representation must have been fraudulently made by the infant and believed in, relied on, and acted upon by the other party; and the facts claimed to constitute such an estoppel must be pleaded."

We think this court very properly declared that the doctrine of estoppel *in pais* applied to infants under the

circumstances as stated. It is a just and reasonable rule, and has been generally recognized by courts in their later decisions. We quote with approval the following from the case of *LaRosa v. Nichols,* 92 N. J. Law, 375, 6 A. L. R. 412:

"Let it be remembered that the contracts of infants are not absolutely void, but only voidable. An illuminating discussion of this question will be found in the opinion of Mr. Justice Stanley, in the supreme court of New Hampshire in *Hall v. Butterfield,* 59 N. H. 354. At page 357 he quotes Lord Mansfield as follows: 'Great inconveniences must arise to others if infants were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts for their benefit. * * * A third rule, deducible from the nature of the privilege that is given as a shield and not a sword, is that it never shall be turned into an offensive weapon of fraud or injustice.' * * * As applied to the facts in the case at bar, the law, as I view it, is that if a youth under 21 years of age, by falsely representing himself to be an adult, which he appears to be, for the purpose of inducing another to enter into a contract with him, and thereby, through such representation and appearance, the other party is lead to believe that such infant is an adult, and makes a contract with him, the benefit of which he obtains and retains, then, in a suit on that contract, the minor will not be permitted to set up the privilege of infancy, because by his fraudulent conduct he has estopped himself from so pleading; and this in a court of law as well as in a court of equity."

Another case where the rule is commented upon and approved in very apt language is that of *Commander v. Brazil,* 88 Miss. 668; also in *Grauman, Marx & Cline Co. v. Krienitz,* 142 Wis. 556, and a number of other cases from different states are cited.

It is urged that the representations made by appellant

at the time these obligations were executed did not amount to a false representation as to the age of appellant. While there is some little conflict between appellant and appellee relative to just what was said at the time, we consider that the verdict of the jury determined that controversy.

The trial court submitted the question to the jury in the following instruction:

"The jury are instructed that, if you find from the evidence that at the time plaintiff sold defendants the tractor and took the notes of the defendant sued upon in this action, the defendant Smith falsely represented to this plaintiff that he was of age, and that he was old enough to do business for himself; and if you further find that plaintiff Klinck believed these statements of the defendant Smith, and that he acted and relied upon them in making this transaction, then you are instructed that defendant Smith cannot now claim that he was a minor, and your verdict will be for the plaintiff."

This instruction properly presented the matter to the jury, and the evidence warranted it in returning the verdict it did. At the time appellant made the representation he did as to his age, he was of such mature appearance as to bear out such representation. He was then, and for some time had been, engaged for himself in a line of business necessitating the use of a machine such as he was negotiating for. In a very few days he disposed of the machine so that he could not return it to the original owner in the event he determined to declare the contract of purchase void. The verdict of the jury determined that the representations of age made by appellant were false and fraudulent; that appellee believed such representations to be true, and acted and relied on them in making the transaction; and appellee, having so pleaded, it brings this case clearly within the rule announced by this court in *Cobbey v. Buchanan, supra,* and the doctrine of estoppel *in pais* as applied to infants in the later decisions of the courts.

We find no error in the proceedings in the trial court and the judgment of the district court is

AFFIRMED.

THEODORE MAJERUS ET AL. V. KATIE NEARY ET AL., APPELLEES: LOUIS P. WIRTH, TRUSTEE, APPELLANT.

FILED DECEMBER 21, 1921. No. 21817.

Trusts: TERMINATION. Where the terms of an express trust have been fulfilled, the trust may be declared terminated by decree of court.

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

James E. Leyda, for appellant.

John C. Mullen, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., FITZGERALD and WAKELEY, District Judges.

FITZGERALD, District Judge.

This is an action brought by Theodore Majerus and others for the purpose of terminating a trust created by the last will and testament of Jacob Majerus, and to procure a construction of the last will of Jacob Majerus.

Jacob Majerus, on August 12, 1910, made the will in question, in which he devised and bequeathed his earthly belongings comparatively equally among his children and the children of a deceased child. He, however, devised most of his real estate to his eldest son, John Majerus, "in trust, however, for" each of his other children, until each devisee should reach the age of 36 years, at which time the devisee would take his or her portion in fee forever. The will allows each devisee, on reaching the age of 21 years, to enjoy the use and benefit of his or her portion, and places the legal title in the trustee. The trustee

may at his discretion, for the benefit of any devisee, and with the consent of the devisee, convey the land devised, provided he should invest the proceeds in other land. An annuity of 50 cents an acre, for the benefit of testator's widow, is assessed against each devisee.

Paragraph 13 of the will provides: "If either one or more of my said children shall die not having been married and leaving no issue, and before reaching the age of 36 years, then the said property herein willed to such child or children (deceased) shall be and rest in the other children without distinction." The provision that the surviving children shall not take the legal title to its share in the division of the portion of a deceased child is here again inserted.

John Majerus, the trustee, died. Theodore, one of the sons, has reached the age of 36, and brought this action, praying the court for the appointment of a trustee, and direction to such trustee to grant a deed to Theodore. The other devisees, being made parties, filed separate answers and cross-petitions, praying for a decree ordering the trustee to convey to each, his or her separate portion. The district court found for the plaintiffs, and for the defendant devisees on their cross-petitions, and decreed the conveyance of all the land as prayed. The court found all the devisees to be *sui juris,* married, and with children.

Defendant Louis P. Wirth, being uncertain of his rights, appealed from the decision of the district court, and presents the case for our determination. Jacob Majerus, the testator, had evidently labored hard, and carefully conserved the fruit of his labor. He had gathered a goodly portion of worldly goods, and he had a large family, most of whom had reached their majority. He seems to have feared that his children might dissipate the earnings of his lifetime if they should come in possession of the same before the rosy hues that youthful imagination sometimes throws on life's screen had cleared away. He made a will. It was within his rights to make

the will, and to make disposition of his property therein. His will is lawful, and we can see no construction that would defeat any portion of it. But, as is frequently the case, the meaning in certain paragraphs of this testament is not entirely clear, and it is submitted to us to determine just what Jacob Majerus meant when he wrote his last will and testament.

Testator had evidently seen comfortable fortunes vanish from the grasp of young men and women before they had realized the value of money. He fixed the age of 36 as a safe period at which to release his land to his children, even though they might still be unmarried. But he seems to have considered the marriage of his children and the bringing of children into the world by them as a substitute for reaching the age of 36 years.

Paragraph 13 of the will settles the question of the vesting of the entire beneficial interest in and to the estate and the property devised in trust. Testator clearly intended by the paragraph to reveal that the marriage of his children should shut off all possibility of a reversion of his devise. The only way that any devisee might lose his or her share that had been devised to John Majerus in trust for him or her was to die, "not having been married and leaving no issue, and before reaching the age of 36 years." This possibility the trial court has found not to exist, and the trial court has also found that there is no reason that would justify the court in restraining the alienation of the lands in question.

It is true that testator did not state in exact words that the marriage before arriving at the age of 36 years would terminate the trust, but the using of exact words might have defeated the very purpose he had in mind. It would be easy for any of the children to have married for the purpose of obtaining title to his or her land, and, after wasting the proceeds, the purpose of such marriage would be accomplished and the relation probably terminate. Testator gave to his two children who were married at the time of making his will their share without restric-

tion. In fact, to his daughter, Mary Sullivan, he had deeded and delivered her portion before his death, though she was under the age of 36 years, but married, and the mother of children. To John, the trustee, he devised absolutely while John was but 30 years of age. There seems no question as to testator's intention to devise to all of his children absolutely, merely putting a restraint on the alienation until the object of his devise should become settled in life. If there was any possibility of any devise being defeated by any contingency, the court would have no right to terminate the trust and order the deeds, but by the language of the will the marriage of the devisee has given to each the right to the unhampered enjoyment of the same. *Bennett v. Chapin,* 77 Mich. 526; *Simmons v. Northwestern Trust Co.,* 136 Minn. 357.

From a consideration of all the circumstances, and the language of the will, we find that the judgment of the trial court should be affirmed, and the decree entered therein is

AFFIRMED.

CHRISTIAN H. VON KNUTH, APPELLEE, V. J. B. RYAN, APPELLANT.

FILED DECEMBER 21, 1921. No. 21613.

1. **Appeal:** DIRECTION OF VERDICT. When the evidence upon a question of fact material to the issue is conflicting, and such that reasonable minds might reach different conclusions, the question is one for the jury, and it is error for the court to direct a verdict.
2. **Vendor and Purchaser:** OPTION: WITHDRAWAL. An option to purchase land given without consideration may be withdrawn at any time before acceptance, upon giving notice to the other party thereto, but an option founded upon a valuable consideration cannot be withdrawn before the time specified therein has expired.
3. ———: ———: ———: ACCEPTANCE. An option to sell land, without consideration or with no time specified in the instrument

within which the option must be accepted, may be revoked at any time by the giver of the option upon notice to the holder of the option before acceptance. The offer, when accepted, constitutes a contract of sale; and the same result flows from the acceptance of the option without consideration, if accepted before the option is withdrawn or revoked.

4. ———: ———: ———. If an option to purchase or sell certain land is revoked by the giver of the option, the consent of the holder of the option is not necessary to a revocation. Notice of a *bona fide* sale by the giver of the option to a third person brought to the holder of the option before acceptance by him constitutes revocation.

5. ———: ———: ———. "A mere option for the purchase of land, indeterminate as to time * * * is terminable at any time upon reasonable notice by the vendor." *Stone v. Snell*, 77 Neb. 441.

6. **Contracts:** AVOIDANCE. Courts do not permit one to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form.

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

Abbott, Rohn & Robins and *John L. Cutright*, for appellant.

Baldrige & Saxton and *Viggo Lyngby, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., GRAVES and WELCH, District Judges.

GRAVES, District Judge.

This action was commenced in the district court for Dodge county by Christian H. Von Knuth, who is appellee, against J. B. Ryan, the appellant, for the recovery of $800 and interest, as damages arising out of the alleged failure of Ryan to perform the terms of a certain option contract. The trial was to a jury, and at the close of the evidence the plaintiff moved the court to direct a verdict in his favor, which motion was sustained, and there was a verdict and judgment accordingly. Defendant appealed

to this court. Subsequent to the trial the plaintiff, Von Knuth, died, and the action was revived in the name of Paul Peterson, his administrator.

The chief error relied upon by the defendant is the action of the trial court in refusing to submit the case to the jury under proper instructions and directing the jury to return a verdict for the plaintiff.

The petition alleges, in substance, that on the 12th day of July, 1919, the defendant was the owner of a certain 80 acres of land, and that on said day defendant entered into a certain written optional contract with plaintiff, wherein he agreed to convey the real estate to plaintiff, or any person designated by plaintiff, in consideration of the price of $12,000. The contract is set out in the petition, and the option is for a period of 90 days, recites a consideration of $1, and provides for a cash payment of $1,500 at the time of the sale, the assumption of a mortgage of $6,400, and a payment of $4,100 cash on March 1, 1920. The petition alleges, further, that in pursuance of the agreement above mentioned plaintiff sold said premises to one C. G. Miller on the 14th day of July, 1919, and immediately entered into a written contract for the sale of the same with C. G. Miller, who thereupon, it is alleged, made a payment to Von Knuth of $1,500 in cash on the purchase price; that immediately upon making the sale aforesaid, it is alleged, appellee made diligent effort to communicate with defendant in order to advise him of said sale and notify him to furnish an abstract and execute a deed, but that plaintiff was unable to find him; that on the 15th day of July, 1919, plaintiff advised defendant of the sale aforesaid, and of his election to take under said option contract, by telegram from Omaha, a copy of which telegram is set out in the petition; that shortly thereafter plaintiff tendered to defendant the initial cash payment of $1,500 and demanded that defendant carry out the terms of his agreement, but that defendant absolutely and unconditionally refused, and has ever since refused, to comply with his

agreement; that prior to the expiration of the contract between plaintiff and defendant aforesaid, and prior to the expiration of the 90-day option period therein provided, defendant sold the land described to a third person, and thereby incapacitated himself from performing his contract with plaintiff, and placed himself in a position whereby he could not comply with his contract, and thereby repudiated it; that, by reason of the foregoing, plaintiff has sustained damages in the sum of $800 and interest from July 15, 1919, for which he prays judgment.

The defendant by his answer denies each and every allegation contained in the plaintiff's petition, except such allegations as are specifically admitted, and admits that on the 12th day of July, 1919, he was the owner of the land described, and further admits that on the 14th day of July, 1919, he sold the aforesaid lands to one Hans McTeason, but denies that at any time he ever entered into an option contract with plaintiff, and denies that he ever signed the instrument, a copy of which is set out in the plaintiff's petition, and alleges that he never signed any contract or written instrument with plaintiff covering said real estate. He admits that he jotted down the terms of sale on a piece of paper and signed his name thereto, but denies that he ever received the consideration expressed in the alleged option agreement, or any consideration whatever, and denies that there was an option period of 90 days in the instrument when signed, or that he authorized plaintiff to insert said period of 90 days in the contract, and denies that plaintiff ever paid or offered to pay him the sum of $1,500, or any sum, as a first payment, and denies that the alleged sale to Miller of said land was *bona fide,* and prays for a dismissal of the action.

The reply is a general denial of all new matter set out in defendant's answer.

The pleadings clearly raise the issues: First, that there was no consideration paid for the option contract sued upon; second, that there was no period of option

stated in the contract at the time of the signing of the same; and, third, that the plaintiff, Von Knuth, did not make a *bona fide* sale of the property to C. G. Miller, as alleged, and had actual notice that the land had been sold to McTeason before he (Von Knuth) notified Ryan that he accepted the option.

From a careful consideration of the record, we find that there is a conflict in the testimony as to whether any consideration was paid, and as to the period of the option, as well as to the *bona fides* of the alleged sale by the plaintiff to C. G. Miller.

As to the payment of the dollar consideration, the record discloses the acknowledgment thereof in the option contract; that plaintiff and his wife testified the consideration was paid, and that the defendant positively denied its payment.

As to the figures and word "90 days" being in the option contract at the time the same was signed by defendant, the record discloses the denial by defendant. The testimony of the witness Debel, an attorney of Blair, Nebraska, is that upon request of Von Knuth, about the middle of July, although not positive of exact date, he wrote into the option contract the description of the land, and the word "days," but is not certain that the figures "90" are in his handwriting, but thinks they are. Plaintiff states positively that he wrote in the figures and word "90 days" before the option contract was signed.

As to the *bona fides* of the sale by plaintiff to C. G. Miller, the testimony of the plaintiff and Broderson agree that about 5 o'clock p. m., July 15, the plaintiff met the witness, Paul Broderson, on the highway near the Ryan eighty, in Washington county, at which time they talked about the sale of the land, and Broderson told plaintiff that he and his son-in-law, McTeason, had already purchased the land. Their testimony is conflicting as to what else was said at that time. Broderson testifies that, when he told plaintiff that McTeason had already bought the Ryan eighty, plaintiff replied that "Ryan" could not

sell it. Plaintiff denies that he so replied, but claims to have told Broderson "that he (Ryan) couldn't sell it; I had an option on the farm and it was sold." The record discloses that the night letter sent by plaintiff to defendant, notifying him of the acceptance and sale to Miller, was received for transmission during the night of July 15, 1919, and the letter and envelope addressed by C. G. Miller to defendant, dated July 14, 1919, was postmarked 12 p. m., July 15, 1919, about seven hours after the conversion in which Broderson informed plaintiff that the land had been sold to McTeason.

"Where the evidence upon a question of fact material to the issue is conflicting, and such that reasonable minds might reach different conclusions, the question is one for the jury, and it is error for the court to direct a verdict." *Gillis v. Paddock,* 77 Neb. 504. Also, *Tarnoski v. Cudahy Packing Co.,* 85 Neb. 147; *Doyle v. Franek,* 82 Neb. 606; *Union Nat. Bank v. Moomaw,* 106 Neb. 388.

We find no evidence of fraud in the inception of the option contract. Appellant admits that the terms of sale in the option contract, and the signature thereon, were in his handwriting. Hence, he is bound by the terms of the option contract as it was when signed.

"Courts do not permit one to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form." 9 Cyc. 389.

If the contract was without consideration, or no period fixed within which to exercise the option, then the giver of the option had the right to withdraw the option upon notice to holder of the option. 10 R. C. L. 687, sec. 18; 27 R. C. L. 340, sec. 37; 6 R. C. L. 603, sec. 26; *Jester v. Gray,* 188 Ia. 1249; *Cummins v. Beavers,* 103 Va. 230, 106 Am. St. Rep. 881; *Stone v. Snell,* 77 Neb. 441.

Want of consideration may be shown, even though the contract acknowledges the receipt of one dollar. *Gray-*

bill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894; *Cummins v. Beavers, supra.*

To effect a revocation of a revocable option to purchase, it was only necessary that notice of sale by the giver of the option be brought to the holder of the option before acceptance. No particular formality is required to revoke an option to purchase which in fact is revocable. *Jester v. Gray, supra; Frank v. Stratford-Handcock,* 13 Wyo. 37, 110 Am. St. Rep. 963.

If the option is revocable, notice to the holder of the option of the sale by the giver of the option to McTeason before acceptance of the option is notice of withdrawal of the option. 6 R. C. L. 603-605, secs. 26, 27; *Wullenwaber v. Dunigan,* 30 Neb. 877; *Mooney v. Daily News Co.,* 116 Minn. 212.

It follows that the action of the trial court in directing a verdict for the plaintiff was error for which its judgment should be reversed; and said judgment is, therefore, reversed and remanded for further proceedings.

REVERSED.

ROY C. GILLISPIE, APPELLANT, V. AUGUST W. BOHLING ET AL., APPELLEES.

FILED DECEMBER 21, 1921. No. 21693.

Partnership. A. was the owner of a threshing machine. He entered into an arrangement with B. with respect to threshing, for the doing of which B. might obtain contracts. A. was to, and did, furnish his thresher, coal, and oil, and replace any breakage occurring. For this A. was to receive 65 per cent. of the earnings of the thresher. B. was to have the use of the machine, operate it, employ and pay all necessary help, and defray these expenses and receive his own compensation out of the remaining 35 per cent. *Held,* this was not a partnership.

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

Lambert & Armstrong, for appellant.

Kelligar & Ferneau and *Ernest F. Armstrong, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., WAKELEY, District Judge.

WAKELEY, District Judge.

Appellant brought this action in the district court against Bohling and Whitlow. The object thereof was to recover for a broken leg and other injuries sustained by him on July 16, 1919, while oiling a threshing machine, operated by the defendant Whitlow, on the farm of one Alfred Rogge. Gillispie's claim was based upon the alleged negligence of Whitlow in starting the engine, operating the thresher, without warning to the plaintiff. It is claimed that the defendants were partners in the operation of the machine and in threshing grain in Nemaha county in 1919, and, as partners in this enterprise, liable to appellant for his injuries sustained.

Upon the conclusion of plaintiff's evidence, Bohling moved for a directed verdict, for the reason that the evidence adduced wholly failed to prove the existence of a partnership between Bohling and Whitlow in the conduct of the threshing business, out of which appellant's injuries arose, and that there was no evidence to sustain a verdict against Bohling, should one be rendered. This motion the court sustained, and thereafter, in his instructions, instructed the jury to return a verdict for Bohling.

The case proceeded against defendant Whitlow, and, as to his liability, was submitted to the jury, who returned a verdict against him for $1,000 and costs. The plaintiff made a motion for a new trial as against Bohling, from the denial of which the plaintiff appealed. Neither party has appealed from the judgment against Whitlow. We are therefore concerned with the single question as to whether or not the facts disclosed make Bohling and Whitlow liable as partners.

Bohling had purchased for $5,000, and on July 10, 1919, was the owner of, a certain Port Huron threshing machine. He entered into a verbal arrangement with

Whitlow with respect to the machine and threshing jobs which Whitlow might be able to obtain. The arrangement was, in substance, this: Bohling owned the thresher and furnished it to the defendant Whitlow. He also furnished the oil and coal to operate it, and defrayed any breakage occurring. For this, he was to receive from Whitlow 65 per cent. of the earnings of the machine, or, as often reiterated in the testimony, 65 per cent. of what the machine made. Whitlow, on his part, was to have the use of the machine, to take charge of it, do whatever threshing he might obtain, employ and pay all necessary help, and take his own compensation out of the remaining 35 per cent. Bohling in no respect managed, or controlled, or directed the operation of the machine, or contracted with those having their grain threshed. He was not present when appellant was injured. He was present several times to see that the machine was working properly, and, at Whitlow's request, collected some of the threshing bills. He also suggested to Whitlow the names of several persons whose work he (Whitlow) might obtain.

It is apparent from the evidence that whether the earnings or profits or what the thresher "made" were to be gross or net, the division thereof in the proportion of 65 and 35 was to be a compensation or payment to the respective parties for what each did; to Bohling, for the use of the machine; to Whitlow, for doing the actual work; that there was no community of profits as such, but that the compensation of each was defined and measured by a certain specified portion of the earnings or of the profits of the venture.

That the receiving of a certain portion or percentage of earnings or profits of an enterprise as compensation, or in return for an article furnished for a particular venture, does not in any respect make the parties thereto partners, or create a partnership liability, has been held by this court in a number of cases, some of them presenting facts very much like those in the case at bar. *Hurst v. Hayden*

Bros., 94 Neb. 704; *Whitney v. Gretna State Bank*, 50 Neb. 438; *Garrett v. Republican Publishing Co.*, 61 Neb. 541; *Agnew v. Montgomery*, 72 Neb. 9; *Waggoner v. First Nat. Bank*, 43 Neb. 84.

In *Whitney v. Gretna State Bank, supra*, the court said: "The question presented to us is: Were these men in fact copartners? Was the property involved in this action copartnership property or was it the property of Hancock? The relation of copartners rests in contract. Whether two or more persons are copartners depends upon intention; and while a copartnership may be established by the course of dealing and the conduct of the parties, and perhaps by the admission of each member thereof, still the relation, if it exists, must rest in the consent and the intention of the parties thereto. * * * Where parties who were not partners have, nevertheless, been held liable as such, they were so held liable because by their conduct they had estopped themselves from averring that they were not partners; but in no case that I have been able to find has any court assumed to hold that two or more persons were copartners as a matter of law when the persons had never agreed or intended to become such."

In *Garrett v. Republican Publishing Co., supra*, Sullivan, J., says: "Where no question of estoppel is involved, persons cannot be held to be partners despite their intention not to form that relation."

In *Waggoner v. First Nat. Bank, supra*, the court said: "Community of interest in profits, not by way of compensation for services rendered or capital loaned, but profits as such, a community of interest in the property the subject of the venture, and a community of power of management of such property, are correct tests of copartnership."

In 1 Bates, Law of Partnership, sec. 45, quoted with approval in *Garrett v. Republican Publishing Co.*, it is said: "An indefinite compensation out of profits for the use of property, real or personal, and dependent on the

success of the business, is in lieu of rent and does not constitute the owner a partner *inter se.*"

Applying these principles to the case in hand, it is evident that they refute any inference of a partnership. Partnership between the defendants cannot be deduced from any intention to form one, because Bohling testifies he never intended to form a partnership or to assume the relation of a partner in the enterprise.

They cannot be held as partners on any ground of estoppel, because there is no evidence whatever that they, or either of them, ever held themselves out to the plaintiff or to any one else as partners, or that they ever did any act or pursued any course of dealing which even remotely led the plaintiff to believe them to be partners. Indeed, there is absolutely nothing in the record showing that the plaintiff had any knowledge whatever of what the arrangement between the defendants was.

They cannot be held to be partners upon the ground that Bohling received 65 per cent. of what the machine "made," first, because whether earnings or profits, gross or net, his 65 per cent. was received solely as compensation for the use of his thresher; second, because Bohling's testimony, taken all in all, shows that his 65 per cent. was 65 per cent. of the gross earnings of the thresher, irrespective of profits; third, because, conceding that his 65 per cent. was profits, the reception of a certain part of profits as compensation or pay for the use of property contributed to the venture does not, under our own and other well-considered cases, create a partnership. See *Waggoner v. First Nat. Bank,* 43 Neb. 84, overruling the third point of the syllabus in *Strader v. White,* 2 Neb. 348, which held: "If a person contract with a partnership to contribute his services to the enterprise, for which he is to be compensated by a proportion of the profits, he becomes a member of the firm, and liable for its debts, although he do not stipulate to bear any part of the losses."

One of the inevitable incidents of partnership is the

power of one partner to bind the other. Suppose Bohling in transporting coal for the thresher from his farm to Rogge's had negligently killed a man. Would Whitlow be liable therefor? Surely not. And yet this is exactly the liability Gillispie seeks to impose on Bohling, because of Whitlow's negligence.

Appellant suggests that the court should have submitted the issue as to partnership to the jury; but where, as here, the facts are not in dispute, the question of partnership or not is one of law for the court.

In our opinion, the transaction was, in legal intendment, a leasing or renting of the thresher to Whitlow for a specified but indeterminate amount, dependent upon, and ascertainable from, the total amount derived by him from threshing done by him, in which Bohling had no voice, over which he had no control, and for which he was to receive 65 per cent. of the receipts, for the use of his thresher.

Judgment

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1922.

SARAH E. STRIBLING ET AL., APPELLEES, V. FRATERNAL AID UNION, APPELLANT.

FILED JANUARY 5, 1922. No. 21573.

Insurance: BENEFICIARIES. Where the statutes of the state under which a mutual benefit association is organized, as well as its own by-laws, specify the classes of persons in whose favor a beneficiary certificate may be issued, and a member of such association, by false and fraudulent representations that the beneficiary named by him comes within one of the classes specified, procures a certificate to issue in favor of such person, such issuance is *ultra vires*, and no recovery may be had upon the certificate either by the beneficiary named or by the heirs at law.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Reversed.*

Fawcett & Mockett and *George R. Allen,* for appellant.

T. S. Allen, contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

MORRISSEY, C. J.

Plaintiff brought suit upon a benefit certificate issued upon the life of one Orlando T. Stribling; a jury was waived, the cause tried to the court, and judgment entered in favor of plaintiff for the amount prayed.

The Life & Annuity Association, a fraternal benefit association, organized and doing business under the laws

of Kansas for the mutual protection of its members, issued to Orlando T. Stribling a certificate of membership wherein A. H. Buckstaff was designated the beneficiary, and in conformity with the application of the member Buckstaff was designated as a "dependent." Subsequently the Life & Annuity Association was taken over and consolidated with defendant, Fraternal Aid Union. The benefit certificate was written and delivered in the state of Kansas and the member never was a citizen of Nebraska. The contract is to be construed according to the laws of Kansas. It is alleged in the petition and admitted by defendant that under the laws of the state of Kansas and Nebraska and the by-laws of the Life & Annuity Association, and of defendant, benefits can be made payable only to wife, children, parents, brothers, sisters, uncles, aunts, nephews, nieces, or dependents; that A. H. Buckstaff, designated in the certificate forming the basis of this action, was not a dependent within the meaning of the law, but was outside and excluded as a beneficiary. Plaintiffs also allege that as the heirs at law of said Stribling, deceased, they are entitled to the benefits of the certificate. It is conceded by all parties that Buckstaff was not "a dependent," but was a creditor of Stribling, and that the benefit certificate was made payable to Buckstaff in settlement of a debt or obligation due from Stribling to Buckstaff, and that Buckstaff did not fall within the class of persons for whose benefit the Life & Annuity Association was authorized to issue benefit certificates. The application for membership signed by Stribling and forming a part of the contract in suit reads as follows:

"Subject to the charter, constitution and by-laws now enacted, or hereafter may be enacted, I hereby make application for beneficial membership in Local Council No. ..... of The Life & Annuity Association located at Delphas, state of Kansas, and if I am accepted I hereby direct that my benefit certificate for $1,000—single—be made payable to A. F. Buckstaff, bearing relation to me

of dependent. (Benefits can only be made payable to wife, children, parents, brothers, sisters, uncles, aunts, nephews, nieces, or dependents.)"

"Also, I agree that all the foregoing statements and answers, as well as those I make, or shall make, to the medical examiner in continuance of this application are by me warranted to be true, and are offered to the Life & Annuity Association as a consideration of the contract which shall be subject to all the limitations and requirements of the constitution and by-laws of said association, with amendments made or may be hereafter made thereto."

Defendant, which stands in the shoes of the original insurer, by answer, alleges that the statement in the application for membership which designated Buckstaff as a dependent was false and fraudulent, and was known to both Stribling and Buckstaff to be such; that the statements made in the application were express warranties, that the application and the warranties therein contained formed the basis for the issuance of the benefit certificate, and that the false and fraudulent statements in the application for membership were made for the purpose of procuring the issuance of the benefit certificate in violation of the statute of the state of Kansas, which, together with the application, the by-laws, and the benefit certificate, form the contract between the parties; that the insurer was without knowledge of the false and fraudulent statements in the application when the benefit certificate was issued, and that defendant did not learn thereof until after the death of Stribling. It further alleges that, when defendant learned the true situation, it tendered to plaintiffs the amount of the assessments paid on the benefit certificate, and offered to confess judgment therefor, together with costs then accrued.

We are not troubled by disputed questions of fact, but we must determine as a question of law whether recovery may be had upon a bneficial certificate issued by an association with limited powers, such as those possessed by

the Life & Annuity Association, upon an application which falsely describes the beneficiary as one falling within the class for whose benefit a certificate may be issued, or is such certificate *ultra vires.*

Buckstaff appears to have abandoned all claim to a recovery upon the certificate, and appellees say the benefit certificate fails as to Buckstaff, the beneficiary designated, because outside the class for whose benefit the association is authorized to issue the certificate, but is valid as to the persons designated by the statute as beneficiaries. They further insist that under the rule in this state an insurance company must plead and prove that the answers were made as written in the application; and that they were false in some particular material to the insurance risk, and that the insurance company relied and acted upon these answers. In support of this assertion they cite *Aetna Ins. Co. v. Simmons,* 49 Neb. 811, and *Goff v. Supreme Lodge,* 90 Neb. 578.

The first case mentioned was a suit on a fire insurance policy. The power of the company to write the policy was not questioned. The court merely held that the application and policy should be construed together, and that the statements in the application were representations, and not warranties. The question here presented was not there involved.

In the case of *Goff v. Supreme Lodge, supra,* the society was authorized, as was the society here, to issue certificates to members of the immediate family, and dependents of the member. The member made application for a benefit certificate payable to a woman whom he designated as "a dependent and niece." Upon the death of the member payment was refused. The answer alleged, among other things, that the beneficiary was not the niece of the member, nor in any manner dependent upon him. The court, while apparently conceding that she was not a niece, found specifically that she was "a dependent," and as such was eligible as a beneficiary.

In addition to these cases from our own state, we are

cited to cases from other jurisdictions holding that, where the beneficiary named in the certificate is unable to take, recovery may be had by those designated in the statute as beneficiaries. But generally in the cases relied upon, in so far as the published reports disclose, the application truthfully disclosed the relationship of the beneficiary (*Kentucky Grangers' Mutual Benefit Society v. McGregor,* 7 Ky. Law Rep. 750; *Caudell v. Woodward,* 15 Ky. Law Rep. 63; *Gibbs v. Anderson,* 16 Ky. Law Rep. 397), or the decision turned upon a question of procedure. This is true in *Mullen v. Woodmen of the World,* 144 Ia. 228, cited by appellees. The decision did not turn upon the power of the society to write the contract. The statute required the association to attach a copy of the application to the certificate, and provided that a society neglecting to do so should "not plead nor prove the falsity of any such certificate or representation." The copy was not attached, and for that reason the court held that the association could neither plead nor prove the falsity of the representations. It merely enforced the statute.

Britton v. Royal Arcanum, 46 N. J. Eq. 102, on casual reading, appears to support the contention of appellee, but a close study of that opinion discloses that the application designated the beneficiary as a "cousin," which designation was false. The society was not authorized to pay benefits to a cousin, therefore the application was notice to the society that the beneficiary was not of the class for whose benefit it was authorized to issue the certificate, and the court, in the exercise of its equity powers, directed payment to be made to the next of kin. The court said: "Where there is a civil wrong there ought to be a remedy, and, if the law gives none, equity may take jurisdiction in order that what is right may be done."

The Life & Annuity Association was doing business under a statute of the state of Kansas at the time the certificate in suit was issued. It was empowered to write certificates on the lives of its members for the benefit of a restricted class of persons. Stribling was bound to know

the law, and apparently he did know it. Had he stated in his application that Mr. Buckstaff was a creditor, the certificate would not have been issued. He saw fit, however, to misrepresent the relationship which Buckstaff bore to him and described his creditor as a "dependent." There must have been a purpose for making the misrepresentation. It could be none other than to procure the issuance of the certificate in violation of the statute and the association's by-laws. This was a fraud materially affecting the rights of the association, which was bound to obey the law of the state, and to conduct its business in conformity with its by-laws. It was a fraud upon the members who had associated themselves together, not for the purpose of engaging in a general insurance business for profit, but for the purpose of mutually protecting the immediate members of the families, and the dependents of the members. Fraud inhered in the contract from its inception; and it was *ultra vires*. *Gray v. Sovereign Camp, W. O. W.*, 47 Tex. Civ. App. 609; *Koerts v. Grand Lodge, Hermann's Sons*, 119 Wis. 520; *Steele v. Fraternal Tribunes*, 215 Ill. 190; *Carter v. Employees Benefit Ass'n*, 212 Ill. App. 213; *Smith v. Baltimore & O. R. Co.*, 81 Md. 412; *Supreme Council, A. L. H. v. Green*, 71 Md. 263.

The court erred in failing to enter judgment in favor of plaintiff and against the defendant on the confession of defendant, and in favor of defendant on all other issues.

REVERSED AND REMANDED.

MAX KIRSHENBAUM ET AL., APPELLANTS, V. MASSACHUSETTS BONDING & INSURANCE COMPANY, APPELLEE.

FILED JANUARY 13, 1922. No. 21707.

1. **Insurance: "RIOT OR CIVIL COMMOTION."** Riot and civil commotion import occasional local or temporary outbreaks of unlawful violence, which, though temporarily destructive, do not rise to the proportions of organized rebellion against the government.

2. ———: ———. The words "riot or civil commotion" as used in a policy of burglary insurance will be given their popular or usual meaning, and, as used in the policy in suit, *held* to imply the wild or irregular action or tumultuous conduct on the part of three or more persons assembled together for the purpose of doing an unlawful act.

3. Trial: TAKING CASE FROM JURY. Where on the trial of an issue of fact the proof relating to the disputed issue is so clear and conclusive that reasonable minds cannot reach different conclusions, it is not error for the trial court to dismiss the jury and enter judgment in accordance with the evidence.

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

J. J. Friedman, for appellants.

E. J. Svoboda and *Kennedy, Holland, DeLacy & McLaughlin, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., BROWN and ELDRED, District Judges.

MORRISSEY, C. J.

Plaintiffs brought suit against defendant on a policy of burglary insurance. At the conclusion of the evidence, on motion of defendant, the jury were dismissed and the court entered judgment for defendant. Plaintiffs appeal. The general clause of the contract insures against loss in the following terms:

"A. For all loss by burglary of merchandise, described in the schedule hereof, and furniture and fixtures from within the premises as hereinafter defined, occasioned by any person or persons who shall have made felonious entry into the premises by actual force and violence when the premises are not open for business, of which force and violence there shall be visible marks made by tools or explosives upon the premises at the place of such entry."

The petition alleged that on September 28, 1919, while the policy in suit was in full force, and during the hours when plaintiffs' store was not open for business, the store was burglarized and merchandise to the value of $547.15

carried away.

The paragraph of the answer which constitutes the main defense is as follows:

"Defendant alleges that, if the said premises were broken into by force and violence and any merchandise taken from the said premises at the said time, said breaking and entering of the said premises occurred through and loss resulted from and was contributed to by the riot and civil commotion on September 28, 1919, in the city of Omaha, Douglas county, Nebraska, and that loss of any goods from the said premises was the result directly or indirectly of the said riot and civil commotion. That the said contract alleged in said plaintiffs' petition contained the provision as follows: 'The company shall not be liable for any loss from * * * riot * * * or civil commotion.'"

Plaintiffs' counsel very tersely state the issues: "We contend that it was clearly a question of fact for the jury to decide from the evidence, under proper instructions of the court, first, whether the material allegations of plaintiffs' petition had been sustained, and, secondly, whether *civil commotion and riot* existed at the time of the breaking and entering of plaintiffs' store, and, if so, that the loss sustained by the plaintiffs was due to such riot and civil commotion and that said causes were the proximate and efficient causes of the burglary and consequent loss."

Plaintiffs' store was broken into and goods were carried away at the time alleged in the petition. Were it not for the provision of the policy, which provides that the defendant shall not be liable for loss caused by "riot * * * or civil commotion," there would be no question as to plaintiffs' right to recover.

It seems to be conceded that at the time plaintiffs' store was broken into, and for several hours prior thereto, there was a riot in the city of Omaha, with the courthouse of Douglas county, and the county jail, located on the top floor thereof, the principal point of attack. Plaintiffs' store was located on a different street from

the courthouse and several blocks distant therefrom. It is claimed by defendant that the rioters attacking the courthouse surged back and forth over the streets of the city, breaking into several places of business, among others being plaintiffs' store, and that they carried away firearms and ammunition to use in the attack upon the courthouse, which was made for the purpose of securing possession of a prisoner who was then confined in the county jail.

Plaintiffs, as we understand their position, do not concede that the rioters who assembled for the purpose of taking the prisoner from the county jail and lynching him were the same parties who broke into the store and carried away the goods, which consisted chiefly of firearms and ammunition. Defendant's contention is that it is immaterial whether the crowd at the courthouse and the crowd assembled in front of plaintiffs' store be regarded as one body or as two; that in either event the loss suffered fell within the exemption clause of the policy pleaded by defendant. We do not deem it necessary to set out the testimony of the witnesses verbatim. Plaintiffs did not see the breaking, but we have the testimony of several disinterested witnesses, each describing the scene in substantially the same manner. From this testimony, which is free from material conflict, it appears that groups of men were going up and down the streets making a great noise; that they broke and entered at least eight places of business; that firearms were taken out and shots were discharged and that from time to time they called, "Let us get some ammunition," "Let us get some guns," "Lynch him," "Kill him," and "Get the nigger." They did not seem to be working as individuals, but as groups made up of many individuals. At least one policeman is shown to have been in the vicinity of plaintiffs' store, but he was apparently unable to quell the commotion. It appears that the parties who inflicted the loss on plaintiffs were engaged in the unlawful, and

in the end successful, effort to get possession of the prisoner and lynch him.

Riot and civil commotion import occasional local or temporary outbreaks of unlawful violence, which, though temporarily destructive, do not rise to the proportions of organized rebellion against the government. *Boon v. Aetna Ins. Co.*, 40 Conn. 575. The words "riot or civil commotion" as used in the policy in suit will be given their popular or usual meaning, and be held to imply the wild or irregular action or tumultuous conduct on the part of three or more persons assembled together for the common purpose of doing an unlawful act.

The proof is conclusive that a "riot or civil commotion" existed, and that it was the proximate cause of plaintiffs' loss. Under the evidence, reasonable minds could not reach different conclusions, and there was no question to submit to the jury. It follows that the court did not err in entering judgment for defendant, and the judgment is

AFFIRMED.

STATE, EX REL. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, RELATOR, V. LEONARD W. COLBY, DISTRICT JUDGE, RESPONDENT.

FILED JANUARY 13, 1922. No. 22257.

1. **Mandamus.** A writ of mandamus should not be issued if a relator does not establish a clear legal right to the performance by the respondent of the particular duty sought to be enforced.
2. **Bill of Exceptions.** A person who desires to present a bill of exceptions of the rulings of the district court upon a motion for a new trial is not required to procure a transcript from the official court reporter of affidavits filed in support of the motion, nor to obtain his certificate to the same.
3. ———: EXTENSION OF TIME: DISCRETION OF COURT. Where an affidavit presented in support of a motion for a new trial is on file in the office of the clerk of the district court, and a copy was in the possession of the party desiring a bill of exceptions settled,

and this was the only evidence necessary to be embodied in the bill, it is not an abuse of discretion by the trial court to refuse to allow an extension of time, over the statutory 15 days, for the presentation of a bill of exceptions.

Original proceeding in mandamus to compel the granting of extension of time for settling of bill of exceptions. *Writ denied.*

Doyle, Halligan & Doyle, for relator.

Sackett & Brewster and *E. O. Kretsinger,* for respondent.

Heard before LETTON, DAY and DEAN, JJ., BLACKLEDGE and TEWELL, District Judges.

LETTON, J.

This is an original proceeding in this court to obtain a writ of mandamus commanding Leonard W. Colby, judge of the district court for Gage county, to extend the time for settling a bill of exceptions in the case of Farmers Mutual Insurance Company v. Nellie Gumaer, Mary Gumaer, and George Lippold, for an additional 40 days.

The facts seem to be that a default judgment was rendered on May 28, 1921, in said case against the insurance company on cross-petitions, in the absence of plaintiff's attorneys, and without notice to them of the date the case would be tried. A motion for a new trial was filed on May 31. The court passed upon this motion on June 4, in the absence of plaintiff's attorneys, and the term of court adjourned *sine die* the same day. On June 11, in reply to a letter, respondent wrote to plaintiff's attorneys that his recollection was that the motion for a new trial had been overruled "a week or more ago" and advised them to write to the clerk of the court for information. On June 15 the attorneys were informed by the clerk of the district court that the motion had been overruled on June 4. They at once ordered a bill of exceptions from the court reporter. They were unable to obtain the proposed bill of exceptions from the reporter until after the

expiration of 15 days after the adjournment of the term. Application was then made to respondent to allow additional time to prepare and present the bill of exceptions, which was denied on the ground that the attorneys had not used due diligence. There being no appeal allowed by statute from such an order, this proceeding was instituted.

This is not a proceeding in equity, and whether plaintiffs are entitled to relief in such a forum is not before us. Mandamus is a purely legal remedy, and unless relator has a clear legal right to the writ it will not be granted. The statute as to extensions of time for the preparation of bills of exceptions provides: "In cases where a party seeking to obtain the allowance of a bill of exceptions has used due diligence in that behalf, but has failed to secure the settlement and allowance of the same as herein required, it shall be competent for the judge who tried the cause, upon due showing of diligence, and not otherwise, to extend the time herein allowed." Rev. St. 1913, sec. 7880.

The question presented is whether the decision of the judge as to the lack of exercise of due diligence is sustained by the evidence, or is such a gross abuse of discretion as to warrant the issuance of the writ.

No evidence was preserved at the time the judgment was rendered. The only evidence presented to the court at the hearing upon the motion for a new trial was an affidavit by T. J. Doyle, one of the attorneys for plaintiff. This affidavit, which is very brief, sets up in substance the facts hereinbefore stated as to the taking of the default judgment and other relevant facts. In the letter ordering the bill of exceptions it is said:

"Please include in this bill of exceptions the affidavit filed May 31, 1921, of T. J. Doyle, in support of the plaintiff's motion for a new trial.

"I am inclosing you herewith a copy of said affidavit, so you can see what it is. You can either use this one, after comparing it with original on file in your court, or

make one yourself, as you desire. *Only be sure* and put this affidavit in the bill of exceptions so the affidavit can be presented in the supreme court.

"Court adjourned June 4, 1921. If you cannot get this bill of exceptions to us, within the 40 days, so it can be served, kindly see that the forty days' extension of time is taken."

Formerly the complaining party prepared his own bill of exceptions to the rulings of the court from his notes of the evidence, and presented them to the adverse party, tendering the evidence as he understood it to have been given. The opposite party then tendered such amendment as he deemed proper, and, if there was any dispute between them, this was settled by the trial judge. The legislation creating the office of court reporter in no wise changed or interfered with the former law relating to the allowance and presentation of bills of exceptions, and this is still a legal method. Since the creation of the office of official court reporter, it has become customary to preserve all the evidence and present it as the bill of exceptions, and there is a tendency on the part of courts to require the bill of exceptions to contain all the evidence. The former practice, however, is recognized in the rules of this court with reference to the preparation of a "case stated," and there is much to be said in favor of the old practice requiring only enough of the evidence to present to a reviewing court, clearly, the ruling complained of. In this case a copy of the only evidence used at the hearing on the motion for a new trial, viz., the affidavit of Mr. T. J. Doyle, was in the hands of the relator in time enough to have presented it on June 20, which was the last day, the fifteenth day falling on Sunday. In fact, on the 11th day of June the trial judge had informed the attorneys that his recollection was that the motion for a new trial had been passed upon a week or more previous to that time, though they were not aware that court had adjourned *sine die* on the 4th. Relators seem to be of the opinion that a reporter's certificate is

necessary to a bill of exceptions. In *State v. Ambrose,* 47 Neb. 235, Commissioner Irvine said, with respect to the reporter's notes: "The notes are not public records. The reporter's certificate to a transcript thereof does not authenticate them so as to permit their introduction in evidence. Parties in preparing and the judge in settling a bill of exceptions are not bound by the reporter's transcript. There is, indeed, nothing to require parties to resort to such transcript in the preparation of a bill. The settlement of a bill rests finally upon the judge's determination of what occurred at the trial; and when the accuracy of a proposed bill is properly challenged, the judge must settle the matter in accordance with the truth, and not blindly in accordance with a reporter's transcript." It has become customary in some of the district courts to allow 40 days time as a matter of course, and relator's attorneys no doubt relied upon this custom, but it is only a custom.

The cases of *Greenwood v. Craig,* 27 Neb. 669, *State v. Dickinson,* 56 Neb. 251, *State v. Ramsey,* 60 Neb. 191, and *Horbach v. City of Omaha,* 49 Neb. 851, bear upon the points presented here, as to extension of time for the allowance of bills of exception.

We are of the opinion there was no abuse of discretion by the district court, in refusing to allow the extension of time required. The writ of mandamus is therefore refused.

WRIT DENIED.

CITY OF CHADRON, APPELLANT, V. LEE CARD ET AL., APPELLEES.

FILED JANUARY 13, 1922. No. 21965.

Estoppel: WATERS: USE BY CITY. Lower riparian proprietors who knowingly, without objection or protest, permit a city to adopt plans, to vote bonds, to let contracts, to create indebtedness, and to expend money in an effort to increase the municipal water

supply from unappropriated waters of a stream, may be estopped to object to the granting of permission to use such waters.

APPEAL from the Department of Public Works. *Reversed, with directions.*

E. D. Crites and *F. A. Crites,* for appellant.

Lee Card, contra.

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., HOBART and PAINE, District Judges.

ROSE, J.

This is a proceeding before the State Department of Public Works, Bureau of Irrigation, Water-Power and Drainage. The city of Chadron is the applicant and is seeking permission to increase its water-supply. It installed a system of water-works in 1892, and has since kept the plant in operation, using water from Chadron creek. Owing to the growth of the city of Chadron an increase in the supply of water for public and private uses is imperatively demanded. To this end additional water-works are in course of construction or have been installed. The present application, as indicated by the prayer, is for a permit—

"To impound and apply to such uses all unappropriated waters flowing in said stream, and all storm and flood waters, and all seepage, subterranean, underground and percolating waters, subject to the disposition of the state, in the said valley of the Chadron creek, and to impound any and all waters not otherwise appropriated."

Some of the lower riparian proprietors are defendants. They filed objections to the issuing of the permit on the ground that under it, if granted, the city of Chadron would interfere with their water rights. A reply to the objections contains a plea of estoppel, to the effect that defendants, with knowledge of the facts, without objection or protest, sat quietly by and permitted the city, in furtherance of its purpose to improve its water-works and increase its water-supply, to pass ordinances, to adopt

plans, to vote bonds, to let contracts, to create indebtedness, and to expend money. Upon a trial of the issues the proceeding was dismissed, and the city has appealed.

The estoppel pleaded by the city is conclusively established by the evidence and prevents defendants from successfully interposing objections to the permit. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Neb. 798. No substantial reason for refusing the city relief to the extent indicated by the foregoing excerpt from the prayer of the application has been given. The order of the Department of Public Works, Bureau of Irrigation, Water-Power and Drainage is therefore reversed and the proceeding is remanded to that tribunal, with instructions to grant the permit.

REVERSED.

WILLIAM L. LOWE, APPELLEE, V. CHARLES T. PAYNE, APPELLANT.

FILED JANUARY 13, 1922. No. 21683.

1. **Evidence:** DECLARATIONS OF LESSOR: SUITABILITY OF PREMISES. When a lease contains no warranty, express or implied, that the leased premises are suitable for the business or purpose for which they are to be used by the lessee, declarations by the lessor, made at the time of the execution of the lease, of their suitability for the lessee's business, in the absence of fraud, deceit or concealment, are not admissible in evidence.

2. **Landlord and Tenant:** LEASES: DUTY OF LESSEE. The rule of *caveat emptor* applies to leases of real estate, wherein the control passes to the lessee, and, in the absence of fraud, deceit or concealment, the duty devolves upon the lessee to examine the premises with respect to suitability for his business and with respect to safety.

3. ———: DEFECTIVE PREMISES: LIABILITY OF LESSOR. In the absence of fraud, deceit or concealment, a lessor is not liable in damages to the lessee for defects in a building which are plainly discernible, when liability therefor is not reserved in the lease.

4. ———: ———: CLOSING OF PREMISES BY MUNICIPALITY. In the absence of a provision in the lease therefor, and in the absence

of fraud, deceit or concealment, a lessor, who is without fault, is not liable in damages to the lessee arising from the closing of a part or all of the leased premises by the municipality, and the consequent eviction of the lessee, under an exercise of the police power by the municipality.

5. Evidence examined, discussed in the opinion, and *held* that the verdict is not supported by the evidence.

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

Fawcett & Mockett and *Francis V. Robinson,* for appellant.

Holmes, Chambers & Mann, contra.

Heard before LETTON, DAY and DEAN, JJ., ALLEN and BEGLEY, District Judges.

DEAN, J.

Plaintiff sued to recover damages from defendant on two grounds: First, that he was induced by fraud and deceit to lease an alleged unsafe three-story brick business property in Lincoln from defendant; and, second, for a wrongful eviction of plaintiff by defendant after plaintiff had entered into possession of the premises under the lease. From a verdict and judgment for $1,742.40, defendant appealed.

Plaintiff was a dealer in automobiles and accessories, and in connection with his business he repaired cars. He rented the building in suit for use in his business. The lease was executed April 4, 1918, and by its terms was to run for a period of 10 years, beginning May 1, 1918, at a rental of $65 a month. Before executing the lease, however, plaintiff and defendant, according to plaintiff's evidence, went through the building and examined the first and second floors. He said he noticed at the time that the east wall was not plumb, but that defendant told him he had known the building for 25 years and that it was safe and suitable for plaintiff's business. No investigation was made by plaintiff of the foundation or basement either from the inside or from the outside.

He said that defendant told him the basement was full of floor supports and trash and rubbish left there by a former tenant. Plaintiff charges that he relied upon defendant's statements respecting the safety and suitability of the building for his business and made no further investigation, and that, after the examination referred to, the parties executed the lease. It may be observed here that the lease contains an agreement that plaintiff shall "make all repairs on the premises such as he may require." Plaintiff contends that this clause referred to such repairs as he should find it convenient to install in his automobile business, while defendant contends that it imposed the burden on plaintiff, not only to make such repairs, but to repair the defects of which he complains. We do not, however, in view of our conclusion, find it necessary to decide the question.

May 1, 1918, plaintiff took possession of the building and put in certain repairs at an alleged cost of $624.88. A week before the expiration of the first year, namely, March 24, 1919, the city building inspector, upon examination of the building, served duplicate notices on plaintiff and defendant, wherein it was stated that the building, "known as number 2033, O street, is unsafe for the purpose for which it is being used, by reason of unsafe walls. You are therefore notified that I will close said building in thirty days if the defects set forth above have not been remedied." The inspector, called on the part of plaintiff, testified that the examination was conducted by the city engineer and himself. He said they found the walls were 16 inches out of plumb; that they did not go down to the foundation but examined the outside and inside walls, and that subsequently he served notice of the defective walls on the parties, to which reference has been made, and that the closure, pursuant to the notice, prevented plaintiff from conducting his business in the building. On the cross-examination he testified that he knew the building, and that he had noticed for 20 years, prior to the examination, that it was not plumb, but he

did not say to what extent during that time; that he could not see any difference in the walls at the time of the trial than they presented at the time of the inspection about a year before. Referring to the chimney, on the west side of the west wall, the witness said that it appeared to be plumb and was without cracks; that it was attached to the building "right up at the roof" and was not elsewhere attached thereto. Continuing, he testified: "Q. Your examination of that building then consisted of going there and looking at it and determining from your plumb-line, etc., that the building was out of plumb? A. Yes, sir. * * * Q. And that was all the steps you did take to determine that, was it not? A. We examined the walls, both east and west walls and rear wall." He said that he found some small seam cracks in the wall about 30 feet from the rear.

The evidence of the city engineer, called on the part of plaintiff, was to the effect that he and the city building inspector made an investigation "of the walls of the building, particularly;" that the east and west walls leaned to the west at certain places; that around the lower portion of the walls, near the foundation, part of the bricks were broken off; that in some places an entire brick was out; that in his opinion the walls leaned uniformly throughout; that he agreed with the inspector that the building should either be repaired or closed. On the cross-examination he said that a person who went around the building and through the building could see the places where he had testified that the bricks were out. He said he had known the building 20 years and that for 10 years he knew that the walls bulged. Pursuant to the notice served by the city inspector the building was closed within the time therein specified.

A consulting engineer, called on the part of defendant, testified with respect to the condition of the building. He said that he examined it on the outside and the inside and that he discovered nothing in connection with its appearance, as affecting its safety, that was hidden or

obscure; that the bulge to the west, in both the east and west walls, was apparent to any person passing along O street; that the moment he stepped into the building he could see the bulge, and that it was almost identical in both walls. On the cross-examination he said that he made no measurements, but that the bulge varied possibly 12 inches in some places; that he could not say what caused it, but that if the foundation had settled the wall would also have settled and cracked, but that no crack was visible. With respect to the piers in the basement he testified that apparently they had not moved and appeared to be all right, and that the joists that rested on the piers and on the foundation had not settled.

Five or six disinterested witnesses, some of them former tenants, who knew of the building for from 5 to 20 years, testified, in substance, that any person who entered the building during the period of their acquaintance with it would at once observe the leaning walls, and that in all respects they remained unchanged through all the years. Two or more of these witnesses testified that they examined the building the morning of the trial and that the walls presented the same unchanged appearance. Some testified that a casual observation by a passer-by on the street would disclose the bulges in the walls, and some that they were as readily discernible from the rear as from the front of the building.

The fact is clearly established that the defects could have been discovered by plaintiff if he had made reasonable inquiry or examination. Plaintiff testified that the defects in the walls were observed by him when he first visited the building with defendant. It does not appear that defendant concealed the defects in the building, nor that he prevented plaintiff from making any examination that he might choose. *Davis v. Manning*, 98 Neb. 707; *Rankin v. Kountze Real Estate Co.*, 101 Neb. 174. The statements attributed to defendant by plaintiff, which were denied by defendant, respecting the condition of the building, or its adaptability to the use of plaintiff's busi-

ness, were mere expressions of opinion, or at the most, even if true, they were "dealer's talk" or "seller's talk." *Nounnan v. Sutter County Land Co.,* 81 Cal. 1; *Davidson v. Fischer,* 11 Colo. 583; *Franklin v. Brown,* 118 N. Y. 110; *Hamilton v. Feary,* 8 Ind. 615; *Walsh v. Schmidt,* 206 Mass. 405.

Plaintiff knew, or should have known, the type of building that was required for the business in which he was engaged. Defendant was not a builder, nor does it appear that he was learned in the science of engineering. He dealt in mattresses and bed springs. In *Williams v. McFadden,* 23 Fla. 143, 11 Am. St. Rep. 345, it is said: "A statement made by the vendor, which is tantamount to an estimate or opinion of the value, condition, character, adaptability to certain uses, etc., of such real estate, is not actionable unless the seller resorts to some fraudulent means to prevent the purchaser from examining the property."

The lease, the contract between the parties, contains no representation or warranty that the building was suitable for the purpose for which plaintiff leased it, nor was there any engagement on defendant's part that he would maintain the building for plaintiff during the term of the lease. 16 R. C. L. 772, sec. 268. In *Dutton v. Gerrish,* 63 Cush. (Mass.) 89, it is said: "Where a contract of hiring contains no warranty, express or implied, that the premises are fit for the purpose for which they are hired, evidence is not admissible of the declarations of the lessor to that effect, made at the time of the hiring." To the same effect is *York v. Steward,* 21 Mont. 515.

In 16 R. C. L. 775, sec. 270, the rule is stated: "In the absence of warranty, deceit, or fraud on the part of a landlord, the rule of *caveat emptor* applies to leases of real estate, the control of which passes to the tenant, and it is the duty of the tenant to make examination of the demised premises to determine their safety and adaptability to the purposes for which they are hired." And at page 779, in the concluding part of section 271, it is

said: "The liability of a landlord on account of a latent defect is not increased by the fact that the defect in a building was in the original construction. A landlord is under no duty to disclose to the tenant obvious defects in the premises, apparent to observation, especially where there is an equal opportunity for observation on the part of each party; and no liability is imposed on the landlord for his failure to make known such defects."

It cannot be maintained that plaintiff, as he contends, was evicted by defendant. The eviction complained of was under an exercise of the police power by the city authorities, and, in the absence of contract between the parties, any resulting damage arising therefrom cannot be attributed to the lessor. *Roth v. Adams,* 185 Mass. 341.

The items going to make up plaintiff's claim for damages, as alleged, consist of not only repairs installed, but as well for expenses attendant upon moving out, and the like, and for "the fair rental value of the premises" at the time of eviction. In view of the law applicable to the facts, and of our conclusion herein, we do not find it necessary to prolong the discussion on these and other alleged assignments of error.

We conclude that the verdict is not supported by the evidence. It follows that the judgment must be, and it hereby is,

REVERSED.

CHARLES URBAN, APPELLANT, V. JOSEPH M. NOVOTNY, APPELLEE.

FILED JANUARY 13, 1922. No. 21938.

Appeal: REVERSAL. Plaintiff brought an action to recover for personal injuries arising from an assault made upon him by defendant. The jury clearly disregarded the material facts in evidence and found for defendant. It follows that the verdict must be set aside.

APPEAL from the district court for Valley county: EDWIN P. CLEMENTS, JUDGE. *Reversed.*

Davis & Davis, for appellant.

Munn & Norman, contra.

Heard before LETTON, DAY and DEAN, JJ., BLACKLEDGE and TEWELL, District Judges.

DEAN, J.

Plaintiff brought this action to recover for personal injuries resulting, as alleged, from an unprovoked assault by defendant. The verdict and judgment were for defendant, and plaintiff appealed.

The sole question before us is whether the verdict is supported by the evidence. A review of the record discloses substantially these facts: The altercation took place August 5, 1920, on a farm where plaintiff and defendant were assisting a neighbor to thresh. About the noon hour plaintiff remarked to defendant that a relative of his owed him a small sum of money for work performed for which he was never paid. That evening defendant, in the presence of some members of the threshing crew and before they left the field, took exceptions to plaintiff's statement about his relative and the assault followed.

It is clearly established that for several years before the assault plaintiff had been under treatment for a serious affection of the bones of his right arm and shoulder and that he had only a partial use of that arm. A physician testified that, about a year before the trial, upon examination, he found the bones of the arm were "rarefied, porous;" that "the humerus, upper arm, anchylosed to the scapula, that is, grown together, and giving him considerable pain at times."

With respect to the facts immediately attending the assault, plaintiff testified that the defendant approached him at about sundown and said he was "going to beat him up," or words to that effect, because of what he had

said about his relative at the noon hour, and that he then seized him, knocked him down twice, and held him down and choked him and twisted his crippled arm and, while in this helpless position, he pressed one or both of his knees against his right side so that his ribs were almost fractured. From the beating he said he became sick and his lungs bled.

Two or three eye-witnesses corroborated plaintiff's evidence. One said that, after the beating, plaintiff was seated and spitting blood, and that he never saw him do any work on his place after the injury, though he lived just across the road from him. Another testified that defendant seized plaintiff's suspenders and his collar band and struck him, and when he fell he choked him and pressed on him with his knees and twisted his lame arm; that one of the threshing crew tried to loosen defendant's hold on plaintiff, "but he couldn't tear him off and he was lifting both from the ground." Another testified that after the assault he assisted plaintiff to the farmhouse on the premises and that he was so weak he could hardly walk. He said that plaintiff "was spitting blood right along," and that his handkerchief was covered with blood.

From the farmhouse plaintiff was removed that evening to a hospital at Ord, where he remained eight days. He was then taken to his home, where he was confined to his bed about a month. From August 5, 1920, to the time of the trial in November, plaintiff was unable to do any work. He was treated by two physicians at the hospital and for a considerable time by one or both of them after he returned to his home from the hospital. The doctors said that he suffered such pain at times that he could not sleep and that, in order to obtain relief, it became necessary to administer anodynes. The physician who examined plaintiff the evening of the assault found abrasions of the skin on the chest, blood-spitting and rales in the lungs and some effusion of serum or blood. The bleeding was attributed to contusions on the chest.

At the hospital plaintiff's temperature increased about a degree and a half above normal and he suffered much pain for three or four weeks. The medical treatment continued until the time of the trial. It also appears from the evidence of one of the doctors that the soreness and abnormal condition of the patient would probably continue for several months so that he would be prevented from doing ordinary farm work. In his opinion the doctor said that the beating would be apt to bring on a recurrence of the trouble in the arm and that it could only be used with great care. The bills of two of the physicians approximated $75 each.

Defendant admitted that, before the altercation, he knew the crippled condition of plaintiff's right arm. He denied that he struck plaintiff, denied that he threw him down, and denied that he pressed him with his knees, but before the close of his testimony he made these material admissions: "Q. You had hold of him first by the shirt? A. Yes; between the suspenders, and he jerked loose. * * * Q. You grabbed him again? A. Yes. Q. And got him by the suspenders? A. Yes, sir. Q. He stumbled, you think, and fell? A. I don't know exactly how he come down. Q. You came down on top of him? A. I was on my feet aside of him, he was down and I on my feet aside of him holding him right along. * * * Q. And you held him down there? A. Yes." Defendant denied that he was on his knees. He said that plaintiff kicked at him, and that to protect himself he "kept this here knee right up against his foot," and that he had his knee by his side. He further testified: "Q. Well, he was down there quite a little while? A. I guess it was quite a while; I don't know how long it was. * * * Q. As a matter of fact before he fell down or before you pushed him down you held him up against the rack there? A. I guess there is where I got the second hold on him. Q. By the rack? A. By the rack. Q. That is what kept him from running off, you held him up against the rack? A. I guess so."

The separator tender, called on the part of defendant, testified that he was on top of the machine, and that defendant "kind of jumped at him (plaintiff) and grabbed another hold and throwed him to the ground and held him there some time, 10 or 15 minutes." Another witness, called by defendant, testified that defendant "grabbed for his (plaintiff's) suspenders and held him and tore his shirt;" that he "got him over towards the hayrack and held him there a little while and Charlie (plaintiff) went down and Joe stood right over him and held him down." He further said that one of the crew "tried to get Joe Novotny (defendant) to let him up and Joe wouldn't do it, or something, I don't know."

Defendant argues that plaintiff was the aggressor and made an attack on him, and that he used no more force than he believed was reasonably necessary to repel the attack and that all of his efforts were directed toward protecting himself from plaintiff's attempted assault. The evidence does not support the argument. The admissions of defendant, and the admissions in the testimony of his material witnesses, as shown herein, corroborate the evidence of plaintiff with respect to the assault. When considered altogether, the evidence clearly shows that plaintiff more than once tried to make an escape from one who was intent upon giving him a brutal beating and who had it in his power to do so. The evidence of defendant himself discloses that plaintiff "jerked loose," and that he again grabbed him and held him down "quite a while," and that he "got the second hold on him by the rack," and that it was the second hold which kept plaintiff from running away. That the attack upon plaintiff was the result of sudden passion cannot be successfully interposed. The commonplace remark, to which defendant took exception, was made at or about the noon hour and the assault did not take place until the sun was going down.

True, the direct testimony of nearly all of defendant's witnesses tends to corroborate the assertion of defendant

in his direct examination, namely, that he did not strike or beat the crippled plaintiff. But, as we have seen, the admissions by defendant himself and the admissions of the witnesses called by him, all on the cross-examination, plainly disclose the execution of a poorly concealed purpose to beat and bruise the plaintiff. It is strongly argued that the verdict of the jury should not be disturbed. But the elementary rule which defendant invokes is not applicable to the facts. The evidence of the three physicians is such that, when considered with all of the other evidence in the case, no other conclusion is permissible than that plaintiff was the victim of a superior brutal force from which he tried to escape.

For some reason that is undisclosed by the record the jury seem to have disregarded the evidence with respect to the material facts. The conclusion is that the judgment must be, and it hereby is, reversed and remanded for further proceedings.

REVERSED.

E. R. NEEDHAM V. STATE OF NEBRASKA.

FILED JANUARY 13, 1922. No. 22019.

Evidence examined, and *held* insufficient to establish judgment of guilt.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

Fradenburg & Matthews, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Charles S. Reed, contra.*

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., HOBART and PAINE, District Judges.

ALDRICH, J.

This is an appeal by E. R. Needham, of Omaha, from a judgment of the district court for Douglas county,

wherein he was convicted of driving an automobile in a dangerous manner while intoxicated, contrary to the ordinances of the city of Omaha. He was sentenced to imprisonment in the county jail for a term of 15 days.

The evidence of the state consists of the testimony of Officer Revers, who made the arrest, the testimony of Sergeant Wheeler, who was acting captain at the police station, and that of Dr. Shook, the police surgeon who examined defendant several hours after the arrest. Officer Revers took the defendant in charge for an infraction of the traffic rules in failing to obey a signal given by him at a street intersection. Revers said that the defendant did not drive the car in a straight line on the way to the station. This, he testified, was the only indication he observed that defendant was drunk. Sergeant Wheeler was acting captain when the defendant was brought to the station. From his testimony we understand that defendant was first booked under the charge of reckless driving. A $50 bond was given and defendant was permitted to drive away in his car. About two hours later, according to Wheeler's testimony, the defendant came back to the police station in an angry mood and exhibited signs of intoxication. At that time Dr. Shook was called to examine the defendant. His testimony is to the effect that defendant had been drinking, but not enough to interfere with his driving an automobile. Sergeant Wheeler then added the charge of drunkenness to the charge of reckless driving. The bond was increased to $500.

Opposed to this evidence of the state is defendant's testimony in which he denies drinking any intoxicating liquor that day. Mr. Brenner testified that he saw defendant in the morning and again about 4 o'clock in the afternoon, and that he was perfectly sober at that time. This was just a few minutes before the arrest by Officer Revers. Mr. Brenner also testified that he drove home from the police station with defendant, but did not see him exhibit any evidence of intoxication. This was after

defendant had been to the station the second time.

In our opinion the state has failed to prove a case against the defendant. In this connection it is noticeable that the police officers allowed defendant to go at large and handle his own automobile. It is significant that Dr. Shook was at the station when defendant was brought in by Officer Revers. Sergeant Wheeler testified that it was the custom to call the police surgeon when an arrested man was suspected of intoxication. Why was Dr. Shook not called to examine defendant when he was at the police station the first time? The casuist may analyze and dissect to his heart's content; he cannot show this man was under the improper influence of liquor. In opposition to the state's evidence, the defendant positively swears he had not touched a drop that day, and he is corroborated by certain circumstances. In addition, we have the evidence of the witness Brenner, who testified that he saw defendant in the forenoon and that defendant took Mrs. Brenner down town at about 4 o'clock; that he was duly sober and straightforward, and was amply able to drive his car. In this he is corroborated by the state's witness, Dr. Shook, who said defendant was capable of driving a car.

It is plain, then, that, taking all of the circumstances into consideration, the state has failed to make a case. The evidence is not clear and satisfactory. For these reasons, we are therefore led to reverse this case.

REVERSED.

STATE OF NEBRASKA, APPELLANT, V. WILLIAM TOOP ET AL., APPELLANTS: GEORGE H. STINE ET AL., APPELLEES.

FILED JANUARY 13, 1922. No. 21861.

1. **Aliens: INHERITANCE.** Where a citizen of the United States, who at the time of his death was the owner of a tract of farm land not within any of the exceptions of section 6276, Rev. St. 1913, dies intestate, leaving as his next of kin two nieces who were

citizens of the United States, and three nephews who were nonresident aliens residing in England, and subjects of the Kingdom of Great Britain and Ireland, there being no treaty between the United States and the Kingdom of Great Britain and Ireland affecting the question, *held*, that the provisions of section 6273, Rev. St. 1913, preclude the three nephews from acquiring any title or interest in such lands, and that the entire estate in the land vested in the two nieces who were residents and citizens of the United States.

2. ———: ———. The exception in section 6273, Rev. St. 1913, giving to the widow and heirs of aliens who have acquired lands in this state prior to March 16, 1889, the right to hold such lands by devise or descent for a limited period, and providing a method for escheating such lands, has no application where the deceased landowner was a citizen of the United States.

3. **Case Overruled.** The decision in *State v. Thomas*, 103 Neb. 147, in so far as it is contrary to the views herein expressed, is overruled.

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

A. V. Thomas, Crane, Boucher & Sternberg and *Bulkley, More & Tallmadge*, for appellants.

Matt Miller, Doyle & Halligan and *Tinley, Mitchell, Pryor, Ross & Mitchell, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, DAY and FLANSBURG, JJ., SEARS and WESTOVER, District Judges.

DAY, J.

The ultimate question which we are called upon to determine in this case is whether, under the facts presented by the record, certain nonresident aliens, residing in England, kin of one John Toop, deceased, have any interest in certain land in this state owned by said John Toop at the time of his death.

A brief statement of the facts, at this time, which have given rise to the several proceedings involving the real estate in question may serve to a clearer understanding of the questions hereinafter discussed.

John Toop, a citizen of the United States and a resident of Butler county, Nebraska, for many years, died at his home intestate on July 28, 1898. At the time of his death he was the fee simple owner of the S. ½ of the S. W. ¼ of section 30, township 13, range 2 east of the sixth P. M.; also the N. ½ of the N. E. ¼ of section 36, township 13, range 1 east of the sixth P. M., in Butler county, Nebraska. He acquired the title to this land March 9, 1889. It was not obtained under any lien or mortgage, was not used for railroad or manufacturing purposes, and was not within the corporate limits of any city or town, but was exclusively farm land. He also owned at the time of his death considerable other property not necessary to mention, as it is not now the subject of controversy. He left surviving him his widow, Sarah Jane Toop, who, under the law as it then stood, took a life estate in the land. She remained in possession of the land under her homestead right until her death on November 9, 1907. John Toop left no children or descendants of children, no father or mother, brother or sister. He was survived, as his next of kin, by two nieces, Sarah Jane Dyer and Emma Tremlin, who were the surviving children of Mary Ann Plowman, a predeceased sister of said John Toop. Both of these nieces were residents and citizens of the United States, and were the only next of kin of said John Toop residing in the United States. He was also survived by William and John Toop, surviving sons of William Toop, a predeceased brother of said John Toop, and also by Robert Orchard, a surviving son of Betsy Orchard, a predeceased sister of said John Toop. William Toop, John Toop, and Robert Orchard, above mentioned, were subjects of the Kingdom of Great Britain and Ireland, and resided in England. These two nieces and three nephews stood in the same degree of relationship to John Toop, and would, under our law of descent, inherit the land in question in equal proportion, subject to the life estate of the widow, unless the fact of alienage of the English kin is a bar to their

taking any interest in the land. In the course of the litigation the names of several grandnieces and grandnephews of John Toop, some of whom are residents and citizens of the United States, appear as claimants to a portion of this land; but, as they took no interest under our statute of descent, no further reference need be made to them. For construction of our law of descent covering this precise situation, see *Douglas v. Cameron,* 47 Neb. 358. It appears, however, that, since the death of John Toop, Robert Orchard, hereinbefore mentioned, has died, and, of course, his survivors would succeed to whatever interest their ancestor may have had. For the purpose of convenience the nonresident alien claimants will be referred to hereinafter as the English kin. It appears further that Sarah Jane Dyer and Emma Tremlin sold the land in question to George H. Stine, who has been in possession thereof for a number of years, has made valuable improvements thereon, and has mortgaged the land to the Mutual Benefit Life Insurance Company. Under this state of facts, an action in mandamus was brought by a group of the English kin, headed by William Toop, against A. V. Thomas, county attorney of Butler county, to compel him to proceed under the provisions of sections 6272-6276, Rev. St. 1913, to escheat that portion of the title to the land claimed by the English kin. That case was ultimately brought to this court, where the writ was allowed. *State v. Thomas,* 103 Neb. 147. In obedience to our mandate the present action was commenced in the name of the state of Nebraska to forfeit and escheat to the state that portion of the title to the land which the English kin would have inherited had each not been a nonresident alien; and it was also prayed that the value of such interest be determined in the manner provided by law and paid to the English kin. All persons who had or claimed any interest in the land were made parties defendant, and each by their respective answers and cross-petitions set up their respective claims. An issue was thus tendered whether the English kin had

any interest at all, beneficial or otherwise, in the lands in question. It was adjudged by the trial court that the English kin took no title, right or interest in the land; that no part thereof escheated to the state of Nebraska; and the cross-petitions of the English kin and the claim of the state were dismissed. The court also adjudged that the entire title to the land, upon the death of John Toop, vested in Sarah Jane Dyer and Emma Tremlin, subject only to the life estate of Sarah Jane Toop, the widow; that by mesne conveyances of Sarah Jane Dyer and Emma Tremlin, and the death of Sarah Jane Toop, the entire title to the land in question became merged in George H. Stine to the exclusion of all the parties, save only the mortgage lien of the Mutual Benefit Life Insurance Company, and, subject to this lien, quieted and confirmed the title to the land in George H. Stine. From this judgment the English kin have appealed.

At the time of the death of John Toop, there was no treaty between the United States and the Kingdom of Great Britain and Ireland, so that the question presented must be determined by the provisions of our statute unaffected by treaty rights.

As before stated, the action was bottomed upon the provisions of sections 6273 and 6274, Rev. St. 1913, relating to the subject of escheats, which, in so far as such provisions affect the question in hand, may be said to be identical with chapter 58, Laws 1889. The changes which have been made affect only questions of procedure. Prior to the act of March 31, 1887, Laws 1887, ch. 62, the legislative policy of the territory, as well as the state, had been to make no distinction between citizens and aliens, whether resident or nonresident, with respect to their right to hold and acquire real property in the state by purchase, devise or descent. At that time, however, restrictions were commenced to be enacted. Section 1, ch. 58, Laws 1889, being section 6273, Rev. St. 1913, is as follows:

"Nonresident aliens and corporations not incorporated

under the laws of the state of Nebraska, are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten years and no longer, and if at the end of such time herein limited such lands so acquired have not been sold to a *bona fide* purchaser for value, or such alien heirs have not become residents of this state, such lands shall revert and escheat to the state of Nebraska, and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeiture of all such lands as provided by this act."

The second section of the act provides the method of procedure in case lands are escheated to the state under the provisions of the act, directs that the county attorney in the county where the land is situated shall proceed to have the title to the land forfeited to the state, that when so forfeited the lands shall be appraised, and that "the heirs or persons who would have been entitled to such lands shall be paid by the state of Nebraska the full value thereof as ascertained by appraisement," less the expense of the appraisal. Section 3 of the act provides:

"Any nonresident alien who owns land in this state at the time this act takes effect may dispose of the same during his life to *bona fide* purchasers for value, and may take security for the purchase money with the same rights as to securities as a citizen of the United States."

Section 4 of the act provides that nothing in the act shall prevent the holders, whether nonresident aliens or corporations not organized under the laws of the state, of liens upon real estate, whether heretofore or hereafter acquired, from taking or holding a valid title under such liens or from becoming a purchaser at any sale for the purpose of enforcing such liens, but provides that lands so acquired shall be sold within ten years, and in default

of such sale the lands shall revert and escheat to the state of Nebraska, as provided in the act. It also exempts from its operation all "real estate necessary for the construction and operation of railroads;" "so much real estate as shall be necessary for the purpose of erecting and maintaining manufacturing establishments;" and "any real estate lying within the corporate limits of cities and towns." There is no contention that the lands in question are within any exception or proviso as set out in sections 3 and 4 of the act; so that the rights of the English kin, if any, under this act must rest upon the interpretation to be given to sections 1 and 2 thereof.

It will be observed that in the very beginning of the act, by plain, clear and unequivocal language, nonresident aliens and corporations not incorporated under the laws of this state are prohibited from acquiring title to, or taking or holding, any lands or real estate in this state by descent, devise, purchase or otherwise. The meaning of this sweeping language is so plain that no argument is necessary to elucidate it. Following this language, there is an "exception" and a "proviso." We have heretofore stated that the English kin make no claim that their rights are predicated upon any of the "provisos" of the act. Do they come within the "exception" clause of the act? The exceptions to the general prohibition is that the widow and heirs of aliens, who before the taking effect of the act had acquired title to lands in the state, are permitted to take such lands by devise or descent, and to hold the same for a period of ten years, and no longer, and if at the expiration of that time the widow and heirs of such aliens have not disposed of their land, or have not become citizens of the United States, then, under the provisions of the act, the lands escheat to the state, but the state is required to pay to the persons entitled to such lands tne appraised value thereof.

It will not escape notice that the exception clause of the act refers only to the "widow and heirs of aliens." But in this case John Toop was a citizen of the United

States. It is difficult to see how by any process of reasoning or fair interpretation of the language of the act it can be extended to include the widow and heirs of citizens. Certainly to do so is to read into the act words which are not there. While no doubt the act should receive a liberal interpretation, yet this license does not warrant us in indulging in judicial legislation. We can find no judicial basis for construing the act so as to give the nonresident alien kin of a deceased citizen the right to take any interest in his lands, which are not within the provisos of the act. The argument that while the English kin may not take the title to the land they nevertheless take a "beneficial interest" is fallacious. It is plausible only because it is not clear why the legislature should have drawn a distinction between the nonresident alien heirs of an alien then holding land and the nonresident alien heirs of a citizen. In *Wunderle v. Wunderle,* 144 Ill. 40, an almost identical statute with our own was under consideration, and it was said:

"It is urged that the act of 1887 should be liberally construed, and that such liberal construction would have the effect of extending the exception named in section 1 to the alien heirs of citizens, as well as to the heirs of aliens. In other words, we are asked to so construe the exception as to give the nonresident alien kindred of citizens the right to take lands by descent or devise, and hold the same for three or five years so as to make sale, or acquire an actual residence in the state. This would involve the insertion of the words 'and the alien heirs of citizens' after the words, 'except that the heirs of aliens.' By such a construction we would make the legislature say what it has not said. It is not the province of the judiciary to make laws, but to construe and interpret them and pass upon their validity. * * * But, here, the legislature has expressly declared that the heirs of certain aliens shall take and hold lands for limited periods subject to the privilege of avoiding their escheat to the state by a sale of them, or by acquiring an actual

residence in the state, within said periods. But the act of 1887 nowhere declares, nor is there anything on its face to indicate that the legislature intended thereby to declare, that the nonresident alien kindred of citizens should so take and hold lands for certain periods."

This same statute was construed in an action brought by the English kin headed by William Toop against the Ulysses Land Company, and others, in the district court of the United States for the district of Nebraska, in an action of ejectment involving this same land. In a memorandum opinion by Judge Thomas C. Munger, before whom the case was tried, after quoting the provisions of the act, it is said:

"It is contended that this statute should be construed so that it would read as if the words 'or citizens' were inserted in the exception, making the exception clause to read, 'except that the widow and heirs of aliens or citizens who have heretofore acquired lands in this state,' etc. The statute as it exists is not open to such an interpretation." The opinion concludes: "As the plaintiffs are nonresident alien heirs of a citizen, the statute forbade their inheritance of the lands in controversy, and judgment will be entered for the defendants."

What, then, becomes of that portion of the estate which the nonresident aliens would have inherited but for their alienage? The rule seems to be well established that, if a citizen dies and his next heir is an alien who cannot take, the alien cannot interrupt the descent to others who do not claim through him, but the inheritance descends to those next of kin who are competent to take in like manner as though the alien kin had never existed. *King v. Ware,* 53 Ia. 97; *Pierson v. Lawler,* 100 Neb. 783.

But it is insisted by the English kin that the decision in *State v. Thomas,* 103 Neb. 147, has become the law of the case, and is decisive of the question now before the court, and that the trial court erred in failing to follow the interpretation placed upon the statute in question in that case. It would seem a sufficient answer to that con-

tention that the parties are different in that case from those in the case at bar. It is quite true that, in issuing the writ of mandamus, it was based upon an interpretation of the statute which made it the duty of the county attorney to begin proceedings to escheat the land. But we now conclude that our interpretation of the statute in that case was wrong, and, in so far as it is at variance with the views herein expressed, it is disapproved.

On the other hand, it is claimed by the appellees that the decision of *Toop v. Palmer*, 97 Neb. 802, and *Toop v. Ulysscs Land Co.*, 237 U. S. 580, are decisive of the case in their favor. Inasmuch as we have reversed our former interpretation of the statute, it would seem unnecessary to discuss this contention of the appellees.

It follows from this discussion that the judgment of the district court is right, and it is, therefore,

AFFIRMED.

Aldrich, J., not sitting.

FRANK S. MOORE, APPELLEE, V. HUFFMAN BROTHERS MOTOR COMPANY, APPELLANT.

FILED JANUARY 13, 1922. No. 21866.

Contracts: STOCK SALES CONTRACT: CONSTRUCTION. Contract construed, and *held* to mean that under the terms of said contract the plaintiff had a right to demand that defendant issue stock to whomsoever he might direct, to the amount of commissions due him on stock sales paid for on the date of the demand, and, upon failure or refusal of defendant to issue said stock, the balance due should be paid in cash.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

W. H. Herdman, for appellant.

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

Heard before LETTON, DAY and DEAN, JJ., ALLEN and BEGLEY, District Judges.

BEGLEY, District Judge.

This is an action brought by Frank S. Moore, appellee, hereinafter called plaintiff, against Huffman Brothers Motor Company, appellant, hereinafter called defendant, in equity, for an accounting of moneys due on a certain written contract. In the court below a decree was entered awarding to plaintiff a money judgment for $10,784.42, and defendant prosecutes this appeal to this court to reverse said decree.

The plaintiff was a stock salesman in the employ of the defendant. The contract in controversy was entered into shortly after the plaintiff severed his connection with the defendant. At the time of the making of the contract there were certain stock sales that had been paid for by purchasers and on which the plaintiff was entitled to the sum of $9,000, which was then due and payable in money. There were other sales on which settlement had not been made, the commissions on these sales aggregating $5,723, and which would be due and payable as soon as settled for by the purchasers of the stock, the precise amount due at any given time being the commission on the sales actually settled for. There was also due the plaintiff $3,100 on a note given by the defendant to the plaintiff. At a meeting of the parties regarding settlement of the indebtedness to the plaintiff, the defendant made the plaintiff a proposal of settlement in writing, which the plaintiff accepted. The proposal and acceptance is the contract, and the same reads as follows:

"Omaha, May 6, 1920.

"Mr. F. S. Moore, Omaha, Nebraska.

"Dear Sir: Confirming our conversation, it has been determined and is agreed between us that your portion of normal commissions accrued and unpaid on stock issued to date, in which you are interested, amounts to $5,723, and it is specifically understood that, of said stock issued, there remains unpaid stock to the par value of $23,500 which must be fully paid in cash before the commission

of $5,723 becomes fully earned and payable.

"It is also understood and agreed that on any stock sold which for any reason we are obliged to cancel or refund to the purchaser and on which commissions have been previously paid or included in above computation that your portion of such commissions shall be deducted from any credits you may have.

"In addition to the conditional amount of $5,723 there is also due you $3,100 on note of this company, and $9,000 original commissions, these three items totaling $17,823.

"It is understood and agreed that the amount of commissions as stated is computed upon straight percentage basis as cash fully paid and that in some instances there are deductions yet to be made covering discounts on liberty bonds, certificates of deposit, interest refunded, etc.

"It is agreed that you are to immediately purchase one Huffman passenger car at an agreed price of $1,691 which will be deducted from the $17,823 above referred to, leaving a conditional balance due you of $16,132, which if and when fully earned is to be paid by preferred stock in Huffman Brothers Motor Company, to the amount of $19,000 par value, any small difference between this amount and what your credits would purchase in stock at $85 per share to be paid in cash.

"Said stock is to be issued upon demand to whomsoever you may direct, but in view of the conditions above stated, we are not to issue stock in excess of the amount that your earned and fully-payable credits will purchase.

"It is also agreed that as soon as stock at $85 per share, to the amount of $10,000, has been issued that you will surrender the $3,100 note that you hold.

"If for any reason the $19,000 stock, or any portion of it, cannot or is not issued, as agreed above, then in that case the balance due shall be paid in cash.

"It is further agreed that this arrangement when completed shall be construed as full and final settlement in

satisfaction of all claims, agreements, promises, or understandings.

"Yours very truly,
"(Signed) Huffman Bros. Motor Co.,
"By W. M. Clement, Acting Secretary.
"Accepted, F. S. Moore."

There is no serious dispute of fact in the record. The precise question for determination in this appeal is rather one of construction of the written contract above set forth and a determination of the rights of the parties under said contract. The defendant concedes that the $9,000 on completed sales, together with the $3,100 represented by the note, were due upon the execution of the contract, and that plaintiff has since received the Huffman passenger car at the agreed price of $1,691 and that defendant has issued to plaintiff 47 shares of the preferred stock of the defendant corporation of the value of $3,995; that plaintiff has surrendered up the $3,100 note and made written demand upon defendant to issue 100 shares of preferred stock of the defendant corporation to Andrew K. Nelson, and charge said stock to plaintiff's account, which written demand was refused by defendant.

The question of differences between the parties arises over the item of $5,723 of the so-called normal commissions upon the sales of stock not settled for at the time of the execution of the contract of settlement. Defendant contends that no part of the normal commissions amounting to $5,723 was due and payable to plaintiff under said contract until all the capital stock sold by plaintiff, on which said normal commissions accrued, was fully paid for by the purchasers. Plaintiff contends that he has a right under said contract to demand payment for each sale of stock when the purchaser pays for the same. There were 13 sales of this stock on which the commissions aggregated $5,723. It was stipulated by the parties on the trial that the sum of $1,352.54 was to be deducted for canceled or unpaid stock, leaving a balance of $4,-

370.46 in the hands of defendant on normal commissions. We think that a fair construction of the contract is that the "conditional balance of $16,132" became an absolute balance due plaintiff when the full amount of the stock upon which commissions therein computed was fully paid to defendant, and that the actual balance due plaintiff at any given time was the amount of commissions in the hands of defendant, received from stock sold by plaintiff, which was fully paid for by the purchasers; and that plaintiff had a right, under said contract, to demand that defendant issue stock to the amount of commisions on stock sales paid for on the date of the demand, but no further, and upon failure of defendant to issue the stock the balance due was to be paid in cash. At the time of the demand for the issuance of 100 shares of stock at the agreed value of $85 per share, there was due plaintiff, in the hands of the defendant, the sum of $6, 414 on original commissions, and the further sum of $4,370.46 on the normal commissions, making a total due plaintiff from defendant of the sum of $10,784.46, and under the terms of the contract, upon refusal of the defendant to issue preferred stock, the said amount was made payable in cash.

The decree of the district court is therefore right and is

AFFIRMED.

JOHN FOSTER, APPELLANT, V. CITY OF LINCOLN ET. AL., APPELLEES.

FILED JANUARY 13, 1922. No. 21711.

Appeal: ISSUES. The issues as framed in the trial court, and upon which the cause was tried, are binding upon the parties in the case, on appeal to this court.

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

W. B. Comstock and *J. S. McCarty,* for appellant.

C. Petrus Peterson, Charles R. Wilke, R. A. Boehmer and *Hall, Baird & Williams, contra.*

Heard before LETTON, DAY and DEAN, JJ., BLACKLEDGE and TEWELL, District Judges.

BLACKLEDGE, District Judge.

The proposition urged in the argument and principally relied upon in the briefs as constituting error is that the court erred in not submitting to the jury the question of the joint negligence of the city of Lincoln and the codefendant Lincoln Telephone & Telegraph Company. It is not disputed that the plaintiff was an employee of the Lincoln Telephone & Telegraph Company and sustained injury in the course of his employment, and at or before the commencement of this suit was receiving compensation from his employer under the provisions of the workmen's compensation act. He states in his petition the amount of compensation he has received and that the Lincoln Telephone & Telegraph Company declines to bring this suit against the city of Lincoln, the third person. The petition further alleges that "the injuries hereinbefore complained of were occasioned wholly by and on account of the negligence and carelessness of the defendant city of Lincoln." Plaintiff prays for judgment against the city of Lincoln only, and that out of any sums so recovered the defendant Lincoln Telephone & Telegraph Company be paid the sum paid by it to plaintiff as compensation. Under these allegations it was entirely proper that the trial court should not submit the question of the joint negligence of the two defendants.

It is urged in the brief that it was negligence of the city in maintaining its insufficiently insulated wires near the wires of the telephone company, and also the negligence of the telephone company in maintaining its wires near the heavily charged wires of the city which caused the injury, and that these two concurrent causes acting separately and independently concurred in causing the accident, and the two constituted a proximate cause of

the accident. This contention, for reasons already stated, is not supported by the allegations of the petition, and no amendment thereof was obtained or requested. The question of the sufficiency of the insulation of the city's wires was submitted by the court's instructions as to negligence on the part of the city.

It is also contended that the court misstated the issues in reference to the plaintiff's reply as to the condition or construction by the city of its system of poles and wires, but, while the statement in the instruction in reference thereto may appear, upon critical examination by lawyers, to be a little broad, we are satisfied that it could not mislead the jury, and that the purport of it, as it was intended by the court and must have been reasonably understood by the jury, was to the effect that the description as to the general construction and relative locations of the two systems of wires was admitted by the parties, and not in dispute.

Finding no prejudicial error, the judgment is

AFFIRMED.

NATHANIEL A. TRENNT, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JANUARY 13, 1922. No. 21837.

1. **Evidence: MARKET REPORTS.** In an action for damages on account of a delayed shipment of live stock, consigned for sale upon the market, market reports in journals such as the commercial world relies upon are competent evidence of the state of the market. *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712.
2. ———. While market reports in journals properly authenticated are competent evidence of the state of the market, it does not follow that they are the only competent evidence thereof.
3. ———: MARKET VALUES. Where the question is as to the market value, or the state of the market, testimony of a witness who states that he does not know the market at or near the time in question, nor remember the number, kind, or class of property under consideration, or any other similar transaction, and whose

sole statement bearing upon such question is that he recollects that at the time, three years before, he and another compared the cattle and felt that in their judgment they would have been able to have gotten 25 or 50 cents a hundred-weight more the day before, is incompetent for the purpose of establishing the state of the market on either date.

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

Byron Clark, Jesse L. Root and *J. W. Weingarten,* for appellant.

Harry W. Shackelford, contra.

Heard before LETTON, DAY and DEAN, JJ., BLACKLEDGE and TEWELL, District Judges.

BLACKLEDGE, District Judge.

This action was instituted by plaintiff, appellee, to recover damages on account of a delayed shipment of cattle from Mullen, Nebraska, to South Omaha, Nebraska. As an element of damage it was alleged in the petition that the shipment should have arrived at destination on October 10, and that it did not arrive until October 11, at which time the market price and value of said cattle had declined 25 cents a hundredweight below what it was on October 10. There were other allegations of excessive shrinkage and unnecessary feeding caused by the delay. The plaintiff recovered a verdict and judgment, and defendant appeals.

While differing in the estimated amount thereof, counsel for both appellant and appellee are agreed that there was a substantial amount included in the verdict as compensation for the fall in the market. This is also substantiated by the record.

On the trial of the case copies of the Daily Drovers Journal-Stockman for the dates in controversy were identified and authenticated by testimony of the publisher, and admitted in evidence as tending to show the state of the market. This was competent under the rule an-

nounced in *Chicago, B. & Q. R. Co. v. Todd,* 74 Neb. 712. So much the counsel for appellee concedes, but contends that it is not the only competent evidence thereof, to which we may readily agree. The point of serious controversy arises over the fact that said evidence shows no decline on the market in that time, and the only testimony offered in opposition was the testimony of the witness Clyde Kells. He stated, in substance, that he was the salesman who sold the cattle after their arrival; that at the time of the trial, some three years later, he could not remember or state the market for cattle on either date in question or about that time, nor remember the number, kind, or class of cattle included in this shipment, although he remembered handling the cattle, nor did he remember any similar transaction or sale. Over the objection of defendant he was allowed to state, as his recollection, that at the time the cattle were sold he and another compared them with cattle that had sold the day before and felt that they would have been able to have gotten 25 to 50 cents a hundredweight more for these cattle if they had been sold on the preceding day's market. A motion to strike out this testimony was overruled. There is no other testimony in the record tending to show any decline in the market, hence the jury must have acted, in assessing the recovery, upon this testimony as overcoming that of the published markets in the Drovers Journal-Stockman. If the testimony was competent, the jury had a right to consider it and determine its credibility.

The cattle were shipped to be sold upon the market. The question to be determined was whether there was a decline in the market for this class and grade of cattle, if a market for them existed at that time and place. Plaintiff alleges in his petition that there was such market, that it had declined within the time of the delay, and had the burden of proof upon both propositions. Testimony as to special or intrinsic value was, therefore, improper. *Boyd v. Lincoln & N. W. R. Co.,* 89 Neb. 840. In proving

value, the rule is almost universal that evidence should not be received to prove what offers have been made to sell or what prices have been asked or refused. Jones, Evidence (2d ed.), sec. 169. The evidence received in this instance did not even approximate the credibility of a *bona fide* offer. It was merely the recollection of the witness that he was of the opinion, at the time, that if he had had the property the day before he could have obtained an offer or bid higher than the price at which the property sold. Such evidence was entirely incompetent for the purpose offered, did not tend to establish the market value, and its admission was error. Since the verdict of the jury must have awarded damages based in part upon this evidence, and the amount thereof cannot be definitely determined from this record, the error was prejudicial, and the judgment is reversed and the cause remanded.

REVERSED.

EDNA TAYLOR, APPELLEE, V. JOHN KOUKAL ET AL., APPELLANTS.

FILED JANUARY 13, 1922. No. 21923.

Negligence: INSTRUCTIONS. In an action to recover for injuries sustained by collision with an automobile, an instruction which erroneously states the speed limit authorized by law for a motor vehicle upon approaching another vehicle, and states that the law requires lights to be exhibited on motor vehicles in use during the period from one hour after sunset to one hour before sunrise, and, without qualification, informs the jury that the failure of any person operating an automobile upon a public highway to comply with any of such provisions, in itself, constitutes negligence, is erroneous.

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

D. O. Dwyer, for appellants.

W. A. Robertson, contra.

Heard before LETTON, DAY and DEAN, JJ., BLACKLEDGE and TEWELL, District Judges.

BLACKLEDGE, District Judge.

Plaintiff, appellee, sued the defendants, upon the ground of negligence, to recover for personal injuries sustained by the collision of an automobile driven by one of the defendants with a buggy in which plaintiff was riding, and recovered a verdict and judgment.

Upon the trial there was testimony given on behalf of defendants tending to prove that the lights on the car were operating when they started from Plattsmouth toward defendants' home, a distance of perhaps three miles; that, when about half the distance had been traveled, the lights failed from some unknown or unexplained cause; that the driver undertook to repair them and was unable to do so; that it was about as far to his destination as to return to Plattsmouth to a garage; that he proceeded homeward, driving, as he claimed, in a careful manner; that the speed of the car when without lights was about ten miles an hour. There was evidence of others tending to show that the speed of the car on part of the journey—whether while the lights were on or not does not clearly appear—was twenty miles an hour.

The trial court gave an instruction to the effect that it is provided by the laws of the state that one operating a motor vehicle upon a public highway upon approaching another vehicle must reduce speed to a rate not exceeding eight miles an hour; also in such instruction stated that a motor vehicle in use upon a public highway between one hour after sunset and one hour before sunrise must have lights exhibited thereon; and further stating, without qualification, that the failure of any person operating an automobile upon a public highway to comply with any of such provisions was in itself negligence.

In so far as it states the statutory speed limit, the instruction was evidently prepared with reference to the provision of section 3049, Rev. St. 1913, which fixed the

same at the rate stated in the instruction, and the fact was overlooked that such statute had, at the time of the trial and of the injury, been superseded by chapter 222, Laws 1919, fixing such limit at ten miles an hour. In view of the testimony to which reference is made, this was clearly erroneous as to this element, and in that it determined as a matter of law the negligence both as to speed and lights, and did not submit the same to the jury.

This case, in the particulars stated, is ruled by the cases of *Stevens v. Luther,* 105 Neb. 184, and *Dorrance v. Omaha & C. B. Street R. Co.,* 105 Neb. 196, which, in fairness to the trial court it should be stated, were decided after the trial of the instant case. In the case last cited, in the opinion by Letton, J., it is said:

"The courts are hopelessly divided upon the question whether the violation of a statute or ordinance designed for the protection of the public constitutes negligence *per se,* or is only evidence of negligence, or, as some courts hold, *prima facie* or presumptive evidence of negligence. Our own decisions are not entirely harmonious, but in *Stevens v. Luther,* 105 Neb. 184, the cases are examined, and we adhere to the rule, long established in this state, that such a violation is evidence of negligence, which the jury are entitled to consider upon the question whether actionable negligence existed, but is not negligence *per se.*"

Following the rule stated, the judgment is reversed and the cause remanded for further proceedings according to law.

REVERSED.

ELIZABETH URAK, APPELLANT, V. MORRIS & COMPANY, APPELLEE.

FILED JANUARY 13, 1922. No. 22208.

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 certain manner, such finding of fact will not be reversed on appeal unless clearly wrong. *Swift & Co. v. Prince*, 106 Neb. 358.

2. ———: ———: PERSONAL ALTERCATION. An injury inflicted upon an employee by a fellow employee not arising from any order, direction, duty or act connected with the employment, but arising out of and occurring during or immediately following a personal altercation between the two, concerning matters not arising out of the performance or supposed performance of any duty or service in the employment, and resulting from what amounted to an assault by one upon the other, is not such an injury as will entitle the injured employee to compensation from the employer under the workmen's compensation act.

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

H. J. Beal and *J. P. Uvick*, for appellant.

James C. Kinsler, contra.

Heard before LETTON, DAY and DEAN, JJ., BLACKLEDGE and TEWELL, District Judges.

BLACKLEDGE, District Judge.

This cause was tried in the district court for Douglas county upon appeal from an award of compensation by the compensation commissioner. There is no question but that the plaintiff sustained severe and probably permanent injury. The accident occurred in the sausage room in defendant's plant on August 29, 1919, the plaintiff being struck upon the hip by a shovel which was in use by a fellow workman. There is conflict in the testimony as to whether the striking by the shovel was accidental purely, or whether the shovel was in the hands of the fellow employee and the blow given "just for fun," or whether the blow was given as the result of an altercation between the plaintiff and her fellow employee in reference to whether plaintiff was a member of a certain union. It is also contended that the plaintiff had, a day

or two prior to the time of the particular occurrence of August 29, sustained another fall by slipping upon a piece of meat, as the result of which she injured her knee or leg. The evidence as to this prior injury was excluded by the district court upon the theory that it was not included in the issues raised before the compensation commissioner, and that it was barred by the statute of limitations at the time of the trial. The trial court found, upon the issues from the evidence received, that plaintiff failed to establish by a preponderance of the evidence that she was injured as the result of an accident arising out of and in the course of her employment, and that she was not so injured, and, further, that on the date in question the plaintiff entered into a controversy with a fellow laborer regarding a matter wholly foreign to plaintiff's employment, to wit, regarding the question whether or not plaintiff belonged to a certain union, and that in the course of this controversy the said fellow laborer intentionally struck plaintiff over the hip with a shovel, and that whatever injuries plaintiff sustained were the result of said assault.

Appellant presents two consignments of error: That the court erred, first, in finding plaintiff was not injured as the result of an accident arising out of and in the course of her employment; and, second, that the court erred in refusing leave to plaintiff to amend the pleadings and submit evidence as to the prior fall or injury of plaintiff.

A careful reading of the record discloses the fact that, while the circumstances surrounding this accident and which led up to it are not so clearly shown as will enable us to reach an entirely satisfactory conclusion as to just what did take place, yet that was the particular province of the trial court, which was also better situated to do so, and had the advantage of seeing and hearing the witnesses. It has become the established rule in this state that in such cases the finding of the trial court will not be disturbed unless from the record the review-

ing court is convinced that such finding is clearly wrong. It cannot be said that there is not sufficient evidence in the record to sustain the finding of the trial court in this case. Under the terms of such finding, we do not think it can reasonably be contended that the accident did arise out of and in the course of plaintiff's employment. There must be somewhere a dividing line, and unless we are to hold that all accidents or injuries which result during the term of employment, or hours of duty, are covered by the act, it would seem that this accident must be excluded. An eminent authority has said that argument by analogy in these cases is valueless and that each case must be decided with reference to its own attendant circumstances. Under the finding, the employment had no connection, causal or otherwise, with the injury. It was, so far as appears, a purely personal affair, not arising out of the work or concerned with anything incidental to it. It was not shown that the place of employment was either a closed shop or an open shop, or that the matter of a union, the subject of their quarrel, had anything to do with plaintiff's employment, or her standing or relations toward the employer or her fellow workmen. The trial court found that it was a personal quarrel between these two, regarding a matter that was wholly foreign to the plaintiff's employment, and, under the rule stated, this finding should not be set aside.

With reference to the second assignment, the original complaint before the compensation commissioner designated an injury, as the foundation of the complaint, which had occurred August 29, 1919. There was, in fact, an injury, upon which plaintiff sought to rely, occurring on that date. Therefore the rule which would perhaps allow the plaintiff to show a different date than that alleged had no application, and the prior injury became, in effect, an additional ground of action as to which the statute of limitations had run at the time of the trial, and this evidently was the theory upon which the trial

court acted. However, the application made for amendment and to be allowed to introduce evidence as to this claimed prior injury did not go to the extent of a showing, or offer of proof, that such injury had materially or substantially contributed to cause the plaintiff's condition, or that any result thereof was or might have been serious, but was only to the extent "that on the 27th or 28th day of August, 1919, plaintiff fell to the floor in the plant of Morris & Company, striking the same hip on a pipe, or a similar article, probably about three inches in diameter, and that as a result of this fall she limped the next day and complained to the matron and to one or two of the employees." The plaintiff in her testimony, which was first admitted and later stricken by the court was to this effect: "I fell down. I cannot tell you just the day, but it was a day or two before I got hit with the shovel. I stepped on a piece of meat and slipped and fell. I don't know how I hurt myself, but I slipped and fell, hit my knee on the side and I grabbed by the barrel and that side was brought close to the floor, and every one started to laugh and I was scared and I got up quick and run back to my place. Q. When you say your side, what do you mean? A. Left knee." This does not, either by the testimony given or by the offer of proof made upon the application to amend, carry the matter far enough to show that the prior occurrence did, or reasonably could, have any material effect on the plaintiff's condition at the time of the trial, and it is not clearly shown to have been part of the issues originally in the case or claim when it was before the compensation commissioner. We cannot say that the trial court erred in this particular.

It follows that the judgment of the trial court should be, and it is,

AFFIRMED.