REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

May 20, 1914, to January 8, 1915.

H. A. LIBBY
REPORTER

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1915.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. BURLEIGH F. SPALDING, Chief Justice.
HON. CHARLES J. FISK, Judge.
HON. EDWARD T. BURKE, Judge.
HON. EVAN B. GOSS, Judge.
HON. ANDREW A. BRUCE, Judge.

H. A. LIBBY, Reporter.
R. D. HOSKINS, Clerk.

PRESENT JUDGES OF THE DISTRICT COURTS.

District No. One,
Hon. Charles M. Cooley.
District No. Two,
Hon. Charles W. Buttz.
District No. Three,
Hon. Charles A. Pollock.
District No. Four,
Hon. Frank P. Allen.
District No. Five,
Hon. J. A. Coffey.
District No. Six,
Hon. W. L. Nuessle.
District No. Seven,
Hon. W. J. Kneeshaw.
District No. Eight,
Hon. K. E. Leighton.
District No. Nine,
Hon. A. G. Burr.
District No. Ten,
Hon. W. C. Crawford.
District No. Eleven,
Hon. Frank Fisk.
District No. Twelve,
Hon. S. L. Nuchols.

OFFICERS OF THE BAR ASSOCIATION.

Hon. John Knauf, President, Jamestown.
Hon. B. W. Shaw, Vice President, Mandan.
Hon. Oscar Siler, Secretary and Treasurer, Jamestown.

SEC. 101. Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reason therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom may give the reasons for his dissent in writing over his signature.

SEC. 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

COUNTY COURTS.

In general, the county courts (so designated by the Constitution) are the same as the probate courts of other states.

Constitutional Provisions.

Sec. 110. There shall be established in each county a county court, which shall be a court of record open at all times and holden by one judge, elected by the electors of the county, and whose term of office shall be two years.

Sec. 111. The county court shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, the sale of lands by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law; provided, that whenever the voters of any county having a population of two thousand or over shall decide by a majority vote that they desire the jurisdiction of said court increased above that limited by this Constitution, then said county court shall have concurrent jurisdiction with the district courts in all civil actions where the amount in controversy does not exceed one thousand dollars, and in all criminal actions below the grade of felony, and in case it is decided by the voters of any county to so increase the jurisdiction of said county court, the jurisdiction in cases of misdemeanors arising under state laws which may have been conferred upon police magistrates shall cease. The qualifications of the judge of the county court in counties where the jurisdiction of said court shall have been increased shall be the same as those of the district judge, except that he shall be a resident of the county at the time of his election, and said county judge shall receive such salary for his services as may be provided by law. In case the voters of any county decide to increase the

jurisdiction of said county courts, then such jurisdiction as thus increased shall remain until otherwise provided by law.

Statutory Provisions.

Increased Jurisdiction: Procedure. The rules of practice obtaining in county courts having increased jurisdiction are substantially the same as in the district courts of the state.

Appeals. Appeals from the decisions and judgments of such county courts may be taken direct to the supreme court.

The following named counties now have increased jurisdiction: Benson; Bowman; Cass; Dickey; La Moure; Ransom; Renville; Stutsman; Ward; Wells.

CASES REPORTED IN THIS VOLUME.

TABLE OF DAKOTA CASES CITED IN OPINIONS.

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

GOTTLIEB STEPPER v. HENRY A. BRUENN.

(147 N. W. 724.)

Partnership — dissolution — accounting — trial de novo — evidence.

Action to dissolve a partnership and for an accounting. Trial *de novo* in this court. Evidence examined and found that the defendant is indebted to the plaintiff in the sum of $742.23, with interest thereon at 7 per cent, from the 1st day of December, 1907.

Opinion filed May 20, 1914.

Appeal from the District Court of McIntosh County, *Allen*, J.

Affirmed.

Hugo P. Remington and *Curtis & Curtis*, for appellant. (*Newton, Dullam, & Young*) of counsel.

In an accounting, the rule is that the books of account are presumed to be correct, until the contrary is shown by competent proof. 1 Enc. Ev. 182, ¶¶ 5 et seq.; 9 Enc. Ev. 569; Stuart v. McKichan, 74 Ill. 122; Gregg v. Hoard, 129 Ill. 613, 22 N. E. 528; Routen v. Bostwick, 59 Ala. 360; Desha v. Smith, 20 Ala. 747; Heartt v. Corning, 3 Paige, 566; Hicks v. Chadwell, 1 Tenn. Ch. 251.

Franz Shubeck and *W. S. Lauder,* for respondent.

By reason of the condition of the books, the methods employed in keeping the accounts, and the manner in general in which the business was conducted, exact justice could not be done in an accounting. Petty v. Haas, 98 Iowa, 257, 98 N. W. 104.

BURKE, J. Action to dissolve a partnership and for an accounting. Appellant demands a trial *de novo* under the Newman act. The evidence covers something over 250 printed pages and an enormous amount of exhibits, including the partnership books of account. No question of law is involved, but it has been the duty of the court to go through this mass of figures and testimony, and make the accounting between the two members of the partnership. This has been done with care by this court, but we do not believe the public interest will be in any manner subserved by setting forth those figures in this written opinion. We will therefore content ourselves with a brief statement of the facts, and announce the result which we have reached.

In the year 1906, plaintiff and defendant resided in the town of Ashley, North Dakota, plaintiff being engaged in a small farm machinery and implement business and defendant running a hardware store. On the 7th of April of that year, they entered into a partnership under the name of Stepper & Company for the purpose of conducting plaintiff's farm implement business. Defendant continued his hardware business individually.

In January, 1907, a new partnership was formed between those parties which took over both the implement and hardware concerns. No articles of copartnership were drawn,—the agreement was entirely oral. The assets consisted of notes and accounts owing to the two old businesses, the hardware stock, and some implement stock. The liabilities consisted of the debts of the two old concerns. Plaintiff was to do the outside work, selling the farm implements, etc., while defendant was to stay in the hardware store and keep books of the entire business. Owing to the fact that defendant contributed a larger share of the assets, he was to receive $400 in profits before there was any further division thereof, after which the profits were to be divided evenly. About December 1, 1907, the two parties, being dissatisfied with the situation, had an understanding which is given by

the plaintiff as follows: "We talked the matter over and agreed that Bruenn carry the business on until the end of the year, and then we make an agreement to settle, and Bruenn agreed that he will pay me what is coming to me in cash." Defendant testifies that plaintiff ran away from the business, and practically deserted the same. The case was tried in the court below, partly by the trial judge and partly before a referee who was appointed by the court to take testimony and make findings of fact therein. The trial court had the advantage of seeing the witnesses on the stand, as well as the aid of the referee. We have reached the same conclusion as announced by the referee in the trial court, and will adopt its conclusion. Such finding is to the effect that there was due to the plaintiff from the defendant the sum of $742.23 and legal interest thereon from the 1st day of December, 1907.

Judgment of the trial court is therefore affirmed.

PETER J. KERSTEN v. GREAT NORTHERN RAILWAY COMPANY.

(147 N. W. 787.)

Evidence — verdict.

1. Evidence examined, and found sufficient to sustain the verdict.

Evidence — train wreck — effect of upon other passengers — conditions — error — cured by instructions.

2. Evidence offered by the defendant, showing the effect upon other passengers and train crew who were in the same wreck, was first rejected by the trial court for the reason that the conditions surrounding such witnesses differed materially from those surrounding the plaintiff. As to most of the witnesses this objection was properly sustained. However, the trial court later made the following statement to defendant's counsel: "I don't think this evidence is admissible, but I am going to let it in, and you, gentlemen of the jury, when I let it in, will consider it for what it is worth after the instructions of the court at the close of the case." After these remarks the defendant recalled certain of his witnesses, who were allowed to testify along the lines desired. If there was any error it was cured by this proceeding.

Physician — testimony — based on testimony of plaintiff — hypothetical question — objections.

3. A doctor was called as a witness, and was asked to base his opinion entirely upon the testimony of the plaintiff, which he had heard, and to state what in his opinion was the cause of the injuries of which the plaintiff complained. The defendant objected upon the grounds that the question "assumed a state of facts not in controversy, irrelevant, incompetent, and no foundation laid." *Held*, that the objection was insufficient to raise the point that it was not a proper hypothetical question.

Physician's testimony — medical text-books — cross-examination — test of credibility of witness.

4. A doctor who testified for the defendant was asked upon cross-examination as to whether or not certain medical text-books and authorities sustained a doctrine contrary to that held by him. Defendant objected to this inquiry. It appears that the text-books in question were presented to the witness, thus showing the good faith of the questioner. The cross-examination was proper to test the credibility of the witness.

Error — Cross-examination — restriction — trial court — discretion.

5. It was not reversible error to restrict the cross-examination of plaintiff's witness, Dr. Jones, such matters resting largely in the sound discretion of the trial court.

Questions — objections — facts not in evidence — assuming.

6. Objection was properly sustained to the following question asked of defendant's expert, Dr. Sihler: Q. "Could that condition, or these symptoms, be brought about by a tap on the head, not severe enough to produce any immediate symptoms of that kind?" The question assumed a state of facts not in evidence. The same objection was sustained to other questions set forth in the opinion.

Argument of counsel — complaint — amendment — request for — allowance.

7. During the argument to the jury, plaintiff asked to amend his complaint in a slight particular, in no way changing the issues, nor necessitating any substantial change in the defense. There was no error in allowing the amendment.

Instructions — jury — proper.

8. Certain instructions of the trial court examined and no error found therein.

Refusal of instructions — covered by other portions of charge.

9. Certain instructions refused by the trial court are found to be fully covered by other portions of the charge.

Burden of proof — defendant — instructions.

10. Certain instructions examined and *held* not to place the burden of proof upon the defendant.

Trial court — conduct — prejudice — defendant's rights.

11. Defendant insists that the general conduct of the trial court was calculated to, and did, prejudice the defendant's rights. Careful examination of the record does not substantiate this complaint.

Opinion filed May 20, 1914.

Appeal from the District Court of Ramsey County, *Cowan*, J.

Affirmed.

Murphy & Duggen, for appellant.

The evidence is clearly insufficient to sustain the verdict and judgment; assuming negligence, there is no proof of injury. Wright v. Sioux Falls Traction System, 28 S. D. 379, 133 N. W. 696.

The inference of a fact is wholly insufficient. Saunders v. Chicago & N. W. R. Co. 6 S. D. 40, 60 N. W. 148; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305, 14 Am. Neg. Rep. 615; Gebus v. Minneapolis, St. P. & S. Ste. M. R. Co. 22 N. D. 29, 132 N. W. 227.

Mere opinion evidence as to the speed of the train, or as to the severity of the alleged jar or shock, is very unreliable, and affords little assistance in arriving at or determining the true physical facts. Foley v. Boston & M. R. Co. 193 Mass. 332, 79 N. E. 765; Chicago Union Traction Co. v. Duckstein, 136 Ill. App. 389.

Evidence of the general effect of the accident, the severity of the shock, including injuries to other persons, is competent. Missouri, K. & T. R. Co. v. Wright, — Tex. Civ. App. —, 47 S. W. 56; Mullin v. Boston Elev. R. Co. 185 Mass. 521, 70 N. E. 1021; International & G. N. R. Co. v. Duncan, 55 Tex. Civ. App. 440, 121 S. W. 362; West Chicago Street R. Co. v. Kennelly, 170 Ill. 508, 48 N. E. 996, affirming 66 Ill. App. 244; Remy v. Olds, 4 Cal. Unrep. 240, 34 Pac. 216; Vietti v. Nesbitt, 22 Nev. 390, 41 Pac. 151, 18 Mor. Min. Rep. 247; Waterhouse v. Jos. Schlitz Brewing Co. 16 S. D. 592, 94 N. W. 587; W. F. Corbin & Co. v. United States, 104 C. C. A. 278, 181 Fed. 296; Lyman v. Boston & M. R. Co. 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976; Burg v. Chicago, R. I. & P. R. Co. 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680.

An amendment should not be allowed after the case is tried, which raises an independent issue, not a part of or connected with the cause as originally set out, and upon which the case was litigated. Patrick

v. Whitely, 5 Ann. Cas. 676, note; Ridgely v. Dobson, 3 Watts & S. 118; Heegaard v. Dakota Loan & T. Co. 3 S. D. 569, 54 N. W. 656; Mares v. Wormington, 8 N. D. 329, 79 N. W. 441; Wood v. Pehrsson, 21 N. D. 357, 130 N. W. 1010; Swedish American Nat. Bank v. Dickinson Co. 6 N. D. 222, 49 L.R.A. 285, 69 N. W. 455; Great Northern R. Co. v. Herron, 68 C. C. A. 599, 136 Fed. 49; Paulsen v. Modern Woodmen, 21 N. D. 235, 130 N. W. 231; Woodward v. Northern P. R. Co. 16 N. D. 38, 111 N. W. 627; Murphy v. Plankinton Bank, 20 S. D. 178, 105 N. W. 245; O'Neill v. Jones, 24 S. D. 79, 123 N. W. 495; Ramirz v. Murray, 5 Cal. 222; Western Cornice & Mfg. Works v. Meyer, 55 Neb. 440, 76 N. W. 23; Allen v. Davenport, 115 Iowa, 20, 87 N. W. 743; Derosia v. Ferland, 83 Vt. 372, 28 L.R.A.(N.S.) 577, 138 Am. St. Rep. 1092, 76 Atl. 153; Allen v. Tuscarora Valley R. Co. 229 Pa. 97, 30 L.R.A.(N.S.) 1096, 140 Am. St. Rep. 714, 78 Atl. 34.

Where the record fails to show that an issue was tried, it is improper to allow an amendment to cover same. Buxton v. Sargent, 7 N. D. 503, 75 N. W. 811; Rockwell v. Holcomb, 3 Colo. App. 1, 31 Pac. 944; Miller v. Kenosha Electric R. Co. 135 Wis. 68, 115 N. W. 355; O'Neill v. Jones, 24 S. D. 79, 123 N. W. 495; Williams v. Lowe, 49 Ind. App. 606, 97 N. E. 809.

The test is, Is the issue the same in the amendment as in the original pleading, but stated in a more amplified form? Ft. Wayne Iron & Steel Co. v. Parsell, 49 Ind. App. 565, 94 N. E. 770; Blake v. Minkner, 136 Ind. 418, 36 N. E. 246; Fleming v. Anderson, 39 Ind. App. 343, 76 N. E. 266; Thrall v. Gosnell, 28 Ind. App. 177, 62 N. E. 462; 1 Cyc. 556 and notes; Missouri, K. & T. R. Co. v. Bagley, 3 L.R.A. (N.S.) 259 notes; Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 305; Chicago General R. Co. v. Carroll, 189 Ill. 273, 59 N. E. 551; Walker v. Wabash R. Co. 193 Mo. 453, 92 S. W. 83; Kirchner v. Smith, 28 Ohio C. C. 45; Bick v. Vaughn, 140 Mo. App. 595, 120 S. W. 618; Johnson v. American Smelting & Ref. Co. 80 Neb. 250, 114 N. W. 144, 116 N. W. 517; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Hume v. Kelly, 28 Or. 398, 43 Pac. 380.

A question propounded to a physician testifying as an expert, which merely assumes that the physician heard all of the evidence of the plaintiff, is wholly improper. Baehr v. Union Casualty & S. Co. 133 Mo.

App. 541, 113 S. W. 689; D'Arcy v. Catherine Lead Co. 155 Mo. App. 266, 133 S. W. 1191; Chalmers v. Whitmore Mfg. Co. 164 Mass. 532, 42 N. E. 98; Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436, 19 Am. Neg. Rep. 145; Kaw Feed & Coal Co. v. Atchison, T. & S. F. R. Co. 129 Mo. App. 498, 107 S. W. 1034; Jones v. Chicago, St. P. M. & O. R. Co. 43 Minn. 279, 45 N. W. 444; Chicago, R. I. & P. R. Co. v. Moffitt, 75 Ill. 524; Craig v. Noblesville & S. C. Gravel Road Co. 98 Ind. 109; State v. Bowman, 78 N. C. 511; McCarthy v. Boston Duck Co. 165 Mass. 165, 42 N. E. 568.

Medical books are not admissible in evidence. Burt v. State, 38 Tex. Crim. Rep. 397, 39 L.R.A. 305, 40 S. W. 1000, 43 S. W. 344.

Where a witness erroneously refers to and quotes from text-books, such books may be introduced to rebut such statements. 3 Wigmore, Ev. ¶ 1700; Eggart v. State, 40 Fla. 527, 25 So. 144; Harper v. Weikel, 28 Ky. L. Rep. 650, 89 S. W. 1125; Marshall v. Brown, 50 Mich. 148, 15 N. W. 55; Fisher v. Southern P. R. Co. 89 Cal. 399, 26 Pac. 894, 9 Am. Neg. Cas. 104; State v. Thompson, 127 Iowa, 440, 103 N. W. 377; Stone v. Seattle, 33 Wash. 644, 74 Pac. 808; Union P. R. Co. v. Yates, 40 L.R.A. 553, 25 C. C. A. 103, 49 U. S. App. 241, 79 Fed. 587.

And where an error is made in the introduction of such evidence, the instructions of the court do not effect a cure. Allen v. Boston Elev. R. Co. 212 Mass. 191, 98 N. E. 618; Butler v. South Carolina & G. Extension R. Co. 130 N. C. 15, 40 S. E. 770; Re DeBois, 164 Mich. 8, 128 N. W. 1092; Gulf, C. & S. F. R. Co. v. Farmer, — Tex. Civ. App. —, 108 S. W. 729; Foley v. Grand Rapids & I. R. Co. 157 Mich. 67, 121 N. W. 257; Marshall v. Brown, 50 Mich. 148, 15 N. W. 55; Hall v. Murdock, 114 Mich. 233, 72 N. W. 150; New Jersey Zinc & Iron Co. v. Lehigh Zinc & Iron Co. 59 N. J. L. 189, 35 Atl. 915; Eggart v. State, 40 Fla. 547, 25 So. 144; Harper v. Weikel, 28 Ky. L. Rep. 650, 89 S. W. 1125; Knoll v. State, 55 Wis. 249, 42 Am. Rep. 704, 12 N. W. 369; People v. Wheeler, 60 Cal. 581, 44 Am. Rep. 70, 4 Am. Crim. Rep. 191; Lilley v. Parkinson, 91 Cal. 655, 27 Pac. 1091; People v. Millard, 53 Mich. 63, 18 N. W. 562; Fisher v. Southern P. R. Co. 89 Cal. 399, 26 N. W. 894, 9 Am. Neg. Cas. 104; Galveston, H. & S. A. R. Co. v. Hanway, — Tex. Civ. App. —, 57 S. W. 695; Bloomington v. Schrock, 110 Ill. 222, 51 Am. Rep. 678.

Remarks of the trial court upon the evidence, continued interruption of counsel for the defendant, comments upon the value of evidence admitted, were improper and prejudicial. State v. Allen, 100 Iowa, 7, 69 N. W. 274; State v. Hazlett, 14 N. D. 490, 105 N. W. 617; Tuchfeld v. Plattner, 116 N. Y. Supp. 693; Schwanz v. Wujek, 163 Mich. 492, 128 N. W. 731.

It is error for the trial court, in the presence of the jury, to reflect upon counsel by words or actions. State v. Phillips, 59 Wash. 252, 109 Pac. 1047; Dallas Consol. Electric Street R. Co. v. McAllister, 41 Tex. Civ. App. 131, 90 S. W. 933; Williams v. West Bay City, 119 Mich. 395, 78 N. W. 328; Walker v. Coleman, 55 Kan. 381, 49 Am. St. Rep. 254, 40 Pac. 641; Cronkhite v. Dickerson, 51 Mich. 177, 16 N. W. 371; Edwards v. Cedar Rapids, 138 Iowa, 421, 116 N. W. 323; Wheeler v. Wallace, 53 Mich. 355, 19 N. W. 33; Sivley v. Sivley, 96 Miss. 137, 51 So. 457; Jageriskey v. Detroit United R. Co. 163 Mich. 631, 128 N. W. 726; Kane v. Kinnare, 69 Ill. App. 81; West v. Black, 65 Ga. 647; Landers v. Quincy, O. & K. C. R. Co. 134 Mo. App. 80, 114 S. W. 543; Schmidt v. St. Louis R. Co. 149 Mo. 269, 73 Am. St. Rep. 380, 50 S. W. 921; Schneider v. Great Northern R. Co. 47 Wash. 45, 91 Pac. 565; Nave v. McGrane, 19 Idaho, 111, 113 Pac. 82; Howland v. Oakland Consol Street R. Co. 115 Cal. 487, 47 Pac. 255; State v. Harkin, 7 Nev. 383; Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; Brunker v. Cummins, 133 Ind. 443, 32 N. E. 732.

The plaintiff must prove the issue of negligence which he alleges. Balding v. Andrews, 12 N. D. 267, 96 N. W. 305, 14 Am. Neg. Rep. 615; Gebus v. Minneapolis, St. P. & S. Ste. M. R. Co. 22 N. D. 29, 132 N. W. 227; Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; Chicago Transit Co. v. Campbell, 110 Ill. App. 366.

The issues were laid down by the complaint and the general denial, and the burden was upon the plaintiff. Rapp v. Sarpy County, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; Schuyler v. Southern P. R. Co. 37 Utah, 581, 109 Pac. 458; Foss v. McRae, 105 Me. 140, 73 Atl. 827; Dorrell v. Sparks, 142 Mo. App. 460, 127 S. W. 103; Southwestern Teleg. & Teleph. Co. v. Luckett, — Tex. Civ. App. —, 127 S. W. 856; Vertrees v. Gage County, 75 Neb. 332, 106 N. W. 331; Leavitt v. Thurston, 38 Utah, 351, 113 Pac. 77; State v. Jackson, 21

S. D. 494, 113 N. W. 880, 16 Ann. Cas. 87; Waterhouse v. Jos. Schlitz Brewing Co. 16 S. D. 592, 94 N. W. 587; United States v. Adams, 2 Dak. 305, 9 N. W. 718; Young v. Harris, 4 Dak. 367, 32 N. W. 97; Territory v. Chartrand, 1 Dak. 379, 46 N. W. 583; Cheatham v. Wilber, 1 Dak. 335, 46 N. W. 580.

The charge of the court must be construed as a whole. McBride v. Wallace, 17 N. D. 495, 117 N. W. 857; Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841.

In this court, the plaintiff is entitled to the presumption that no error was committed by the trial court. Whitney v. Brown, 75 Kan. 678, 11 L.R.A.(N.S.) 468, 90 Pac. 277, 12 Ann. Cas. 768; Mageau v. Great Northern R. Co. 103 Minn. 290, 15 L.R.A.(N.S.) 511, 115 N. W. 651, 946, 14 Ann. Cas. 551; Johnson v. Walker, 86 Miss. 757, 1 L.R.A.(N.S.) 470, 109 Am. St. Rep. 733, 39 So. 49; State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846; Grimsetad v. Lofgren, 105 Minn. 286, 17 L.R.A. (N.S.) 990, 127 Am. St. Rep. 566, 117 N. W. 515; Kuhl v. Chamberlain, 140 Iowa, 546, 21 L.R.A.(N.S.) 766, 118 N. W. 776; Madson v. Rutten, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872; McClain v. Lewiston Interstate Fair & Racing Asso. 17 Idaho, 63, 25 L.R.A.(N.S.) 691, 104 Pac. 1015, 20 Ann. Cas. 60; Shaw v. Lobe, 58 Wash. 219, 29 L.R.A.(N.S.) 333, 108 Pac. 450; Cetofonte v. Camden Coke Co. 78 N. J. L. 662, 27 L.R.A.(N.S.) 1058, 75 Atl. 913; Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215.

T. T. Cuthbert and *A. E. Smythe,* for respondent.

Where a train is derailed and a passenger sustains damage in consequence thereof, the mere fact that an accident happened under the circumstances shown creates a presumption of negligence. Thomp. Neg. § 2761; Bonner v. Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010; Ohio & M. R. Co. v. Voight, 122 Ind. 288, 23 N. E. 774; Pattee v. Chicago, M. & St. P. R. Co. 5 Dak. 267, 38 N. W. 435; Philadelphia & R. R. Co. v. Anderson, 94 Pa. 351, 39 Am. Rep. 787.

The circumstances under which the accident occurred may certainly be shown, to give the jury the opportunity to decide the facts with reference to the fall and the injury. Indianapolis, G. & F. R. Co. v. Hub-

bard, 36 Ind. App. 160, 74 N. E. 535; Winkle v. George B. Peck Dry Goods Co. 132 Mo. App. 656, 112 S. W. 1026; Lehane v. Butte Electric R. Co. 37 Mont. 564, 97 Pac. 1038; Chicago, B. & Q. R. Co. v. Hildebrand, 42 Neb. 33, 60 N. W. 335; St. Louis Southwestern R. Co. v. Cleland, 50 Tex. Civ. App. 499, 110 S. W. 122; Doyle v. Boston & A. R. Co. 145 Mass. 386, 14 N. E. 461, 14 Enc. Ev. 98.

The rule that appellate courts will not disturb the verdict where there is a conflict in the evidence, and where there is substantial evidence to sustain the verdict, is well settled. Caledonia Gold Min. Co. v. Noonan, 3 Dak. 189, 14 N. W. 426, affirmed in 121 U. S. 393, 30 L. ed. 1061, 7 Sup. Ct. Rep. 911; State ex rel. Morrill v. Massey, 10 N. D. 154, 86 N. W. 225; Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454, approved in Nichols & S. Co. v. Stangler, 7 N. D. 109, 72 N. W. 1089; Axiom Min. Co. v. White, 10 S. D. 202, 72 N. W. 462; Bailey v. Walton, 24 S. D. 119, 123 N. W. 701; Casey v. First Nat. Bank, 20 N. D. 211, 126 N. W. 1011; Charles E. Bryant & Co. v. Arnold, 19 S. D. 106, 102 N. W. 303; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225.

Evidence that other passengers on the train were not injured is no proof against the plaintiff's claim of injury. Similar facts, without showing similar conditions, do not constitute relevant evidence. Cleveland, C. C. & I. R. Co. v. Wynant, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118; Phillips v. Willow, 70 Wis. 6, 5 Am. St. Rep. 114, 34 N. W. 731; Hudson v. Chicago & N. W. R. Co. 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735; Langhammer v. Manchester, 99 Iowa, 295, 68 N. W. 688; Potter v. Cave, 123 Iowa, 98, 98 N. W. 569; Temperance Hall Asso. v. Giles, 33 N. J. L. 260; Laufer v. Bridgeport Traction Co. 68 Conn. 475, 37 L.R.A. 533, 37 Atl. 379; Bach v. Iowa C. R. Co. 112 Iowa, 241, 83 N. W. 959; Campbell v. Russell, 139 Mass. 278, 1 N. E. 345; Gulf, C. & S. F. R. Co. v. Brown, 16 Tex. Civ. App. 93, 40 S. W. 608.

The allowance of an amendment of the complaint to conform to the facts proved on the trial, and in no manner changing the cause of action, is not error. Martin v. Luger Furniture Co. 8 N. D. 220, 77 N. W. 1003; Barker v. More Bros. 18 N. D. 82, 118 N. W. 823; Webb v. Wegley, 19 N. D. 606, 125 N. W. 562; Goldstein v. Peter Fox Sons Co. 22 N. D. 636, 40 L.R.A.(N.S.) 566, 135 N. W. 180; Miller v.

Perry, 38 Iowa, 303; Brown v. Bosworth, 62 Wis. 542, 22 N. W. 521; Nash v. Adams, 24 Conn. 33; Phœnix Mut. L. Ins. Co. v. Walrath, 53 Wis. 676, 10 N. W. 151; Swift v. Mulkey, 14 Or. 63, 12 Pac. 76.

The mere fact that the train was wrecked or derailed raises an inference of negligence against the defendant. 3 Thomp. Neg. § 2809; Furnish v. Missouri P. R. Co. 102 Mo. 438, 22 Am. St. Rep. 781, 13 S. W. 1044; Southern Kansas R. Co. v. Walsh, 45 Kan. 653, 26 Pac. 45; Meador v. Missouri P. R. Co. 62 Kan. 865, 61 Pac. 442; Pershing v. Chicago, B. & Q. R. Co. 71 Iowa, 561, 32 N. W. 488, 9 Am. Neg. Cas. 337; Miller v. Louisville, N. A. & C. R. Co. 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339.

Expert evidence must be based upon previous testimony of the witnesses, or upon facts agreed or assumed to be true hypothetically. Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359.

Where a physician is present and hears all the testimony of the plaintiff, he may give expert testimony in response to hypothetical questions, based on such testimony of the plaintiff. Atchison, T. & S. F. R. Co. v. Brassfield, 51 Kan. 167, 32 Pac. 814; Hunt v. Lowell Gaslight Co. 8 Allen, 169, 85 Am. Dec. 697; Abbott v. Dwinnell, 74 Wis. 514, 43 N. W. 496; Hand v. Brookline, 126 Mass. 324; Cornell v. State, 104 Wis. 527, 80 N. W. 745; Gilman v. Strafford, 50 Vt. 723; Yardley v. Cuthbertson, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765; Com. v. Johnson, 188 Mass. 382, 74 N. E. 939; State v. Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; Wright v. Hardy, 22 Wis. 348.

Great latitude is allowed in the examination of experts, to test their credibility, or to fix the value of their evidence. Dilleber v. Home L. Ins. Co. 87 N. Y. 79; People v. Augsbury, 97 N. Y. 501; Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Geisendorff v. Eagles, 106 Ind. 38, 5 N. E. 743; People v. Sutton, 73 Cal. 243, 15 Pac. 86; McFadden v. Santa Ana, O. & T. Street R. Co. 87 Cal. 464, 11 L.R.A. 252, 25 Pac. 681; Erickson v. Smith, 2 Abb. App. Dec. 64; Davis v. State, 35 Ind. 496, 9 Am. Rep. 760.

No medical books were offered in evidence, nor was any effort made to introduce in evidence the opinion of any text writer. Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862; Ripon v. Bittel, 30 Wis. 614;

Broadhead v. Wiltse, 35 Iowa, 429; Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516; State v. Wood, 53 N. H. 484; 2 Whart. Ev. 666.

The conduct of the trial court, his remarks or the propriety of the same, will not be inquired into or considered by the supreme court, unless objection, ruling, and exception were made and taken. People v. Abbott, 101 Cal. 645, 36 Pac. 129; Hall v. First Nat. Bank, 133 Ill. 243, 24 N. E. 546; Mulliner v. Bronson, 114 Ill. 510, 2 N. E. 671; Vass v. Waukesha, 90 Wis. 337, 63 N. E. 280; Osborn v. Ratliff, 53 Iowa, 748, 5 N. W. 778; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 271; Cromer v. State, 21 Ind. App. 502, 52 N. E. 239; Hedlun v. Holy Terror Min. Co. 16 S. D. 261, 92 N. W. 31.

The trial court may ask pertinent questions. 1 Thomp. New Trials, § 220, Abbott, Civil Jury Trials, 3d ed. pp. 176–178, and cases cited with the text.

Improper remarks by the trial court are in no case ground for a reversal of the judgment, unless it is shown that they were prejudicial, or were of such a character as to raise the presumption of prejudice. Elgin, J. & E. R. Co. v. Lawlor, 229 Ill. 621, 82 N. E. 407; 38 Cyc. 1320; Logan v. Agricultural Soc. 156 Mich. 537, 121 N. W. 485; Reilly v. Eastman's Co. 28 Misc. 125, 58 N. Y. Supp. 1089; Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124; McMahon v. Eau Claire Waterworks Co. 95 Wis. 640, 70 N. W. 829, 2 Am. Neg. Rep. 478; Hedlun v. Holy Terror Min. Co. 16 S. D. 261, 92 N. W. 31.

The remarks of the court were not unprovoked, and, assuming them to have been slightly improper, the judgment cannot be disturbed on such grounds. Finan v. New York C. & H. R. R. Co. 111 App. Div. 383, 97 N. Y. Supp. 859; 38 Cyc. 1320; Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 Pac. 330; D. H. Fleming & Son v. Pullen, — Tex. Civ. App. —, 97 S. W. 109; Hedlun v. Holy Terror Min. Co. 16 S. D. 261, 92 N. W. 31.

It is not error to refuse specific instructions, when the points involved are fully covered by the general charge. State v. Hayes, 23 S. D. 596, 122 N. W. 652.

Burke, J. Plaintiff is a florist residing at Devils Lake, North Dakota, and at the time of the trial was fifty-eight years of age. He sues for injuries alleged to have been received while a passenger upon one of defendant's trains, which was wrecked near Litchfield, Minne-

sota. He recovered $1,875 in the court below. We will treat the assignments of error in eleven subdivisions, following the classification adopted by appellant:

(1) Appellant's first and principal contention is that the evidence is insufficient to support any verdict in plaintiff's favor. We cannot set out in this opinion the entire evidence, which covered nearly one hundred pages, but will give a few extracts which support our conclusion that the evidence justifies the verdict.

The plaintiff was upon one of the coast trains, consisting of an engine and about ten coaches, and was asleep in an upper berth of the Pullman sleeping car. The accident happened at 1:46 A. M. and was caused by a misplaced switch. The engineer testifies that he was running about 28 or 30 miles an hour when he saw the open switch about three car lengths ahead, and that the train was going pretty nearly as fast when it struck the same. The locomotive and three coaches left the track and ran along upon the ties. The engine slowed down after it hit the switch, and finally turned over on its side. None of the rear coaches left the rails, and were afterwards returned to Minneapolis and continued on their way over another line, reaching Devils Lake about eleven hours late. The plaintiff testifies that he was asleep in his berth when the accident occurred, and that the first thing he knew he was in the aisle, and the train was stopped. He says that he opened his eyes and looked at the electric lights, and thought that the whole car was on fire, and ran out as quickly as he could. Being reassured by a member of the train crew, he returned to his berth and dressed. He further testifies that when he got back to the car and was lying on the bed, his head started to ache, and that he felt of his head and there was a bump there. He says the bump was to the left of the center of his head and over the left car, and "big as an egg I guess, pretty near,—a small egg." He testifies that he did not know how he got out of the berth. He further testifies that since the accident he has headaches all of the time, and gets dizzy, and cannot work in his greenhouse. He also testifies that his right arm was injured. "I got no feeling in it. It feels dead. I can't lift it up, and I got no strength in it. Can't lift anything like I could before,—just a dead feeling is all. My arm feels just like a man that lies on his arm and sleeps, not a pain, just dead, that is all, some of the time; some of the time it is a little better. Don't have

that feeling elsewhere. Didn't have it before this accident. My health was always good before,—never so strong in my life. My memory is not so good since. Memory was good before the accident." He further testifies that he did not have any bump when he went to bed, and that he never had headaches prior to the accident. He further testifies that two claim agents boarded the train shortly after the wreck, and that one of them tried to get him to sign a paper to the effect that he had not been injured, but that he had refused and had told said claim agent of his injury. It is conceded that the plaintiff refused to sign this statement, although the claim agent denies that plaintiff claimed any injury at that time. Plaintiff offered the evidence of two doctors who heard his testimony, and, basing their opinions upon the same, state that the cause of plaintiff's condition seems to be a lesion of the brain in the motor area on the left side. These physicians were examined and cross-examined at length, and the jury had the benefit thereof.

There is some dispute as to the facts above narrated. No one seems to have seen the plaintiff fall from his berth, and the jury were asked to make that finding from the circumstances shown to exist. The defendant offered the testimony of other physicians who had examined plaintiff, and who testified that his condition, if it actually existed as testified to by himself, might be due to "general senility, a gradual lessening of the functions from old age, gradual breaking down of health on account of age, natural process." These physicians also testified that a blow on the left side of the head would be very liable to affect the left side of the brain. Testimony was also offered tending to dispute the probability of plaintiff's being thrown from his berth.

Upon this state of facts defendant insists that there is no direct evidence of the manner in which the accident occurred, and the injuries shown are consistent with, and may be ascribed to, other causes; and that it is "clearly not within the province of the jury to guess wherein the truth lies, and to make that guess the foundation for a verdict."

After a careful consideration of the facts in this case, and after reading the many cases cited by both appellant and respondent, we have reached the conclusion that there is sufficient evidence in the record to justify the finding that plaintiff was thrown from an upper berth on account of the derailment of the locomotive and front cars, and that he

received injuries from the fall, which led to the condition to which he testifies.

Caledonia Gold Min. Co. v. Noonan, 3 Dak. 189, 14 N. W. 426, 121 U. S. 393, 30 L. ed. 1061, 7 Sup. Ct. Rep. 911; State ex rel. Morrill v. Massey, 10 N. D. 154, 86 N. W. 225; Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Casey v. First Nat. Bank, 20 N. D. 211, 126 N. W. 1011; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225. The cases cited by appellant are based upon facts showing the contention of the plaintiff to be so inherently improbable and unreasonable as to test the credulity of the court. We do not believe the evidence in this case is of that nature, and hold with respondent upon this assignment.

(2) The second point raised by appellant relates to the rejection of the evidence of the train crew and passengers as to the effect of the wreck upon their persons. It was evidently the purpose of the defendant to show that other persons in the train were not thrown violently around, and that therefore it was improbable that plaintiff had been thrown from his berth. The train conductor was in the dining car, standing up, and testifies that he was not thrown down, and did not fall down as the result of the stop. Defendant offered to show that the dining-car crew, who were sleeping upon army cots standing about 1 foot in height, were not awakened. One of the brakemen was also in the dining car awake, sitting down, and defendant sought to show that he felt just an ordinary stopping, like setting the emergency brake quickly. A fellow passenger in the same car, but in a lower berth, was also offered as a witness to testify that he was not thrown from his berth. At first all of this testimony was excluded by the trial court upon the theory that the conditions surrounding those other persons were different from those surrounding plaintiff, but before the subject was concluded practically reversed his rulings, and at different times made the following statements to the counsel for appellant:

The Court: "I allow you to inquire relative to the jarring of the car and stopping, or any reference to anything that occurred to Kersten."

And again: "I allow you to inquire of this witness relative to anything about Kersten in that car at that time."

And again: "Well, I haven't any authority here on it; I am just going on my own sense in this matter, there is no authority on either side. I will overrule the objection (made by plaintiff) and allow you to inquire about that of this man."

And again: "I will allow it, as to what the train was doing and what noises the train was making."

Again: "I don't think this evidence is admissible, but I am going to let it in, and you, gentlemen of the jury, when I let it in, will consider it for what it is worth under the instructions of the court at the close of the case." This last remark was made when plaintiff had objected to the following question to the brakeman who was in the dining car, as before mentioned:

Q. "Just describe what effect, as you saw it, the stopping had upon him at that time."

After these remarks of the court the defendant recalled his witnesses, and they were allowed to testify along the lines desired, subject only to objection to the questions for other reasons. It is thus apparent that error, if any, occurring in the earlier rulings of the trial court, was cured by the subsequent admission of the testimony. It will therefore be unnecessary to decide whether or not the testimony was in fact admissible, upon which question, however, see: Laufer v. Bridgeport Traction Co. 68 Conn. 475, 37 L.R.A. 533, 37 Atl. 379.

(3) The third complaint of appellant is based upon the admission of certain questions asked by the plaintiff of his witness Dr. Jones. The doctor testified that he had heard all of the testimony given by the plaintiff, and was then asked to exclude any opinion obtained from personal examination, and any knowledge that might have come to him in any way excepting through the testimony of the plaintiff, and to give his opinion as to the cause of the injuries of which said plaintiff complained. To this question the objection was entered: "That it assumed a state of facts not in controversy, irrelevant, incompetent, and no foundation laid." This objection was overruled. It is apparent that the objection was not sufficient to raise the point argued at this time, to wit, that it was not a proper hypothetical question, and required the doctor to pass upon the credibility of the witness. For this reason alone it was properly overruled. However, under the ruling in Walters v. Rock, 18 N. D. 45, 115 N. W. 511, the objection was also properly

overruled because the opinion of the doctor was founded upon evidence not in controversy.

(4) The fourth complaint of appellant relates to the cross-examination of defendant's witness Dr. Sihler. The doctor had given his opinion as to the effect upon the brain of a blow delivered directly above the injury. Upon cross-examination he was asked whether or not certain medical text-books and authorities sustained a doctrine contrary to that held by the witness. It appears that the text-book to which reference was made was offered to the witness, and that the author at that time was a teacher of surgery in Johns Hopkins University. Thus the cross-examination was evidently in good faith to test the accuracy of the conclusion given by the expert who was upon the stand. Great latitude should be allowed in the cross-examination of experts to test their credibility and knowledge. Dilleber v. Home L. Ins. Co. 87 N. Y. 79; McFadden v. Santa Ana, O. & T. Street R. Co. 87 Cal. 464, 11 L.R.A. 252, 25 Pac. 681; Jones, Ev. 2d ed. § 389; Davis v. State, 35 Ind. 496, 9 Am. Rep. 760. We think the cross-examination proper.

(5) Appellant alleges restriction of the cross-examination of the plaintiff's witness Dr. Jones. The question asked was:

Q. "Would not this hardening of the arteries—might it not rather sometimes act locally as well as over the whole body?"

Objection was made to this question as assuming a state of facts not in evidence. The witness had already been cross-examined at length, and had testified that plaintiff's symptoms might be explained on other theories, if the symptoms had come on gradually, and not suddenly. While this question might have been allowed along the lines of the rest of the cross-examination, we believe the extent of such cross-examination to rest largely in the discretion of the trial court, as cross-examination must end somewhere. There is no reversible error in this ruling.

(6) The 6th assignment relates to the examination of defendant's expert Dr. Sihler. The witness had testified that he had examined plaintiff, and considered his condition a case of "general senility," etc. He was then asked: Q. "Would that condition, or these symptoms, be brought about by a tap on the head, not severe enough to produce any immediate symptoms of that kind?" This was objected to as not a proper hypothetical question, assuming a state of facts not in evidence, and incompetent. Again he was asked: Q. "Do you agree with Drs. Jones

and McGuerren, that a blow on the left side of the head, not severe enough to produce the loss of muscular control of the arm, would show the loss of muscular control of the arm on the left side of the body instead of the right?" This was objected to as assuming a state of facts not in evidence. We think both questions objectionable under the state of facts disclosed by the record.

(7) The 7th assignment has to do with an amendment to the complaint allowed by the trial court during the arguments of counsel to the jury. The complaint originally alleged that "said train was so negligently and carelessly operated and managed by defendant and its servants in control thereof, that the same left the track while going at a high rate of speed." The amendment added the following words: "Caused by the defendant, wrongfully and negligently permitting and allowing an open switch." Under § 6883, Rev. Codes 1905, courts may, before or after judgments, in furtherance of justice and on such terms as may be proper, amend any pleading by conforming the pleading to the facts proved. The cause of the derailment was a minor matter which might indeed have been entirely omitted from the complaint. It was, of course, known to the defendant earlier than to the plaintiff. The insertion of the clause above mentioned in no manner changed the issues, nor necessitated any substantial change in the defense. The defendant's engineer testified that the open switch was the cause of the derailment. We see no prejudice to the defendant in this amendment. Martin v. Luger Furniture Co. 8 N. D. 220, 77 N. W. 1003; Barker v. More, 18 N. D. 82, 118 N. W. 823; Webb v. Wegley, 19 N. D. 606, 125 N. W. 562; Goldstein v. Peter Fox Sons Co. 22 N. D. 636, 40 L.R.A.(N.S.) 566, 135 N. W. 180.

(8) It is claimed that the instruction of the court to the effect that the burden of proof is upon the plaintiff to establish his "right to recover" by a fair preponderance of the evidence, etc., "and that the jury should be satisfied from the evidence that the testimony in behalf of his recovering should be of greater weight than the evidence against his right to recover," is an inaccurate statement of the law of burden of proof, and prejudicial to the interests of the defendant. We do not think the matter important. The style and diction of the trial court must be left to himself. While the word "must" would be better than the word "should" before the words, "be satisfied from the evidence,"

yet we cannot see wherein this trifling change of diction in any manner prejudices the rights of the defendant. If the defendant desired the instruction upon this point in different language, he, no doubt, could have had it delivered to the jury by making a simple request. 1 Sackett, Instructions to Juries, § 360.

(9) Error is also predicated upon the refusal of the court to charge the jury that if they were unable to determine which of several causes was responsible for plaintiff's condition, they could not find for plaintiff and give him compensation therefor. Upon this question the trial court instructed the jury that if they "should find those ailments do not arise from his injuries received from the railroad company, then you should not consider said ailments as grounds for damages, because unless they resulted from the negligence of the railway company, the railway company would not be responsible, and should not pay damages to him on that account." The language of the trial court is as broad as the requested instruction, and no error can be predicated in giving the one and refusing the other.

(10) The 10th assignment relates to the submission to the jury by the court of the issue of defendant's negligence in permitting an open switch. The language of the court is as follows: "It is admitted that the train was derailed. It is admitted in the answer. I say to you, gentlemen of the jury, that if you find from the evidence that this train was derailed on account of an open switch, that is, on account of a switch having been left open, that you would be justified in finding that the leaving of such a switch open would be negligence on the part of the company, unless the evidence taken all together shows clearly to your mind that the leaving of the switch open has been explained in such a way as to show you that it was not negligence on the part of the company; unless the evidence shows clearly to your mind that the company was using great care for the safety of Kersten, even when you take into consideration the fact that the switch was left open." Plaintiff insists that this charge places the burden of the proof upon the defendant. We do not see any merit in this contention. The charge given, in no way prejudices the defendant. It has not changed the burden of proof, and is not error.

(11) The defendant's last complaint is that the trial court's general conduct was calculated to, and did, prejudice the defendant's rights.

We have gone carefully through the record, and have noted every word appearing therein attributed to the trial court, and we can see nothing in any manner sustaining the assertion of the defendant in this particular. The trial court did ask questions of the witnesses at times when he felt that a word of explanation would aid himself or the jury, but such questions were fairly worded in each instance.

Finding no error in the record, the judgment is accordingly affirmed.

THOMAS C. EKWORTZELL v. BLUE GRASS TOWNSHIP, August Gappert, Edward Friling, Peter Moos, Constituting Board of Supervisors of Said Township, August Weinreich, Clerk of Said Board, and Ben Beckett, Overseer of Highways of Said Township.

(147 N. W. 726.)

Trial *de novo*.

Board of county commissioners — proceedings — highway — establishment — collateral attack.

1. Certain proceedings of the board of county commissioners of Morton county appearing in the records of 1894, examined, and *held* to show the establishment of the highway in question. For reasons stated in the opinion, the attack of the plaintiff is collateral and is completely refuted by the recitals set forth in the opinion.

Proceedings to establish highway — direct attack — laches.

2. While not necessary to a decision of this case, this court would probably hold from the evidence that the plaintiff is guilty of such laches as would prevent a direct attack upon the proceedings at this time.

Opinion filed May 20, 1914.

Appeal from the District Court of Morton County, *Nuchols*, J.

Affirmed.

W. H. Stutsman, for appellant.

To constitute estoppel, one, by his acts or representations, or by his silence when he should speak, either intentionally or by his negligence must induce another to *believe* and to *act* to his injury. Pence v.

Arbuckle, 22 Minn. 417; Hawkins v. Methodist Episcopal Church, 23 Minn. 256.

Estoppel is interposed to prevent injustice and to guard against fraud, by denying to a party the right to repudiate his admissions when they have been rightfully and in good faith acted upon. Alexander v. Walter, 8 Gill, 239, 50 Am. Dec. 688; Taylor v. Zepp, 14 Mo. 482, 55 Am. Dec. 113.

No intendments are indulged in favor of an estoppel, but the pleader must fully set out all the facts essential to its existence. Troyer v. Dyar, 102 Ind. 396, 1 N. E. 728; Henderson v. Keutzer, 56 Neb. 460, 76 N. W. 881; McQueen v. Bank of Edgemont, 20 S. D. 378, 107 N. W. 208, and cases cited; Jones v. Peebles, 130 Ala. 269, 30 So. 564; Scott v. State, 1 Sneed, 629.

B. W. Shaw, for respondent.

The board having acted upon the petition, and having assumed jurisdiction, the existence of all preliminary facts will be presumed to have been established. This is absolutely true in case of collateral attack, like here presented. In such a case, the board's decision is final. Ely v. Morgan County, 112 Ind. 361, 14 N. E. 236; Todd v. Crail, 167 Ind. 48, 77 N. E. 402; Evansville, I. & C. Straight Line R. Co. v. Evansville, 15 Ind. 421; Adams v. Harrington, 114 Ind. 66, 14 N. E. 603; Strieb v. Cox, 111 Ind. 299, 12 N. E. 481; Cox County v. Montgomery, 106 Ind. 517, 6 N. E. 915; Terre Haute v. Beach, 96 Ind. 143; Chicago & A. R. Co. v. Sutton, 130 Ind. 405, 30 N. E. 291; Bowen v. Hester, 143 Ind. 511, 41 N. E. 330; Runner v. Scott, 150 Ind. 441, 50 N. E. 479; Knox County v. Aspinwall, 21 How. 539, 16 L. ed. 208; Evansville Ice & Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N. E. 592.

All previous jurisdictional facts are presumed to exist, when the attack is collateral. State ex rel. Jenkins v. Harland, 74 Wis. 11, 41 N. W. 1060; State v. Minneapolis & St. L. R. Co. 88 Iowa, 689, 56 N. W. 401; Cassidy v. Smith, 13 Minn. 129, Gil. 122; Lingo v. Burford, 112 Mo. 149, 20 S. W. 459; State v. Lewis, 22 N. J. L. 564; 37 Cyc. 127.

A description of a proposed highway which is sufficiently definite to enable a surveyor to locate the highway is all that the law requires. Clift v. Brown, 95 Ind. 53; Adams v. Harrington, 114 Ind. 66, 14 N. E.

603; Henline v. People, 81 Ill. 269; Yankton County v. Klemisch, 11 S. D. 170, 76 N. W. 312.

Acquiescence in the layout of a road may work an estoppel to object. Freetown v. Bristol County, 9 Pick. 46; Re Woolsey, 95 N. Y. 135; State v. Wertzel, 62 Wis. 184, 22 N. W. 150; State v. Boscawen, 32 N. H. 331; Yankton County v. Klemisch, 11 S. D. 170, 76 N. W. 312.

A grantee of one estoppel is also barred. Miller v. Schenck, 78 Iowa, 372, 43 N. W. 225; Gurnsey v. Edwards, 26 N. H. 224.

Where a highway has been opened and used, its existence as such cannot be attacked collaterally. Miller v. Porter, 71 Ind. 521; Gurnsey v. Edwards, 26 N. H. 224; State v. Boscawen, 32 N. H. 331.

BURKE, J. About June 5, 1894, a number of freeholders of the county of Morton petitioned the county commissioners to establish a highway extending for several miles and incidentally passing on the south line of a certain quarter section designated as the S. E. ¼ of 30–140–86, which tract was at that time owned by one Ruoff. This petition was signed, among others, by this plaintiff, who, however, did not at that time own the land. Proceedings were subsequently had whereby the county board appointed three freeholders of the county to act as viewers and report to the board. Those proceedings are set out in the minutes of the board of county commissioners under the date of July 2, 1894. On October 2, 1894, the three viewers reported to the county commissioners that they had slightly deviated from the section line in passing the above-described tract, and had gone thereon around several water holes which obstructed the section line. The county board declared said road open and a public highway. At that time there were no objections made by any person, nor any claim for damages made against the county by reason of the taking of the private land for this public use.

Early in the year 1906, said highway was surveyed by the county surveyor, who made and filed a report thereon, to the county board, which was approved on the 4th day of June, 1906, and no appeal has ever been taken from the action of the said board. All of these steps were taken under §§ 1206–1217, Comp. Laws 1887.

The said road has been in continuous use as a highway since October 2, 1894. In 1906 Ruoff, who was owner at that time, fenced said

quarter section along the south line, and placed two gates at the places where the fence intersected the road. Finding that the traveling public failed to close the gates after passing through the same, the latter moved the fence back, to avoid the intersection with the road. On July 25, 1907, this plaintiff, Ekwortzell, purchased the land from Ruoff, and in the year 1911 placed a fence upon the south line of said tract, but without leaving gates at the intersections of the road. The township supervisors of Blue Grass township caused this fence to be removed, claiming that it obstructed a public highway. Plaintiff then brought this action to restrain the defendants from interfering with this fence.

(1) This appeal is under the Newman act, which necessitates a trial of all issues anew in this court, but appellant has requested us to review only certain findings of the trial court which he claims are not supported by the evidence, and to review certain conclusions of law which he insists are not sustained by the findings of fact. There is no objection to this procedure. The respondent is, of course, satisfied with all of the findings and conclusions of law, and those that are satisfactory to the appellant will be assumed to be correct by this court. Appellant divides his arguments into some eighteen propositions, but we do not find it necessary to pass upon each of the questions raised. The trial court found that the county commissioners had jurisdiction to lay out said highway, and that the same is a valid and existing highway of said county. This is attacked by appellant upon several grounds, among which were that there was no proper petition presented in 1894; that no sufficient notices were posted at that time; that the viewers did not properly locate the highway; that the county board did not declare the road a public highway; and that the highway was not properly surveyed and reported.

All of those objections constitute an attempt to attack collaterally a record of the county board, which, upon its face at least, shows all of those jurisdictional steps to have been taken. Such attacks cannot be sustained in this action. The recitals in the minutes of the county board will be taken by this court as conclusive when attacked in a collateral suit. The record of the board of county commissioners contains the following recital under date of July 2, 1894: "The board, being satisfied that the proper notices had been posted for the time required by law, the prayer of the petitioners was granted, and Max Schultze, Edward

Frieling, and Phillip Geck were appointed viewers to view proposed road and report to the board." On the 2d day of October, 1894, the following proceedings were had: "Moved by Mr. Ingleter, seconded by Mr. Fuhr:—Resolved, that the report of the committee appointed to view proposed road . . . be accepted with the following alterations. . . . Motion prevailed and said described was declared open and a public highway." On January 4, 1906, the proceedings show the following: "On motion the county surveyor's report on county road No. 34 was adopted and placed on file. Motion carried." Among the exhibits is the petition (or copy thereof) for county road; road viewers' report, and plat and report of a county surveyor.

All of the recitals as above stated should be and are accepted by this court as binding as far as this collateral attack is concerned, and show the road in question to be a legal highway. See: Todd v. Crail, 167 Ind. 48, 77 N. E. 402; Evansville, I. & C. Straight Line R. Co. v. Evansville, 15 Ind. 421; Ely v. Morgan County, 112 Ind. 361, 14 N. E. 236; Adams v. Harrington, 114 Ind. 66, 14 N. E. 603; Strieb v. Cox, 111 Ind. 299, 12 N. E. 481; Cox County v. Montgomery, 106 Ind. 517, 6 N. E. 915; Terre Haute v. Beach, 96 Ind. 143; Chicago & A. R. Co. v. Sutton, 130 Ind. 405, 30 N. E. 291; Bowen v. Hester, 143 Ind. 511, 41 N. E. 330; Runner v. Scott, 150 Ind. 441, 50 N. E. 479; Knox County v. Aspinwall, 21 How. 539, 16 L. ed. 208; Evansville Ice & Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N. E. 592; State ex rel. Jenkins v. Harland, 74 Wis. 11, 41 N. W. 1060; State v. Minneapolis & St. L. R. Co. 88 Iowa 689, 56 N. W. 401; Cassidy v. Smith, 13 Minn. 129, Gil. 122; Lingo v. Burford, 112 Mo. 149, 20 S. W. 459; State v. Lewis, 22 N. J. L. 564; 37 Cyc. 127; Clift v. Brown, 95 Ind. 53; Henline v. People, 81 Ill. 269; Yankton County v. Klemisch, 11 S. D. 170, 76 N. W. 312.

(2) Paragraph No. 1 has disposed of practically all of the points raised by appellant, and renders unnecessary an extended discussion upon the question of estoppel, which is urged by respondent. It was held by the trial court that plaintiff and his grantor are guilty of laches in not making timely objection to the said road. There is considerable evidence upon this proposition, and we would probably hold the estoppel established under the facts of the case, did we deem it necessary to a decision of this case upon its merits.

Holding, as we do, that the road was legally and duly established so far as this lawsuit is concerned, it follows that defendants should not be enjoined in doing their duty and removing the obstruction. The judgment of the trial court is in all things affirmed.

NORTHERN ROCK ISLAND PLOW COMPANY, a Corporation, v. ANDREW JEPSON, Peter Jepson, P. A. Lyngstad, and All Other Persons Unknown, Claiming Any Interest or Estate in, or Lien or Encumbrance upon the Property Described in the Complaint, and Their Unknown Heirs.

(147 N. W. 728.)

One Frank E. Jepson died after making application to enter a government homestead. His father, Peter Jepson, was his sole heir at law. A brother, Andrew Jepson, cultivated the land and offered final proof, which was rejected by the General Land Office for the reason that the proof should be made by the father. The father, thereupon, made proof, and patent was issued to the heirs at law of the deceased entryman. Prior to the issuance of the patent, the father had quitclaimed to Andrew, and Andrew, acting upon orders from the General Land Office, had quitclaimed back to the father. Some five months after the issuance of patent, plaintiff obtained a money judgment against Andrew Jepson, and this action is brought to subject the said homestead to the lien of said judgment. *Held:*

Estate of deceased entryman — government land — gift — judgment — lien.

1. That the tract was not a part of the estate of the deceased entryman, but was a gift from the United States government to his father, Peter Jepson, on account of said father being the sole heir of the deceased entryman. The judgment debtor, Andrew Jepson, therefore never had any interest in the said tract, and the judgment therefore never became a lien thereon.

Opinion filed May 20, 1914.

Appeal from the District Court of Adams County, *Crawford,* J.

Affirmed.

Blaisdell, Murphy, & Blaisdell and *E. C. Wilson,* for appellant.

The record of a deed, in the absence of a showing of good reasons for not offering in evidence the deed itself, is wholly incompetent.

Rev. Codes 1905, § 7297; American Mortg. Co. v. Mouse River Live Stock Co. 10 N. D. 290, 86 N. W. 965; Sykes v. Beck, 12 N. D. 242, 96 N. W. 844.

While the findings of fact by the commissioner of the general land office are usually binding, his conclusions of law are not binding. Parsons v. Venzke, 4 N. D. 452, 50 Am. St. Rep. 669, 61 N. W. 1036.

Anyone having an estate or interest in real property, or lien upon same, may maintain this form of action. Rev. Codes 1905, §§ 7519, 7522; Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029.

The presumption of citizenship may be drawn from one's residence, and the fact that he has a homestead. 7 Cyc. 147; Kadlec v. Pavik, 9 N. D. 278, 83 N. W. 5; Re Willis, 22 Land Dec. 426.

Andrew Jepson has earned the title to the land in question and is therefore the equitable owner. Bergstrom v. Svenson, 20 N. D. 55, 126 N. W. 497, Ann. Cas. 1912C, 694; Douglass v. Stephens, 61 Fla. 589, 54 So. 455.

To be effectual for any purpose, a deed must be delivered and accepted. 13 Cyc. 560, 561, 570, 571.

The judgment lien in this case attached to the land in question. Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Rev. Codes 1905, § 4957.

The execution, delivery, and acceptance of a deed may relate back; but this is only where no rights of third parties have intervened. Arnegaard v. Arnegaard, 7 N. D. 475, 41 L.R.A. 258, 75 N. W. 797.

One claiming exemptions must plead and prove the same. There is no such issue in this case. 18 Cyc. 1491–1493; 20 Cyc. 746; 21 Cyc. 635–643; First Nat. Bank v. Thompson, 72 Iowa, 417, 34 N. W. 184.

Boehm & Jackson, for respondents.

No lands acquired under the homestead laws of the United States are liable for any debt contracted prior to the issuing of patent. U. S. Rev. Stat. § 2296, U. S. Comp. Stat. 1901, p. 1398; 32 Cyc. 1083, ¶ 3; Coleman v. McCormick, 37 Minn. 179, 33 N. W. 556; Gould v. Tucker, 20 S. D. 226, 105 N. W. 624; Ash v. Ericksson, 115 Minn. 478, 132 N. W. 997.

The exemption is effectual in favor of the heirs of the entryman. Ash v. Ericksson, supra; Englert v. Dale, 25 N. D. 587, 142 N. W. 169.

A deed does not convey after-acquired property. Richardson v. Cambridge, 2 Allen, 118, 79 Am. Dec. 767; Grand Tower Min. Mfg. & Transp. Co. v. Gill, 111 Ill. 541; Libby v. Thornton, 64 Me. 479; Wright v. Wright, 99 Ga. 324, 25 S. E. 673; Gray v. Folwell, 57 N. J. Eq. 446, 41 Atl. 869.

The courts will take judicial notice of the decisions and rules of the United States land department. Jones, Ev. 1st ed. ¶ 208; Caha v. United States, 152 U. S. 221, 38 L. ed. 419, 14 Sup. Ct. Rep. 513; Southern P. R. Co. v. Groeck, 68 Fed. 609; Whitney v. Spratt, 25 Wash. 62, 87 Am. St. Rep. 738, 64 Pac. 919; Finley v. Woodruff, 8 Ark. 328; Ansley v. Peterson, 30 Wis. 653; Carman v. Johnson, 29 Mo. 84; Bellows v. Todd, 34 Iowa, 18; Lerch v. Snyder, 112 Pa. 161, 4 Atl. 336.

Letters from the United States land department officials are admissible in evidence. Ansley v. Peterson, 30 Wis. 653; Bellows v. Todd, 34 Iowa, 18; Lerch v. Snyder, 112 Pa. 161, 4 Atl. 336.

There was a complete delivery of the deed from Andrew Jepson to Peter Jepson. The proper record of a deed raises the presumption of delivery. Wells v. American Mortg. Co. 109 Ala. 430, 20 So. 136; Ellis v. Clark, 39 Fla. 714, 23 So. 410; Colee v. Colee, 122 Ind. 109, 17 Am. St. Rep. 345, 23 N. E. 687; Fenton v. Miller, 94 Mich. 204, 53 N. W. 957; Burke v. Adams, 80 Mo. 504, 50 Am. Rep. 510; Tobin v. Bass, 85 Mo. 654, 55 Am. Rep. 392; Morrill v. Gelston, 34 Md. 413; Robinson v. Pitzer, 3 W. Va. 335.

BURKE, J. In September, 1902, Frank E. Jepson made an application to enter as a government homestead a 160 acre tract involved in this action. Before establishing residence thereon, and in the month of May, 1903, said entryman died, leaving no wife, children, or mother, but being survived by his father and three brothers. Under the laws of this state, Peter Jepson, the father, became his sole heir at law. Andrew Jepson, one of the brothers, had a government homestead near Frank's land, and made the cultivation and improvements required by the United States land laws to entitle the heirs to make application for, and receive, patent to the land. It was evidently the intention of the father, Peter, that the brother Andrew should have the land, because on the 6th day of February, 1908, he executed a quitclaim deed to said

tract in favor of Andrew. When the proof of cultivation reached the commissioner of the General Land Office in July, 1909, he rejected the same, but allowed the father, Peter, to present an amended homestead application upon behalf of the heirs, and required the brother Andrew to quitclaim back to the father any interest he claimed in the land. This was done, and in February, 1910, patent was issued to the homestead of the deceased entryman in favor of the heirs of Frank E. Jepson. On July 7, 1910, a judgment was docketed in favor of the Northern Rock Island Plow Company against the brother Andrew Jepson. This action is brought by the plow company against the father, Peter, and brother Andrew to have the land in question declared subject to the lien of the said judgment. It is their contention that the brother Andrew owns the tract.

(1) The burden of proof is upon the plaintiff to establish ownership of the land in the brother Andrew, and that its judgment is a lien thereon. The defendant insists that plaintiff has failed to establish either one of those two propositions. As we have reached the conclusion that there is a failure of proof of ownership in Andrew, it will be unnecessary to pass upon the second question.

It is well settled by the decisions of this and other courts that a government homestead upon which patent has not been earned is not the property of the decedent, but remains the property of the United States government. Under the land laws of the government, the heirs at law may, upon proof of property cultivation, apply for and receive a patent for the tract, but the grant is made directly to the heirs. Bernier v. Bernier, 147 U. S. 242, 247, 37 L. ed. 152, 155, 13 Sup. Ct. Rep. 244; Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Note in 34 L.R.A.(N.S.) 398; Bergstrom v. Svenson, 20 N. D. 55, 126 N. W. 497, Ann. Cas. 1912C, 694. Therefore on February 14, 1910, the United States granted the land to the heirs at law of Frank E. Jepson, deceased; it is admitted that Peter, the father, was the sole heir at law; so we have only to consider the effect of the two quitclaim deeds already mentioned; the first being from the father to Andrew, dated February 19, 1908, two years before patent was issued. It is claimed by the defendant that this deed is utterly void because at that time the land was the property of the United States government. Plaintiff insists that such deed,

which contained the following clause: "Together with every right, title, or interest in said property, that the grantor may have acquired or shall hereafter acquire in said property as the heir of said Frank E. Jepson, deceased," was sufficient to convey the land after the issuance of the patent. This dispute is immaterial in view of the fact that Andrew later, on November 19, 1909, issued and filed a quitclaim back to the father, Peter. This deed was not produced at the trial, but it affirmatively appeared that it had been forwarded to Washington, D. C., with the proofs offered by the father, and there was introduced in evidence the record thereof in the office of the register of deeds of the proper county. We think the record was properly received, and the proof sufficient to show that when the patent was issued the land became the absolute property of the father, Peter. There is absolutely no proof of any conveyance made by the father to the brother Andrew after that date, the only evidence upon which the plaintiff relies being two letters written by the father in 1911, stating that the land was deeded over to his son Andrew. Those letters were not sufficiently identified to entitle them to admission as evidence, and must be absolutely disregarded, while the father himself testified positively by deposition that the land belonged to him, and that Andrew had no interest therein, and the son Andrew also testified at the trial to the same effect. So, on the record it stands established that the land at the time of the trial was the property of the father, Peter, and therefore the judgment of the plaintiff constituted no lien thereon. The judgment of the trial court is affirmed.

NORTHERN ROCK ISLAND PLOW COMPANY, a Corporation, v. ANDREW JEPSON, Peter Jepson, P. A. Lyngstad, and all other persons Unknown, Claiming Any Interest or Estate in, or Lien or Encumbrance upon the Property Described in the Complaint, and Their Unknown Heirs.

(147 N. W. 729.)

Opinion filed May 20, 1914.

Appeal from the District Court of Adams County, *Crawford*, J. Dismissed.

Blaisdell, Murphy, & Blaisdell, Minot, N. D., and *E. C. Wilson,* Hettinger, N. D., for appellant.

Boehm & Jackson, Hettinger, N. D., for respondents.

PER CURIAM. This appeal is from an order of the trial court canceling of record *lis pendens* filed in the case of the Northern Rock Island Plow Co. v. Jepson, ante, 25, 147 N. W. 728, just decided by this court. As the original action has been affirmed, the question whether the *lis pendens* was wrongfully discharged becomes immaterial and moot, and the appeal is accordingly dismissed.

EARL SIMON McCANNA v. FERN McCANNA.

(147 N. W. 718.)

Upon trial *de novo, held:*

Decree of divorce — fraud — coercion — deceit.

1. That the decree of divorce heretofore entered in this action was not shown to have been obtained by fraud, coercion, or deceit.

Evidence — sufficiency.

2. That the testimony upon which the said divorce was granted was sufficient to support the said decree.

Summons and complaint — service — written acknowledgment thereof.

3. That the summons and complaint were duly served upon the defendant and written acknowledgment of service indorsed thereon by herself.

Attorney — authority to appear — decree — setting aside — error.

4. That attorney J. J. Sampson was duly authorized by her to appear in her behalf upon the trial.

It was therefore error of the trial court to set aside the decree.

Opinion filed May 20, 1914.

Appeal from the District Court of Ramsey County, *Cowan,* J.

Reversed.

F. T. Cuthbert and *A. R. Smythe,* for appellant.

There is a clear and conclusive showing in the record here presented, that the trial court abused its discretion in setting aside the decree and

reopening the judgment. There was no valid ground shown or established for such action. 11 Enc. Pl. & Pr. 1170, 1180–1182, 1184–1187.

Taylor Crum, for respondent.

The discretionary power of the court to reopen judgments will not be interfered with except in clear cases of abuse. Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; Weber v. Tschetter, 1 S. D. 216, 46 N. W. 201; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 391.

Such orders are not disturbed as a rule. Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63, 12 Am. Neg. Rep. 619; 15 Enc. Pl. & Pr. 281, 282; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 229, 130 N. W. 228, and cases cited; Cline v. Duffy, 20 N. D. 537, 129 N. W. 75.

As a general rule, where the moving party makes a clear showing that he has a good cause of action or defense, on its merits, the trial court cannot, in the exercise of a sound discretion, deny to him the relief asked. Richardson v. Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 545.

The state has an interest in maintaining the *rules which have been presented* by the proper authority concerning marriages and divorces, which interest it is the duty of the courts to protect. Wiemer v. Wiemer, 21 N. D. 371, 130 N. W. 1015; Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095.

A judgment fraudulently taken may be set aside on motion. 1 Black, Judgm. 320; Yorke v. Yorke, supra; Haverty v. Haverty, 35 Kan. 438, 11 Pac. 364; True v. True, 6 Minn. 458, Gil. 315; Young v. Young, 17 Minn. 181, Gil. 153; Colby v. Colby, 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460; Daniels v. Benedict, 50 Fed. 351.

The trial court found that the divorce was fraudulent, or at least one obtained through the mistake and legal inexperience of the girl,—grounds which are contemplated by our law. Rev. Codes 1905, §§ 4056, 4058, 6884; True v. True, 6 Minn. 458, Gil. 315; Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621; Danforth v. Danforth, 105 Ill. 603; Singer v. Singer, 41 Barb. 139.

Burke, J. Plaintiff and defendant were married February 18, 1911, and shortly thereafter went to live upon a farm owned by plaintiff's father, near Cando, North Dakota. It appears from the record that

plaintiff's parents are very well-to-do, and that plaintiff is very much addicted to drinking intoxicating liquors and gambling. The couple resided together upon the said farm until about the 9th day of October, 1911, when plaintiff brought an action for divorce. Service of the summons and complaint is admitted in writing under date of October 9, 1911, and an answer was interposed the same day, signed by J. J. Sampson, an attorney at law. On the 14th day of October, 1911, hearing was had before the Honorable John F. Cowan, Judge of the district court, upon stipulation of the parties. Findings of fact and conclusions of law favoring the plaintiff were signed by the judge the same day and filed with clerk of court May 3, 1912. Thereafter and on January 12, 1912, defendant applied to the same court to have the judgment opened upon the grounds and for the reason that the divorce "was obtained by fraud, coercion, and deceit; also on the ground that the testimony upon which said decree was granted was in part untrue and insufficient in law to authorize the court to grant such judgment and decree; also on the ground that there was no service of the summons and complaint served upon the defendant giving the court jurisdiction of the subject-matter of said action; also upon the ground that no attorney was authorized by defendant to appear or act for her in said action." In support of this motion, defendant offered her own affidavit as well as an affidavit of her sister. Plaintiff filed affidavits of himself, his father, his mother, his attorney, and the attorney who appeared for defendant. On the 30th day of November, 1912, the trial court entered an order to the effect "that the judgment and decree of divorce heretofore entered in this action, . . . be and the same is here vacated, set aside, and held for naught, and the defendant is allowed thirty days from the date of the service of this order upon plaintiff's attorney in which to plead to the complaint." This appeal is from such order. The grounds upon which the trial court granted relief are not stated in the order, so we are under the necessity of reviewing each of the grounds alleged in the motion. We are aware that trial courts are clothed with large discretionary powers in matters of this kind, and their findings should not be disturbed excepting for a clear abuse of discretion. In this case we believe the proof against the application so overwhelming that the trial court abused its discretion in making the order aforesaid.

(1) The first ground for the opening of the case is that the decree

was obtained by fraud, coercion, and deceit. The affidavits upon which the order was based are of such length that it will be impossible to reproduce them here. The affidavit of the defendant is to the effect that she and her husband, during the latter part of September, 1911, had had some unpleasant words regarding his conduct with another woman; that she had told him that if he liked this other girl so well—better than he liked his wife—that she would go away and leave him, but that the husband had begged her not to go. That shortly afterwards she went to Cando, met his father, and told him of the trouble she had had with her husband; that the father had told her the best thing to do was to separate; that he was unable to do anything towards making her husband treat her right. Affiant told him that she did not wish to leave her husband; that the next day her father-in-law came to the house and told her that the best thing to do was to go to Devils Lake and get a divorce right away, and that they finally all went there in an automobile; that her mother-in-law told her that she might just as well let him get a divorce—that he would get it anyway, but that affiant replied that there was nothing against her excepting what her husband knew before their marriage. That her father-in-law told her that if she would let her husband get a divorce he would give her half of the crops, and also help her, and see that she never wanted for anything; that thereafter they went down to a lawyer's office, who took her along into a private office and persuaded her to sign an admission of service upon summons; the nature of which, however, she alleges she did not comprehend; that thereafter the father and mother-in-law took her to a *café* for supper and told her that a divorce had been granted; that notwithstanding the divorce, her husband had continued to write loving letters to her, and that they had on several occasions cohabited as husband and wife. The letters and postal cards referred to by her are made part of the record, and contain many terms of endearment. In a supplemental affidavit, defendant claims that Attorney Sampson admitted to her that he had been employed by her father-in-law. Her sister's affidavit is to the effect that the same attorney had told her practically the same thing. The above-mentioned affidavit also contains much irrelevant matter. In passing, it will be noticed that defendant's own affidavit in many places shows that she was aware of the pendency of the divorce proceedings, and that immediately after the decree was entered she had been

advised of its entry by her father-in-law. Opposed to this showing are the affidavits of plaintiff and the other persons mentioned. Plaintiff states that it was at his request that his father took himself and wife to Devils Lake, but only after the defendant had agreed to separate on account of quarreling and because of the conduct of the defendant towards him. That the defendant had stated in the presence of himself and the other persons mentioned, that she was willing to admit service of the summons and complaint, and that the complaint was true with two exceptions,—one an allegation that she had threatened to poison plaintiff, and another that she had attempted to use a butcher knife on him, and that by the agreement of all parties concerned those two statements were stricken from the complaint; that during all the time defendant had known of the pendency of the divorce proceedings and that they had agreed upon a division of their property. The affidavits of the father and mother of plaintiff are to the effect that plaintiff and defendant together had informed them that they had separated, and were not going to live together longer, and requested to be taken to Devils Lake to get a divorce; and that defendant had stated to them that her husband was entitled to a divorce and that she would let him have it. They further denied having any knowledge of the details of the divorce proceedings until they reached Devils Lake, and they specifically deny that they employed Attorney Sampson or that they ever had met him or ever had known where his office was. They further state that immediately after the decree was entered, defendant told them that she was glad it was over, and glad that her husband had the divorce, but that if he ever married the other woman referred to, she would kill her. The affidavit of plaintiff's attorney fully corroborates plaintiff and his father and mother, setting out in detail the conversation had with the defendant in which she objected to that part of the complaint wherein it was alleged that she had attempted to poison her husband, and that she had assaulted him with a butcher knife; and that when those two allegations were stricken out, defendant admitted service of the same by signing her name to an admission thereof. Most convincing of all, however, is the affidavit of attorney J. J. Sampson, who made the same while aware of approaching death. He states that he was an attorney and counsellor at law, engaged in the practice at Devils Lake; that he read all of said complaint to the defendant prior to the hearing

in said action and consulted with her regarding the same. That she had objected to the two certain allegations before mentioned, and that at her request same were stricken out, whereupon she admitted service of the summons and complaint. That at that time the defendant had told him that she and her husband had agreed upon a division of property; that at her request he had appeared at the hearing for the purpose of seeing that no testimony was admitted excepting in support of the allegations in the complaint. That it was impossible for the defendant not to know the nature of the action. He denied making the statement that he had been employed by the parents of the plaintiff. He further denies being in a room with the defendant or making the statement alleged by her.

From the extracts given and from the rest of the testimony which we have carefully read and weighed, we have reached the conclusion that the decree was not obtained by fraud, coercion, and deceit. We have before us the identical affidavits that were acted upon by the trial court, and feel that he was wrong, and it is our duty to so hold.

(2) The second reason given in the notice to vacate is that the testimony upon which the decree was granted was in part untrue and insufficient to authorize the court to grant such judgment and decree. The testimony is set out in the record, but is too long to be reproduced. The husband testified that his wife had found fault and criticized him, that she had fits of violent temper on an average of once a week, during which she struck and threw things at him; that she had struck him probably eight or ten times; that he had given her no provocation, and had endeavored in every way to live with her peacefully and harmoniously, and this testimony was corroborated by a witness who says that he heard her call him names too foul to mention. When it is remembered that it was a stipulated hearing wherein defendant was represented by an attorney, and that some of the allegations had been softened down, at her request, we consider the testimony sufficient.

(3) The third grounds for opening the decree is that there was no service of a summons and complaint upon the defendant to give the court jurisdiction. In paragraph one we have set out the affidavits upon this phase of the subject, and we are of the opinion that the service upon her has been conclusively established.

(4) The fourth ground is that no attorney was authorized to appear

or act for her in said action. The affidavits in paragraph one conclusively establish that she employed J. J. Sampson and that he was authorized by her to appear in said action. It is our conclusion that the decree should not have been disturbed. It appears to us that the defendant made her own property settlements with her husband, but upon further consideration, and probably upon outside advice, believes she is entitled to more.

While the public is interested in all divorce suits, it is not so particularly interested in the division of property. The defendant insists that her husband did not want the divorce, and did not even know about it; but this is not borne out by his letters, and is contradicted by the admitted fact that he has not remarried her.

The trial court will reinstate the decree.

STATE OF NORTH DAKOTA v. GEORGE L. BICKFORD.

(147 N. W. 407.)

Evidence of embezzlement — sufficient to justify conviction.

1. Evidence examined and *held* sufficient to justify a conviction of the crime of embezzlement under §§ 9204, 9205, Rev. Codes 1905.

Information — counts — one general offense.

2. Information examined, and *held* to charge one, and not several offenses.

Embezzlement — general crime — committed in different ways — charged in different counts.

3. Sec. 9205, Rev. Codes 1905, describes but one general crime of embezzlement, which may be committed in different ways, and the same may be charged in different counts alleging the various ways by which the same was accomplished.

Unlawful acts — committed in different ways — separate counts.

4. Where the statute declares an act unlawful when perpetrated in any one or all of several modes, the information may charge the act in separate counts, basing each count upon the different modes specified.

Note.—The authorities on the question as to when a bank deposit is special are reviewed in a note in 39 L.R.A.(N.S.) 847. And on the question as to the care required of a bank in keeping special deposit, see notes in 32 L.R.A. 769; 25 L. ed. U. S. 750; and 9 Am. Dec. 183.

Felony — evidence of one transaction — rule — different counts — joinder of — evidence — general verdict.

5. Although it may be the general rule in the case of a felony that the court will permit the prosecution to give evidence of only one felonious transaction, it is also the rule that when it appears on the opening of the case and during the trial that there is no more than one criminal transaction involved, and the joinder of the different counts is meant only to meet the various aspects in which the evidence may present itself, the court will not restrict the prosecuting officer to particular counts, and will suffer a general verdict to be taken on the whole.

Verdict — form of — effect of — general crime of embezzlement committed by different methods.

6. A verdict of "guilty of embezzlement as charged in the information" is sufficient in a prosecution for having committed the crime of embezzlement condemned by § 9205, Rev. Codes, 1905, in the different manners described in said section. Such a verdict is a general verdict, and has the same effect as the verdict of "guilty" provided for in § 10044, Rev. Codes, 1905.

Evidence of peculations — parts of one crime — aggregate shortage proved —information — charging clause.

7. Where the evidence shows a cumulation of peculations, the aggregate misappropriation may be treated as one crime, and all the peculations as parts of the one offense, and the aggregate shortage proven may be more or less than the sum stated in the information.

Exact amount embezzled need not be alleged — need not be proved.

8. It is not necessary that the exact sum embezzled should be alleged, nor is it necessary to prove the exact sum as charged.

Embezzlement by public officer — turning moneys over to successor — securities — fraudulent conversion — shortage — made good on final settlement — fact of embezzlement not negatived.

9. The crime of embezzlement by a public officer does not merely consist in failing to turn over all moneys to the state at the time of the relinquishment of his office, but in having fraudulently converted money or securities while in that office. The mere fact, therefore, that a friend may come to one's rescue, and furnish money sufficient to make good a shortage on a final accounting, does not in any way negative the fact that, prior to such final accounting, money has been fraudulently converted,—that is to say, embezzled.

Special deposit — bailment — specified property — identification and return.

10. A special deposit is a bailment of certain specified property, which can be and is to be identified and returned.

Special deposit — banks — money in, for safe keeping — bailee — identical money — mingling with other funds of bank — return of.

11. A special deposit as used in ¶ 14 of § 111, Rev. Codes 1905, implies the

placing of money in a bank for safekeeping, so that the banker is a bailee, and must keep the identical money without mingling it with the other funds of the bank, to be returned in kind to the state treasurer or such person or persons as he may direct.

Deposit — special deposit — banks — permission to loan — prohibited — safekeeping and return of same property.

12. A deposit in a bank is not a special deposit, where the banker is allowed to loan out or to use the money deposited. A special deposit involves safekeeping merely, and the return of the identical money or articles deposited.

Embezzlement — failure to account for funds — physical confiscation.

13. The crime of embezzlement may be committed by a fraudulent failure to account for funds, as well as by physical confiscation.

Proof — order of, on trial — trial court — control of — discretion.

14. The order of proof upon the trial of a cause is largely within the control of the trial judge, and his discretion must largely control.

Testimony — general objection — not best evidence — irrelevant, incompetent, and immaterial — proper rebuttal evidence.

15. The objection that the testimony "is not the best evidence, incompetent as such, irrelevant, and immaterial," does not raise or suggest the objection that such testimony is not proper on rebuttal.

(Additional Syllabus on Rehearing, Filed May 22, 1914.)

Criminal statute — constitutional objection — raised for first time on petition for rehearing — may be considered.

16. A constitutional objection to a criminal statute may be raised on a petition for a rehearing, even though it has not been raised either upon the trial or upon the original appeal.

Conviction — imprisonment — judgment for fine — estate — fine — not merely compensatory to state or municipality.

17. That part of § 9205, Rev. Codes 1905, which provides that in case of conviction the defendant shall, in addition to serving a term of imprisonment, "pay a fine equal to double the amount of money or other property so embezzled as aforesaid; which fine shall operate as a judgment at law on all the estate of the party so convicted and sentenced, and shall be enforced by execution or other process for the use of the state, county, precinct, district, town, city, or school district whose moneys or securities have been so embezzled," imposes a fine, and did not merely include in said statute a provision for the compensation of the state or municipality injured.

Fine — judgment for — operate against entire estate — unconstitutional — funds — common schools.

18. That part of § 9205, Rev. Codes 1905, which provides that the defendant

upon conviction shall "pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all the estate of the party so convicted and sentenced, and shall be enforced by execution or other process for the use of the state, county, precinct, district, town, city, or school district whose moneys or securities have been so embezzled," is unconstitutional in that it violates § 154 of the Constitution of North Dakota, which provides that "the interest and income of this [land grant] fund, together with the net proceeds of all fines for violation of state laws, and all other sums which may be added thereto by law, shall be faithfully used and applied each year for the benefit of the common schools of the state."

Part of statute unconstitutional — remainder not necessarily void — act — inducement — incident — separate parts — independent — effective standing alone — test.

19. When a part of a statute is unconstitutional, that fact does not compel the courts to declare the remainder void, unless the unconstitutional part is of such import that the other parts of the statute, if sustained without it, would cause results not contemplated or desired by the legislature. The question to be determined is whether the obnoxious part is an inducement of the whole act, or whether it is merely an incident thereto. The test to be applied in determining whether the unconstitutional provision in a statute invalidates the whole enactment is the answer to the following questions: (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

Elimination of part of act — unconstitutional — legislature— presumption in favor of remainder.

20. Sec. 9205, Rev. Codes 1905, may be enforced and sustained even after eliminating therefrom the provision which relates to the fine. Even after the excision of such part of the statute, it can be presumed that the legislature would have passed the act, even though it had realized that the unconstitutional part would be eliminated therefrom.

Opinion filed December 2, 1913. Opinion on Rehearing filed May 22, 1914.

Appeal from the District Court of McLean County, *Crawford*, J.

Defendant was convicted of the crime of embezzlement as a public officer, under § 9205, R. C. 1905, and appeals.

Affirmed.

Statement of facts by BRUCE, J.

Defendant was convicted of the crime of embezzlement of state funds and securities, under §§ 9204 and 9205, Rev. Codes 1905, and an appeal has been taken to this court. There is but little conflict between counsel as to the particular acts done or omitted. The controversy is almost entirely over the motives which caused the same to be done or omitted, and the conclusions of fact and of law to be drawn therefrom. According to the state's theory of the case, which at any rate found some support in the evidence: On January 4th, 1909, the defendant took charge of the state treasurer's office. At this time the Bowbells bank was not a state depository, although the defendant's predecessors had evidently deposited $5,000 therein. On January 9th, 1909, the defendant deposited $20,230 of state funds in this bank on open account, and carried it on such open account until February, 1909. The Bowbells bank had a capital of $10,000, with no surplus, the defendant owning forty-eight shares, his wife ten, and his brother forty-two. The bank was not named as a regular state depository until January, 1910, and then only for the sum of $5,000, and during the times mentioned there was in this bank, in addition to the sum hereinafter mentioned, the $5,000 on open account which was made by the defendant's predecessors. In February, 1909, the open-account deposit was transformed into a certificate of deposit for $20,230. In regard to this transaction, the defendant testified: "When we transferred the open account by means of this check for $20,230 into the form of a certificate of deposit, I still had the same amount of money on deposit in the First State Bank of Bowbells as I had before, so far as the state was concerned. The certificate of deposit register showed that I had $5,000 subject to check and the certificate of deposit. It would not appear upon any books or any report I would have to make, as a deposit in the First State Bank of Bowbells, a mere superficial investigation, unless a person went into the cash drawer and examined the items themselves, they would not know I had $25,000 in the bank belonging to the state." In February, 1909, the county treasurer of Barnes county sent in his report of collections of school funds, and with it sent his official checks on various Valley City banks aggregating $25,215.26. Between the first of February and the middle of March, 1909,

the defendant sent these checks to the Bowbells bank. They were collected by the bank, and the bank retained the money. The defendant did not take a certificate of deposit, nor did he carry the amount on an open account. He merely took the bank's receipt for the money. On cross-examination he said: "Prior to the 19th day of March I had on deposit of state money in the First State Bank of Bowbells $5,000 in round numbers on open account, $20,230 in this one certificate of deposit, and $25,215.26 represented by the amount sent for the proceeds of the state auditor's draft, a total sum of something over $50,000. The First State Bank of Bowbells was the only bank of which I had personal knowledge, and I still say I felt more secure. . . . This item of $25,215.26 actually went to the bank at Bowbells. I said I had an acknowledgment of its receipt, in the cash drawer in my desk, that was not open to public examination. It was not material to any of the clerks in the office other than myself to know that such a slip was in the office. I knew where it was, and I could account for it." Mrs. Kirtz, the bookkeeper of the First State Bank of Bowbells, testified that she could find no account indicating any special deposit of this kind, and on the same subject the defendant testifies: "I made an effort to have no books down here (at the trial). I was not required to bring them. I knew that the deposit of this $25,215.26 was going to be in question in this trial; and it was on deposit in the First State Bank of Bowbells. I cannot state positively that that ledger would show this identical article; the item would have to show up in the aggregate on the general ledger, not itemized. It depends on how the books were kept whether if it was a special deposit the item would have to show when it came into that special deposit. I know of their bookkeeping system, and if I made a deposit, general or special, of $25,215.26, it would have to be credited to somebody. I do not suppose this was credited to me, it would be credited to an account. I never looked it up. This item of $25,215.26 actually went to the bank at Bowbells." It appears from the statutes and the testimony introduced on the trial, that the system of accounting in vogue in the state auditor's and state treasurer's offices at the times in question was as follows: The respective officers reported collections due to the state to the state auditor from time to time. On receipt of such reports the state auditor made

the distribution of the sums to the various state funds, and entered them on his record, and thereupon drew a draft or warrant upon the county treasurer payable to the state treasurer. This warrant was then delivered to the state treasurer and charged to him on the state auditor's books. The state treasurer then deposited the draft or warrant with a bank for collection and credit to the state. The county treasurer of Barnes county did not conform to this practice. Instead of waiting for the state auditor's draft or warrant and honoring the same, he sent his checks to the state treasurer with his report, without waiting for the draft or warrant to be presented. The result was that for some time the amount due from Barnes county was in the treasurer's hands before the county treasurer became charged with the state auditor's warrant therefor. With respect to Barnes county, therefore, it was the state treasurer's duty to enter the warrant in the usual way on the collection register, and to record the fact of its payment, and thereupon cancel it and send it to the county treasurer. The checks aggregating $25,215.26, hereinbefore mentioned, were sent in by the Barnes county treasurer with his report, and were received by the state auditor in the early part of February, 1909. They were turned over to the state treasurer by the auditor on March 15th, 1909. The checks were paid by the bank on which they were drawn on the 19th day of March, 1909. The state auditor's warrant therefor, however, was not made out until May, 1909. The state treasurer, instead of canceling the state auditor's warrant, and sending it to the county treasurer, and entering such warrant on the collection register in the usual way, and of recording the fact of its payment on his books, put the warrant in the cash drawer. An examination of the state treasurer's office was made by the deputy bank examiner some time between the 10th and the 15th of August, 1909. A few days before, and on August 7th, 1909, this paid warrant for $25,215.26 was entered on the remittance register, with three other similar paid warrants and other items aggregating $77,962.73, and remitted by the treasurer to the First National Bank of Fargo, and at the same time the account of that bank was charged with a deposit of that amount. On August 12, 1909, the auditor's warrant for $25,215.26 was charged back to the state by the First National Bank of Fargo, as the bank did not care to carry it, and communi-

cated by telephone with the defendant in regard to the matter. The bank, however, before returning it, was requested to hold it three days. The amount was credited back to the bank in the state treasurer's books under date of August 16, 1909, but did not appear as a cash item again until August 18, 1909. It was then kept as a cash item for about a week, and then again entered upon the remittance register, with other items, as a remittance to the First National Bank of Fargo, and charged to the account of that bank. It was not, in fact, however, remitted, and this fictitious debit was offset by crediting to that bank an equivalent sum on September 30, 1909. In this connection it should be stated that under chapter 217 of the Laws of 1909, the state treasurer was required to file with the governor and publish quarterly a statement showing the deposit of state funds, and September 30th, 1909, was the last day of the quarter. This same paid warrant again appeared as a cash item from September 30th, 1909, until January, 1910, when it was again put on the remittance register as a remittance to the First National Bank of Fargo, and charged as a deposit to the account of that bank. It was not in fact, however, remitted to the bank. It is to be noticed in this connection that there was to be, and was, another examination by the state auditing board, or the state bank examiner, of the treasurer's office on or about January 8th, 1910. The result of this entry was to make it appear on the treasurer's books that there was $25,215 26 more on deposit in the First National Bank of Fargo than there actually was. Another quarterly report was due at the end of March, 1910, and on March 21st, 1910, a check was drawn by the state treasurer on the First National Bank of Fargo, and made payable to the Citizens State Bank of Flaxton for $1,900, and charged to that bank. The check, however, was not sent on or used, but was placed among the canceled vouchers in the state treasurer's office. On March 28th, 1910, another state treasurer's check for $23,315.26 was drawn on and credited to the account of the First National Bank of Fargo, and made payable to the Union National Bank at Grand Forks, and charged to it. This check was not, however, used or sent out of the state treasurer's office, but was also retained and placed with the canceled vouchers, although the result of the issuance of both checks made it appear that the pretended deposit of $25,215.26 in the First National Bank of

Fargo had been transferred to the Citizens State Bank of Flaxton and the Union National Bank of Grand Forks. In this manner the account of the First National Bank at Fargo was reduced on the state treasurer's books to conform to the actual balance, but it made the state treasurer's books show $1,900 more in the Flaxton bank and $23,315.26 more in the Grand Forks bank than the balances actually were. To remedy this discrepancy, the defendant in a letter to Mr. Burgett, president of the Flaxton bank, sent for redemption to such bank a certificate of deposit for $5,000, of which $1,900 was to be credited by the bank to the state, and a draft issued to the defendant for $3,100, the balance of the $5,000, and a separate draft to the defendant for $54.65 for the accrued interest. This separate draft for $54.65 was never credited to the state, nor was the deposit of $1,900 charged to the Flaxton bank on the state's books. In order to remedy the discrepancy in the account of the Union National Bank, a deposit for $23,315.26 was made on March 28th, 1910. This deposit was composed of the certificate of deposit of the Bowbells bank for $20,000 dated October 11th, 1909, a draft of $3,100 from the Flaxton bank, and $215.26 in some form from the Bowbells bank, making $23,315.26 in all. For these items defendant obtained a draft from the Bowbells bank for the amount of $23,315.26, which he sent to the Grand Forks bank. The effect of this was that it repaid $20,215.26 of the previous misappropriations, the $1,900 and $3,100 of state funds derived from the Flaxton certificate being, however, merely transferred from one bank to another, and the $54.65 interest item being unaccounted for.

In addition to all of this there was also received from Barnes county in March and April, 1909, $15,220.55 for February school fund collections, $16,569.87 for ordinary February collections, and $11,646.14 for ordinary March collections. These amounts were, as before, sent by means of checks on Valley City banks. The checks were sent to the Bowbells bank, and certificates of deposit were taken for the two last items, and a draft on a Minneapolis bank for the first item of $15,220.15. The certificates of deposit and draft were, as in the case of the former transactions, kept in the defendant's private desk, and when the state auditor's drafts were delivered to him for the respective amounts he kept them uncanceled, and put them in the state treasurer's

drawer as cash items, the same as the $25,315.26 transaction hereinbefore referred to. Just before the August, 1909, examination by the state bank examiner, these three state auditor's drafts were entered on the remittance register as part of a $77,962.73 remittance to the First National Bank of Fargo, in which remittance, as heretofore shown, the $25,315.26 drafts were also attempted to be concealed. This remittance was charged to the account of the Fargo bank. The drafts, as a matter of fact, were never sent to the Fargo bank. Evidently, however, other drafts or funds were sent, among them a certificate of deposit for $4,000 on the bank at Flaxton, which was afterwards recalled. It thus appears that during the first three months of the defendant's term of office about $90,000 was turned into the Bowbells bank, a part being in the form of a draft of the bank on a Minneapolis correspondent for the sum of $15,220.55, which was held by the defendant in his private desk until August, 1909, when it was apparently sent to the First National Bank at Fargo as part of a $77,962.73 remittance, with other substituted items, including the $4,000 certificate of deposit of the Flaxton bank afterwards recalled, but which did not include any of the state auditor's drafts hereinbefore referred to. Up to this date, therefore, the misappropriations represented by the two Bowbells bank certificates of deposit for $16,569.87 and $11,646.14 were ostensibly made good, less the sum of $4,000 represented by the Flaxton certificate of deposit, which was recalled; this leaving unpaid the auditor's draft for $25,215.26, an open account in the Bowbells bank of $20,230, and a balance of $4,000 on two certificates of deposit for $16,569.87 and $11,646.14,—in all $49,445.26. So that, in addition to the draft of $15,220.55, which was then paid after being held several months, approximately $25,000 of the misappropriated items were apparently repaid by means of substituted items in the remittance to Fargo on August 7, 1909.

Previous to this, however, a deposit of $25,000 from the Wasecа Hail Insurance Company, safety fund, was taken by the defendant and placed in the Bowbells bank, without any entry thereof being made upon his books. So that the amount of misappropriation remaining in the Bowbells bank on and after August 7, 1909, was substantially the same as before, and over $60,000. On August 17, 1909, money of the

state was again taken to replace this insurance money. The facts in regard to the insurance deposit are as follows: In May, 1909, the insurance company deposited $25,000 in bank certificates of deposit as a safety fund. This was a mere temporary deposit pending an arrangement for a deposit of bonds. The defendant turned these certificates over to the Bowbells bank shortly after receiving them, and the bank cashed them and kept the money. In the latter part of July or the first of August, 1909, the insurance company desired to substitute government bonds for the cash, and to that end drew a draft on the state treasurer, with the bonds attached, and to be delivered on payment of the draft. The defendant delayed the matter until August 17th, when he honored the draft by drawing checks on numerous state depositories to the amount of $25,000. He then covered up the misappropriation to the Bowbells bank by putting these government bonds in the cash drawer, and counting them as cash items, and keeping up the device until he substituted Bowbells certificates of deposit just before going out of office. There can be no question that the insurance deposit had been misappropriated, that state funds were drawn upon to make good this shortage, that the government bonds were put in the cash drawer to cover up this shortage, and that finally Bowbells certificates were put in to replace the government bonds. As hereinbefore shown, the state auditor's draft for $25,215.26 was retired by means of false entries indicating a transfer of $23,315.26 from the First National Bank of Fargo to the Union National Bank of Grand Forks, and $1,900 from the Fargo bank to the Flaxton bank. In this transaction, also, a certificate of deposit of $5,000 from the Flaxton bank, which represented state money, was used to make good a part of the $25,215.26, and $20,000 was obtained by the Bowbells bank giving a draft in payment of the $20,230 before referred to, and which was originally deposited on open account, and subsequently changed into a certificate of deposit. The remaining $215.26 was taken from the remaining so-called special deposit in the Bowbells bank. This transaction took place at the end of March, 1910. On April 6, 1910, the defendant received another remittance of $15,438.11 from the Barnes county treasurer by means of checks on the Valley City banks as before. These, as before, were sent to the Bowbells bank, and certificates of deposit

taken therefor. When the state auditor's draft for the amount was received, he, as before, carried that draft as a cash item in the same way he had previously carried the other paid drafts. It was also taken out, and ostensibly remitted to Fargo, and then put back again in the drawer as before. This continued until the end of his term, when Bowbells certificates were deposited for the whole shortage, except the $54.65 before referred to. The final result, as shown by the evidence, was that during the defendant's term of office there was a total embezzlement of at least $60,492.76, $60,438.11 on the final showing being represented by Bowbells certificates of deposit, and $54.65 being unaccounted for. The defendant's successor in office, Gunder Olson, qualified and took charge of the office on January 3, 1911. At this time there were in the cash drawer the certificates of deposit from the Bowbells bank for $60,438.11, none of which had ever been disclosed to the state bank examiners or in the treasurer's reports to the governor. The defendant sought to induce Mr. Olson to accept these certificates as the equivalent of cash, and to hold them about thirty days, stating that the Bowbells bank was then unable to pay them, and that he would within thirty days be able to take them up as the result of a deal then on hand. This the incoming treasurer declined to do, and the defendant was arrested. Shortly after his arrest his friends and associates made good the shortage to the amount of $60,428.11, and the certificates were turned over to them. It, however, appears that on the final settlement there was, in addition to the certificates of deposit, $150 in cash, which, if the certificates of deposit had been accepted, would have amounted to more than was necessary to account for the money which was required to be transferred to the defendant's successor. The defendant, however, took this money out of the cash drawer, and stated that he would return it if any deficiency was found.

The defendant, on the other hand, takes the position that the deposit in the Bowbells bank was a special deposit for safe keeping merely, and was put there because the defendant had confidence in the institution. He also claims that the irregularity in the accounts were either due to poor bookkeeping or to the exigencies arising from the overloaded depositories and the necessity of collecting the Barnes county checks when received. His version of the affair is that when the ac-

counts were turned over to him the First National Bank of Bismarck was qualified as a depository for $60,000, and had actually on deposit more than double that amount; that the deposits in the other Bismarck banks exceeded the amount for which they were designated, and that the same was true of many others; that at certain times an excess deposit was a practical necessity, for sometimes a single remittance is far in excess of the amount for which a deposit is designated, or can under the law be qualified for; that at about the time the defendant qualified two bank failures had taken place; that the total number of depositories designated by the state was 503, and their total capacity was about $2,100,000; that during the year 1909 the state had on hand in money necessary to be deposited at one time as high as $2,348,881.59, or approximately $250,000 more than the limits of the depositories; that for practical purposes the limit was less than $2,100,000, as all of the accounts were active, and collections had to be made through the banks in various counties; that on May 18th, the date of the receipt of the draft for $25,215.26, the amount of actual money in the hands of the treasurer required to be distributed among these depositories was $2,223,315.82, or more than $123,000 in excess of the legal limits of the depositories; that on July 1st the cash on hand aggregated $2,348,881; that when the defendant assumed office the statute in regard to the legal limit of the depositories was not recognized, nor were the methods of collection prescribed by law strictly followed; that the defendant was young and inexperienced, and had never held an office of a similar kind before, and was surrounded by clerks, some of whom were inexperienced and possibly careless; that at the very threshold of his duties he was confronted with a crisis, and that there were turned over to him three depositories (the Bismarck banks) which were already overloaded, and that there were $20,230 in checks and drafts to be taken care of; that when in February, 1909, the Barnes county checks for $25,215.26 were sent to him there was a letter of transmittal, which was handed by him to the auditor, and the letter was indorsed by the auditor "3-15-09. Draft turned over to the state treasurer, cancel draft when sent to state treasurer;" that the draft, however, was sent out by the state auditor's office uncanceled or bearing no notation to show the true condition, and that the same is true of the other drafts

for similar remittances; that on March 15th, 1909, the state auditor told the defendant "to get rid of those checks because they were for $25,000, and I didn't want them laying around the vault. I do not remember who he gave them to. There had been a bank failure just a few months before in which the state had lost some funds; I was not anxious to hold those checks because I had to wait from the land department to give me the distribution of the funds." The deputy state auditor also testified "that (the draft) carries the first information to the state treasurer's office of the amount of taxes due from such and such a county. Up to the time of the receipt of the draft, the state treasurer has no information as to the distribution upon his books of the moneys to the different funds. . . . Until he receives this, he has no method by which he can go through his register and enter the amounts to correspond with our register; he cannot get the entries into his books until this draft is received." The defendant, in short, claimed that the money was irregularly in his hands; that the checks had to be collected; that if they had been placed in a regular depository account they would have created a discrepancy between his books and the books of the state auditor; and he knew the Bowbells bank, and felt confident and secure with it. He further claimed that he was confronted with another crisis when, sixty-one days later, the draft came; and that on that day the cash on hand aggregated $100,000 in excess of the legal capacity of the depositories, and from $200,000 to $500,000 in excess of their practical limit. It was for him to determine, he says, whether the money should be withdrawn from what he calls a special deposit for safe keeping in the Bowbells bank, and placed in the already gorged depositories, or should it be permitted to remain where it was. It is claimed that he is not on trial charged as a poor bookkeeper, or as keeping unskilled or incompetent assistants. It is claimed that the errors committed when the draft was taken from the drawer once or twice and sent out in the regular channels were the errors of his assistants, and that such errors were not uncommon or unnatural, and had before been made. He says that in September or October, and as soon as the depositories could receive the money, the special deposit was withdrawn, save $215.26, which was overlooked, but was afterwards withdrawn. As far as the subsequent checks for $15,225.55 from Barnes county are

concerned, he claims that the same were turned over to him by the auditor, and cashed on March 26, 1909; that the checks were sent to the Bowbells bank, which issued its draft therefor on the Northwestern National Bank of Minneapolis on March 24, 1909; that when these checks were received the depositories were glutted, and he held the Bowbells draft in a drawer in his desk until it could be deposited, and on August 10th, 1909, less than three months after the date of the state auditor's draft, the Bowbells bank draft was cashed. In relation to the Barnes county checks for $16,569.87, he claims that they were given to him by the auditor; that they were forwarded by him to the Bowbells bank for collection, and that the Bowbells bank gave him a draft on the Northwestern National Bank of Minneapolis on April 3d, 1909, for the same; that at this time the depositories were gorged, and that the draft was held by him until August 10th, and then cashed. In regard to the Barnes county checks for $11,646.11, he claims that on account of the fact that the school fund collections were also included, a complete distribution could not be made until the drafts were issued by the auditor; that the checks were sent by him to the Bowbells bank as before, and a draft on Minneapolis obtained; that the draft was held until August 7, 1909, for the same reasons as before. As far as the remittance of $15,438.11 is concerned, he says that the same transaction occurred, but, instead of a draft being taken, a certificate of deposit on the Bowbells bank was taken and was held by him until the end of his term. In regard to the Waseca Insurance Company deposit, it is claimed that the money did not belong to the state at all; that it was deposited by the defendant in the Bowbells bank, and remained there as a special deposit until transformed into a certificate of deposit in December, 1910; that in the summer of 1910, the insurance company desired to substitute bonds for this money, and this was accomplished by drawing checks on the various depositories to pay a draft made by the company; that the special deposit was then transferred to the state, and the bonds placed in the cash drawer to represent the same; that these bonds were the symbol by which was represented the special deposit. It is claimed that the transaction would not have been open to criticism if the defendant had withdrawn the money from the depositories in August, 1910, and sent the same to the Bowbells bank as a special deposit; but that

this was a laborious and expensive method. Defendant's explanation of the Flaxton bank matter was as follows: The First National Bank of Fargo, through error, had been debited $25,215.00, and it was necessary to correct this error; that the Union National Bank of Grand Forks was entitled to a deposit, and its amount was fixed by the treasurer at $23,215.26; that the Flaxton bank held a certificate of deposit for $5,000; that there was $215.26 remaining in the special deposit in the Bowbells bank; that there was $20,000 worth of certificates of deposit in the Bowbells bank; that the question was to get this adjusted with the least bookkeeping; and that his assistant, Mr. Austin, thereupon credited the Fargo bank with $25,215.26 by drawing checks therefor; that the $5,000 Flaxton certificate of deposit was cashed, leaving $1,900 in open account, and taking a draft for $3,100; that the Flaxton $3,100 draft, with the $215.26 special deposit, and the $20,000 certificate of deposit in the Bowbells bank, were then remitted to the Union National Bank.

Niles & Koffel, and *Geo. R. Robins,* and *Geo. A. Bangs,* for appellant.

The information was too broad, vague, and indefinite. The crime of embezzlement may be committed in four different ways. State v. Howe, 27 Or. 138, 44 Pac. 672.

Where the offense may be alternately charged in separate counts, it must clearly appear from such counts that the same offense or transaction is so thus charged. The information or indictment must charge but one offense. Rev. Codes 1905, § 9851; State v. Smith, 2 N. D. 515, 52 N. W. 320; State v. Marcks, 3 N. D. 532, 58 N. W. 25; State v. Belyea, 9 N. D. 353, 83 N. W. 1; State v. Valentine, 7 S. D. 98, 63 N. W. 541; State v. Boughner, 7 S. D. 103, 63 N. W. 542; State v. Hall, 14 S. D. 161, 84 N. W. 766; State v. Mattison, 13 N. D. 391, 100 N. W. 1091.

The rule is that where the information attempts to charge the same offense as having been committed by different means, and separate counts are made use of in so doing, the information must clearly show but one offense charged. People v. Thompson, 28 Cal. 217; People v. Shotwell, 27 Cal. 394, 400; People v. Garcia, 58 Cal. 103; People v.

Quvise, 56 Cal. 396; Territory v. Poulier, 8 Mont. 146, 19 Pac. 594; Sturgis v. State, 2 Okla. Crim. Rep. 373, 102 Pac. 57; DeGraff v. State, 2 Okla. Crim. Rep. 519, 103 Pac. 538; Chanpett v. State, 4 Okla. Crim. Rep. 23, 109 Pac. 124; Scott v. State, 4 Okla. Crim. Rep. 70, 109 Pac. 240; Cochran v. State, 4 Okla. Crim. Rep. 379, 111 Pac. 974; Grant v. State, 6 Okla. Crim. Rep. 372, 117 Pac. 1100; Kimbrell v. State, 7 Okla. Crim. Rep. 354, 123 Pac. 1027; State v. Chapman, 6 Nev. 320; State v. Malim, 14 Nev. 288.

The verdict must respond to and be within the issues as framed by the information and the plea of defendant. Rev. Codes 1905, §§ 9914, 10044 and 10059; 12 Cyc. 690; 7 Enc. Pl. & Pr. 459; 22 Enc. Pl. & Pr. 873; 2 Bishop, New Crim. Proc. 2d ed. 1005; Clark, Crim. Proc. 485.

Conviction for some offense duly charged, but less than that alleged, cannot be treated as void; it is a conviction in part. Riflemaker v. State, 25 Ohio St. 395; State v. White, 41 Iowa, 316, 20 Am. Rep. 602; State v. Behee, 17 Kan. 402; State v. Whitaker, 89 N. C. 472; Gibbs v. State, 34 Tex. 135; People v. Coch, 53 Cal. 627; People v. Ah Gow, 53 Cal. 627; Huffman v. State, 89 Ala. 33, 8 So. 28; People v. Curtis, 76 Cal. 57, 17 Pac. 941; State v. Bellard, 50 La. Ann. 594, 69 Am. St. Rep. 461, 23 So. 504; State v. French, 50 La. Ann. 461, 23 So. 606; Chambers v. State, 44 Tex. Crim. Rep. 61, 68 S. W. 286; State v. Copenhaver, 35 Mont. 342, 89 Pac. 61; People v. Smith, 136 Cal. 207, 68 Pac. 702, 13 Am. Crim. Rep. 719; People v. Arnett, 126 Cal. 680, 59 Pac. 204; Kimball v. Territory, 13 Ariz. 310, 115 Pac. 70; People v. Tilley, 135 Cal. 61, 67 Pac. 42; State v. DeWitt, 186 Mo. 61, 84 S. W. 956; People v. Cummings, 117 Cal. 499, 49 Pac. 576; People v. Small, 1 Cal. App. 320, 82 Pac. 87; State v. Pollock, 105 Mo. App. 278, 79 S. W. 980; Koch v. State, 126 Wis. 470, 3 L.R.A.(N.S.) 1086, 106 N. W. 531, 5 Ann. Cas. 389.

Under the law mentioned, one cannot be convicted unless he is an officer or person charged by law with the collection of public moneys. Moore v. State, 53 Neb. 831, 74 N. W. 319; State v. Meyers, 56 Ohio St. 340, 47 N. E. 138; State v. Spaulding, 102 Iowa, 639, 72 N. W. 288; United States v. Smith, 124 U. S. 525, 31 L. ed. 534, 8 Sup. Ct. Rep. 595; United States v. Germaine, 99 U. S. 508, 25 L. ed. 482;

United States v. Bixby, 10 Biss. 238, 6 Fed. 375; State v. Newton, 26 Ohio St. 265; Hartnett v. State, 56 Tex. Crim. Rep. 281, 23 L.R.A.(N.S.) 761, 133 Am. St. Rep. 971, 119 S. W. 855; Com. v. Alexander, 129 Ky. 429, 112 S. W. 586; State v. Bolin, 110 Mo. 209, 19 S. W. 650; Dickey v. State, — Tex. Crim. Rep. —, 144 S. W. 271.

The money in such cases must be public money. United States v. Mason, 218 U. S. 517, 54 L. ed. 1133, 31 Sup. Ct. Rep. 28; State v. Pierson, 83 Ohio St. 241, 93 N. E. 977; State v. Connelly, 104 N. C. 794, 10 S. E. 469; Dickey v. State, — Tex. Crim. Rep. —, 144 S. W. 271.

The ownership of the property embezzled must be alleged in the information and proved on the trial. State v. Collins, 4 N. D. 433, 61 N. W. 467; State v. Nelson, 79 Minn. 373, 82 N. W. 674.

Finding the defendant guilty of embezzlement as charged in the information is material. But the jury failed to find the other essential elements of the offense. The verdict must respond to the issues submitted to the jury. Turley v. People, 188 Ill. 628, 59 N. E. 506; Donovan v. People, 215 Ill. 520, 74 N. E. 772; Mai v. People, 224 Ill. 414, 79 N. E. 633; People v. Lee, 237 Ill. 272, 86 N. E. 573; People v. Davidson, 240 Ill. 191, 88 N. E. 565; People v. Morton, 245 Ill. 530, 92 N. E. 318; State v. Holland, 162 Mo. App. 678, 145 S. W. 522; State v. Grossman, 214 Mo. 233, 113 S. W. 1074; Kimball v. Territory, 13 Ariz. 310, 115 Pac. 70.

The verdict is inadequate and uncertain, as it does not show on which of one or more independent counts the defendant is convicted; and it will not sustain a judgment. State v. Harmon, 106 Mo. 635, 18 S. W. 128; State v. Pierce, 136 Mo. 34, 37 S. W. 815; Scott v. State, 4 Okla. Crim. Rep. 70, 109 Pac. 240.

The court's instruction to the effect that, "it is sufficient to establish that the defendant converted any portion of said sum to his own use as above set forth" is erroneous in that each separate, isolated, distinct transaction, if criminal, constitutes a completed offense. State v. Laechelt, 18 N. D. 88, 118 N. W. 240.

It is incumbent upon the state to elect which offense it will rely upon for conviction. State v. Poull, 14 N. D. 557, 105 N. W. 717.

And this should be required before the defendant shall be compelled to enter upon his defense. People v. Hatch, 13 Cal. App. 521, 109 Pac. 1097; Edelhoff v. State, 5 Wyo. 19, 36 Pac. 627, 9 Am. Crim. Rep. 256; Goodhue v. People, 94 Ill. 37; West v. People, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254; Mayo v. State, 30 Ala. 32; People v. Castro, 133 Cal. 11, 65 Pac. 13; People v. Williams, 133 Cal. 165, 65 Pac. 323; Trask v. People, 35 Colo. 83, 83 Pac. 1010; White v. People, 8 Colo. App. 289, 45 Pac. 539; Stockwell v. State, 27 Ohio St. 563; Bainbridge v. State, 30 Ohio St. 264.

In cases of this character, where the prosecuting officer is at liberty to prove one out of several specific and independent offenses, it is his duty, at or before the commencement of the trial, to elect and settle upon one. People v. Bartnett, 15 Cal. App. 89, 113 Pac. 879; State v. Norris, 122 Iowa, 154, 97 N. W. 999; People v. Seaman, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203; Kittrell v. State, 89 Miss. 666, 42 So. 609; Thweatt v. State, 49 Tex. Crim. Rep. 617, 95 S. W. 517; Gelber v. State, 56 Tex. Crim. Rep. 460, 120 S. W. 863; State v. Workman, 66 Wash. 292, 119 Pac. 751; State v. Osborne, 39 Wash. 548, 81 Pac. 1096; State v. Palmberg, 199 Mo. 233, 116 Am. St. Rep. 476, 97 S. W. 566.

When the prosecution fails to so elect, it will be deemed and presumed that it will rely upon the transaction it first isolates, and upon which proof is offered. State v. Hilberg, 22 Utah, 27, 61 Pac. 215; State v. Hansen, 40 Utah, 418, 122 Pac. 375; People v. Williams, 133 Cal. 165, 65 Pac. 323; People v. Clark, 33 Mich. 112, 1 Am. Crim. Rep. 660; Richardson v. State, 63 Ind. 192, 3 Am. Crim. Rep. 302; Wickard v. State, 109 Ala. 45, 19 So. 491; Scruggs v. State, 111 Ala. 60, 20 So. 642; Baker v. People, 105 Ill. 452; State v. Bates, 10 Conn. 372; Mitchell v. People, 24 Colo. 532, 52 Pac. 671; Cochran v. State, 30 Ala. 542; Fields v. Territory, 1 Wyo. 78, 3 Am. Crim. Rep. 318.

Evidence of the commission of other offenses is limited in its purpose, to show intent, motive, or credibility, but never is proof of the specific charge in the information. State v. Laechelt, 18 N. D. 88, 118 N. W. 240; Blashfield, Instructions to Juries, § 354; 11 Enc. Pl. & Pr. 369; 12 Cyc. 631; 7 Enc. Ev. 642; 3 Enc. Ev. 188, 189; 11

Ann. Cas. 818; Harrold v. Territory, 18 Okla. 395, 10 L.R.A.(N.S.) 604, 89 Pac. 202; Bacon v. State Tax Comrs. 60 L.R.A. 350 note; Com. v. Shepard, 1 Allen, 581; Com. v. Sawtelle, 141 Mass. 140, 5 N. E. 312; State v. Lewis, 19 Or. 478, 24 Pac. 914; Chamberlain v. State, 80 Neb. 812, 115 N. W. 555; Stanley v. State, 88 Ala. 154, 7 So. 273; McGuire v. State, 2 Ala. App. 218, 57 So. 57; People v. Gray, 66 Cal. 271, 5 Pac. 240; People v. Glass, 158 Cal. 650, 112 Pac. 295; People v. Cook, 148 Cal. 334, 83 Pac. 49; Edelhoff v. State, 5 Wyo. 19, 36 Pac. 627, 9 Am. Crim. Rep. 256; Herren v. People, 28 Colo. 23, 62 Pac. 833; Warford v. People, 43 Colo. 107, 96 Pac. 556; Jaynes v. People, 44 Colo. 535, 99 Pac. 328, 16 Ann. Cas. 787; State v. Jeffries, 117 N. C. 727, 23 S. E. 163; State v. Beard, 124 N. C. 811, 32 S. E. 804; State v. Greene, 33 Utah, 497, 94 Pac. 987; Kollock v. State, 88 Wis. 663, 60 N. W. 817; Eacock v. State, 169 Ind. 488, 82 N. E. 1039; Porter v. State, 173 Ind. 694, 91 N. E. 340; Storms v. State, 81 Ark. 25, 98 S. W. 678; People v. Hagenow, 236 Ill. 514, 86 N. E. 370; Morse v. Com. 129 Ky. 294, 111 S. W. 714; Francis v. State, 7 Tex. App. 501; McCall v. State, 14 Tex. App. 353; Barton v. State, 28 Tex. App. 484, 13 S. W. 783; Warren v. State, 33 Tex. Crim. Rep. 502, 26 S. W. 1082; Oliver v. State, 33 Tex. Crim. Rep. 541, 28 S. W. 202; Thornley v. State, 36 Tex. Crim. Rep. 125, 61 Am. St. Rep. 837, 34 S. W. 264, 35 S. W. 981; Martin v. State, 36 Tex. Crim. Rep. 125, 35 S. W. 976; Grant v. State, 44 Tex. Crim. Rep. 311, 70 S. W. 954; Peterson v. State, — Tex. Crim. Rep. —, 70 S. W. 978; Scoville v. State, — Tex. Crim. Rep. —, 77 S. W. 792; Wyatt v. State, 55 Tex. Crim. Rep. 73, 114 S. W. 812; Harris v. State, 55 Tex. Crim. Rep. 469, 117 S. W. 839; Field v. State, 55 Tex. Crim. Rep. 524, 117 S. W. 806; Harvey v. State, 57 Tex. Crim. Rep. 5, 136 Am. St. Rep. 971, 121 S. W. 501; Stanley v. State, 62 Tex. Crim. Rep. 306, 137 S. W. 703; Adams v. State, 62 Tex. Crim. Rep. 426, 138 S. W. 117; Carden v. State, 62 Tex. Crim. Rep. 545, 138 S. W. 598; Thomas v. State, 63 Tex. Crim. Rep. 98, 138 S. W. 1018; Saldiver v. State, 55 Tex. Crim. Rep. 177, 115 S. W. 584, 16 Ann. Cas. 669.

And a failure to object or except will not cure error in such respect. 3 Enc. Ev. 189; 11 Am. & Eng. Enc. Pl. & Pr. 370, note, 1; Blash-

field, Instructions to Juries, 354; Porter v. State, 173 Ind. 702; 91 N. E. 349; Warren v. State, 33 Tex. Crim. Rep. 502, 26 S. W. 1082; Thornley v. State, 36 Tex. Crim. Rep. 125, 35 S. W. 981; Martin v. State, 36 Tex. Crim. Rep. 125, 35 S. W. 976; Stanley v. State, 62 Tex. Crim. Rep. 306, 137 S. W. 703; Carden v. State, 62 Tex. Crim. Rep. 545, 138 S. W. 598; Thomas v. State, 63 Tex. Crim. Rep. 98, 138 S. W. 1018.

There was error in the court's denial of defendant's motion to require the state to elect upon which count it would proceed to trial. Rev. Codes 1905, § 9205; State v. Howe, 27 Or. 138, 44 Pac. 672; State v. Reinhart, 26 Or. 466, 38 Pac. 822; Edelhoff v. State, 5 Wyo. 19, 36 Pac. 627, 9 Am. Crim. Rep. 256; State v. Poull, 14 N. D. 557, 105 N. W. 717.

The belief of right on the part of the defendant negatives the possibility of embezzlement; and the court erred in refusing such instruction. Rev. Codes 1905, § 9213; 10 Am. & Eng. Enc. Law, 2d ed. 996, 997; State v. Lanyon, 83 Conn. 449, 76 Atl. 1095; Eatman v. State, 48 Fla. 21, 37 So. 576; State v. Culver, 5 Neb. (Unof.) 238, 97 N. W. 1015; Wadley v. Com. 98 Va. 803, 35 S. E. 452; State v. Wallick, 87 Iowa, 369, 54 N. W. 246; People ex rel. Perkins v. Moss, 187 N. Y. 410, 11 L.R.A.(N.S.) 528, 80 N. E. 383, 10 Ann. Cas. 309; McCourt v. State, 64 N. Y. 583; People v. Hurst, 62 Mich. 276, 28 N. W. 838; People v. Bauman, 105 Mich. 543, 63 N. W. 516.

The defendant had the legal right to deposit state moneys in any bank deemed by him suitable; and, upon request, it was error for the court to refuse to so charge. Iowa Code 1897, § 4840; Okla. §§ 2304 and 5692; Mills's Anno. Stat. (Colo.) § 1249; Hill's Anno. Laws (Or.) § 1772.

A general deposit of money does not constitute a loan, or a conversion thereof. 13 Cyc. 790, note 55; 1 Bolles, Banking, 430; Allibone v. Ames, 9 S. D. 74, 33 L.R.A. 585, 68 N. W. 165; Moulton v. McLean, 5 Colo. App. 454, 39 Pac. 78; Davis v. Dunlevy, 11 Colo. App. 344, 53 Pac. 250, 27 Colo. 244, 60 Pac. 570; Warren v. Nix, 97 Ark. 374, 135 S. W. 896; Law's Estate, 144 Pa. 499, 14 L.R.A. 103, 22 Atl. 831; Hunt v. Hopley, 120 Iowa, 695, 95 N. W. 205; State ex rel. Carroll v. Corning State Sav. Bank, 136 Iowa, 79, 113 N. W. 500;

State v. McFetridge, 84 Wis. 473, 20 L.R.A. 223, 54 N. W. 1, 998; State v. Hill, 47 Neb. 456, 66 N. W. 557; Farmers & M. Bkg. Co. v. Red Cloud, 62 Neb. 442, 87 N. W. 175; Bardsley v. Sternberg, 18 Wash. 612, 52 Pac. 251, 524; Thompson v. Territory, 10 Okla. 409, 62 Pac. 355; Baker v. Williams & E. Bkg. Co. 42 Or. 213, 70 Pac. 711; Comstolk v. Gage, 91 Ill. 338.

The defendant was not responsible for the acts or omissions of the Bowbells bank, or of any of its officers, unless authorized, directed, or commanded by him; and, upon request, the court's refusal to so charge was error. State v. Carmean, 126 Iowa, 291, 106 Am. St. Rep. 352, 102 N. W. 97; Ex parte Rickey, 31 Nev. 82, 135 Am. St. Rep. 651, 100 Pac. 134; Ex parte Smith, 33 Nev. 466, 111 Pac. 930; Eureka County Bank Habeas Corpus Cases, 35 Nev. 80, 126 Pac. 655, 129 Pac. 308.

It was error to instruct the jury that the ownership of the moneys was not included in the material allegations of the information. State v. Collins, 4 N. D. 433, 61 N. W. 467; State v. Young, 9 N. D. 169, 82 N. W. 420.

Andrew Miller, Attorney General, and *H. R. Berndt,* State's Attorney, for respondent (*Engerud, Holt & Frame,* of counsel).

There is a radical difference between the transaction itself and the form or forms of committing or doing it. Rev. Codes, 1905, § 9851; People v. Shotwell, 27 Cal. 394; People v. Thompson, 28 Cal. 214; People v. Quvise, 56 Cal. 396.

The law requires that the identity of the offense charged be clear, and not left to inference. People v. Thompson, 28 Cal. 214; People v. Jailles, 146 Cal. 301, 79 Pac. 965; People v. Shotwell, 27 Cal. 394; People v. Garcia, 58 Cal. 103; People v. Quvise, 56 Cal. 396; Territory v. Poulier, 8 Mont. 146, 19 Pac. 594.

Where different courts in an information refer to the same transaction, the pleading is good, even though the counts set forth the different ways in which the offense was committed. Taylor v. People, 12 Hun, 212; People v. Rose, 52 Hun, 33, 4 N. Y. Supp. 787; People v. Rice, 35 N. Y. S. R. 185, 13 N. Y. Supp. 161; People v. Rose, 39 N. Y. S. R. 291, 15 N. Y. Supp. 815; People v. Callahan, 29 Hun, 580; People v. Crotty, 30 N. Y. S. R. 44, 9 N. Y. Supp.

937; People v. Dimick, 107 N. Y. 13, 14 N. E. 178; People v. Charbineau, 115 N. Y. 433, 22 N. E. 271; Candy v. State, 8 Neb. 482, 1 N. W. 454; State v. Nelson, 29 Me. 329; State v. McNally, 55 Md. 559; Bishop, Crim. Proc. 2d ed. 457; M'Gregg v. State, 4 Blackf. 101; Cooper v. State, 79 Ind. 206; McCollough v. State, 132 Ind. 427, 31 N. E. 1116; Kane v. People, 8 Wend. 203; Mayo v. State, 30 Ala. 32; Cummins v. People, 4 Colo. App. 71, 34 Pac. 734.

There is no question but that the offense charged must be clearly stated, to the end that it may be identified and plain to defendant, and that the verdict must respond to the offense charged. Both these requirements are met in this case. State v. French, 50 La. Ann. 461, 23 So. 606; State v. Jenkins, 60 Wis. 599, 19 N. W. 406.

A verdict in such form as, "guilty of embezzlement as charged in the information" and fixing the amount, is valid. Guenther v. People, 24 N. Y. 100; People v. McCarthy, 110 N. Y. 309, 18 N. E. 128.

Where the verdict is guilty of some offense included in the one charged, it is a sufficient response to the charge. State v. Collyer, 17 Nev. 275, 30 Pac. 891; State v. Otey, 7 Kan. 69; Carrick v. State, 18 Ind. 409; Bryant v. State, 72 Ind. 400; Doolittle v. State, 93 Ind. 272; Birdwell v. State, — Tex. Crim. Rep. —, 20 S. W. 556; Wallace v. State, 2 Lea, 29; State v. Wilson, 40 La. Ann. 751, 1 L.R.A. 795, 5 So. 52; Revel v. State, 26 Ga. 275; People v. Davidson, 5 Cal. 133; People v. Jochinsky, 106 Cal. 638, 39 Pac. 1077.

A general verdict of "guilty" is sufficient; it implies proof of all facts necessary to a conviction. People v. Brady, 6 Cal. Unrep. 719, 65 Pac. 823.

Two or more of the acts constituting an offense may be committed by the same person at the same time and place, and the transaction be and remain one distinct offense. State v. Dale, 8 Or. 229; Bishop, Crim. Proc. § 586; State v. King, 81 Iowa, 587, 47 N. W. 775; Mills v. State, 53 Neb. 263, 73 N. W. 761; State v. Spaulding, 24 Kan. 1; Bartley v. State, 53 Neb. 310, 73 N. W. 744; State v. Mitton, 37 Mont. 366, 127 Am. St. Rep. 732, 96 Pac. 927; Territory v. Poulier, 8 Mont. 146, 19 Pac. 594; State v. Schweiter, 27 Kan. 499; Byrne v. State, 12 Wis. 519; People v. Frank, 28 Cal. 507; State v. Burns, 44 Conn. 149; Fahnestock v. State, 102 Ind. 156, 1 N. E. 372; State

v. Meade, 56 Kan. 690, 44 Pac. 619; State v. Palmer, 4 Mo. 453; Lancaster v. State, 43 Tex. 519; 1 Bishop, Crim. Proc. 2d ed. § 457; 12 Cyc. 693, 694.

The verdict is for an offense included in that charged in the information; a jury has the unquestioned right to convict for a lesser included offense. People v. Jefferson, 52 Cal. 452; People v. Barnhart, 59 Cal. 381; People v. Maroney, 109 Cal. 277, 41 Pac. 1097; People v. Lowen, 109 Cal. 381, 42 Pac. 32; People v. Muhlner, 115 Cal. 303, 47 Pac. 128 and cases cited; Phillips v. Territory, 1 Wyo. 82.

The amount of the embezzlement, under the law, is immaterial. Hoge v. People, 117 Ill. 33, 6 N. E. 796.

Omission to state the amount embezzled in the verdict is no ground for a new trial. Jones v. State, 13 Ala. 153; People v. Bork, 31 Hun, 360, 96 N. Y. 188.

A finding of the amount is for the benefit of the party whose funds have been taken. It is also the basis for a judgment. Case v. State, 26 Ala. 24; People v. Bork, supra.

No description of the embezzled funds is necessary, other than the general terms "money," "bank notes," "certificates of stock," or "valuable securities." Rev. Codes 1905, § 9864; Brown v. State, 18 Ohio St. 496; Ker v. People, 110 Ill. 646, 51 Am. Rep. 706, 4 Am. Crim. Rep. 211; State v. Reinhart, 26 Or. 466, 38 Pac. 826; Jackson v. State, 76 Ga. 573; State v. Pratt, 98 Mo. 482, 11 S. W. 978; Carl v. State, 125 Ala. 89, 28 So. 505; Willis v. State, 134 Ala. 429, 33 So. 226; State v. Wise, 186 Mo. 42, 84 S. W. 954; State v. Wissing, 187 Mo. 96, 85 S. W. 557; State v. Shour, 196 Mo. 202, 95 S. W. 405; Bartley v. State, 55 Neb. 294, 75 N. W. 832.

The exact amount embezzled need not be alleged or proved. The aggregate shortage may be more or less than the sum stated in the information. State v. Lewis, 31 Wash. 75, 71 Pac. 779, 782, 783; Weimer v. People, 186 Ill. 503, 58 N. E. 378, 380; Bolln v. State, 51 Neb. 581, 71 N. W. 444.

The points sought to be made by defendant in his requests for instructions were fully covered by the court in its general instructions to the jury, and were therefore properly refused by the court. State v.

Moeller, 20 N. D. 123, 126 N. W. 568; State v. Barnes, 26 S. D. 268, 128 N. W. 170.

The defendant had no proprietory right in the matter of the order of proof. Such matter is discretionary with the trial court. Bowman v. Eppinger, 1 N. D. 22, 44 N. W. 1000; State v. Ekanger, 8 N. D. 562, 80 N. W. 482; F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109; Pease v. Magill, 17 N. D. 166, 115 N. W. 260; State v. Albertson, 20 N. D. 516, 128 N. W. 1122; State v. Malmberg, 14 N. D. 523, 105 N. W. 614.

BRUCE, J. (after stating the facts as above). The first assignment of error, or point one, of appellant's brief, is directed to the action of the court in overruling the demurrer to the information. It is alleged that more than one offense is charged, and that the information therefor violates § 9851, Rev. Codes 1905. The information begins by informing the court "that heretofore, to wit, on the 3d day of January, 1911, in the county of Burleigh, and state of North Dakota, one George L. Bickford, late of said county and state, *did commit the crime of embezzlement in the manner following, that is to say:* Count one: That at said time and place the defendant, George L. Bickford, was, and ever since on or about the 4th day of January in the year nineteen hundred nine, had continuously been, the duly elected, qualified, and acting state's treasurer of the state of North Dakota, and during such period and in his said term of office as such state treasurer of the state of North Dakota, and by virtue of and in the course of his official duty as such state treasurer, he, said George L. Bickford, collected, received, obtained, and had in his possession and custody and under his control as such state treasurer certain public money, bank notes, checks, drafts, bills of exchange, and valuable securities of the aggregate sum and value of sixty thousand four hundred thirty-eight dollars and eleven cents, and all of which said money, bank notes, checks, drafts, bills of exchange, and valuable securities were then and there the property of the state of North Dakota; and he, the said George L. Bickford, so having in his custody and under his control as such state treasurer, as aforesaid, the public money, bank notes, checks, drafts, bills of exchange, and valuable securities aforesaid, on, to wit, the third day of January,

in the year one thousand nine hundred eleven, in the county of Burleigh in the state of North Dakota, did then and there wilfully, fraudulently, and feloniously *appropriate and convert* the same public money, bank notes, checks, drafts, bills of exchange, and valuable securities *to his own use,* in violation of his said official trust, and thereby did embezzle the same. This contrary to the statute in such cases made and provided, and against the peace and dignity of the state of North Dakota."

Count two begins with the words: "And your informant in the name and by the authority of the state of North Dakota further informs this court: That on, to wit, the third day of January, 1911, in the county of Burleigh, state of North Dakota, the said defendant, *George L. Bickford, did commit the crime of embezzlement in the manner following, that is to say:*" Then follows language identical with that of the first count, with the exception that, instead of charging that the said Bickford appropriated and converted the public money, bank notes, checks, etc., "to his own use, in violation of his said official trust, and thereby did embezzle the same," it charges that he appropriated and converted the said moneys, etc., "to the use of the First State Bank of Bowbells," etc., "and thereby did then and there feloniously embezzle the said public money, bank notes," etc.

The third count is the same as the foregoing, except that it charges that the said Bickford did "*loan the said public money,*" etc., "to the First State Bank of Bowbells," etc., "and then and there did feloniously embezzle the said public money," etc.

We are of the opinion that only one offense is charged. It is true that each count is complete in itself. It is, however, also true that the information begins with the general charge of the crime of embezzlement, which it says was committed "in the manner following, that is to say," and that then the separate counts follow. It is quite clear to us that this general allegation charges the one general crime of embezzlement, and that the several counts are merely various statements of the ways in which the said general crime was committed.

Sec. 9204, Rev. Codes 1905, defines embezzlement as "the fraudulent appropriation of property by a person to whom it has been intrusted." Sec. 9205 provides: "If any county treasurer or other officer or

person charged with the collection, receipt, safe keeping, transfer, or disbursement of public moneys, or securities, or any part thereof belonging to the state or any county, precinct, district, city, town, or school district shall convert to his own use, or to the use of any other person or persons, body corporate, association, or party whatever, in any way whatever, such public moneys or securities, or any portion thereof, or shall use the same or any portion thereof by way of investment in any kind of securities, stocks, loans, property, land, and merchandise, or in any form whatever not authorized by law, or shall loan the same or any portion thereof with or without interest to any company or corporation, association or individual, or if any person shall advise, aid, or in any manner knowingly participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of said moneys or securities as aforesaid as shall be thus converted, used, invested, loaned, or paid out as aforesaid, and upon conviction thereof, such county treasurer or other officer or person shall be punished by imprisonment in the penitentiary for a term of not less than one year, nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid; which fine shall operate as a judgment at law on all the estate of the party so convicted and sentenced, and shall be enforced by execution or other process for the use of the state, county, precinct, district, town, city, or school district whose moneys or securities have been so embezzled." In the same chapter (chapter 51) are other provisions making a common offense of embezzlement out of fraudulent appropriations by carriers, trustees, bailees, and clerks or servants. It is true that in § 9205 a special penalty is provided for in case of fraudulent appropriations by public officers, but in the whole chapter there is but one common crime of embezzlement, based upon the fundamental act of the "fraudulent appropriation of property by a person to whom it has been intrusted," and in § 9205 we find no suggestion of specific crimes, but the general crime of embezzlement committed by the fraudulent misappropriation of public money by conversion to one's own use, to the use of any other person or persons, body corporate, association or party whatever, *in any way whatever*, or the use of such money, etc., in any form whatever

not authorized by law. The several counts of the information, in our opinion, do not charge, therefore, the commission of different offenses, but contain merely allegations of various ways by which the same was accomplished; or, to put it in different words, various facts by which the common and necessary fact, that is to say, the substantive crime of embezzlement, was committed. A fraudulent conversion, indeed, is at the foundation of the whole matter and of the whole chapter and of § 9205. Sec. 9205, in fact, denounces and emphasizes as embezzlement: (1) Conversion to the officer's own use; (2) conversion to the use of any other person or persons, body corporate, association, or party whatever; (3) conversion by using the same, or any portion thereof, by way of investment in any kind of securities, etc., not authorized by law; (4) conversion by using the same in any form whatever not authorized by law; (5) conversion by unlawfully loaning the same with or without interest, etc. And the foundation of all of these different unlawful appropriations is a conversion of the funds in violation of his official trust by the officer, that is to say, a fraudulent appropriation to his own use. In every case there must necessarily be the prior fraudulent appropriation to one's own use. If, indeed, an officer gives funds to one who is not entitled to receive them, or loans them to one who is not entitled to receive them, he first appropriates them from the lawful channels, exercises an individual control and use over them, and commits the basic offense of a fraudulent appropriation. Sec. 9205, indeed, would mean just the same and would be just as effective if it had simply declared that a public officer who fraudulently converts the public funds intrusted to him shall be guilty of embezzlement and punished as in said section prescribed. Here the gist of the offense is the unlawful appropriation, and the manner of its commission is subsidiary thereto. In the case of Taylor v. People, 12 Hun, 212, the court, in passing upon the sufficiency of an indictment for larceny, said: "Each count in the indictment theoretically describes a different offense, but where it is apparent 'from the general tenor of the indictment that each count relates to the same transaction,' and that the introduction of separate counts is not for the purpose of proving distinct offenses, but only for the purpose of meeting possible variances or defects of the evidence to establish some one of the ingredients of the

felony as described in a particular count, then the court can properly exercise a discretion to prevent a failure of justice, and treat the indictment as it is in fact an indictment for one offense." See also State v. Chapman, 6 Nev. 320; People v. Rice, 35 N. Y. S. R. 185, 13 N. Y. Supp. 161; People v. Rose, 52 Hun, 33, 4 N. Y. Supp. 787. In State v. Malim, 14 Nev. 288, the court said: "Is it not evident from the general frame-work, language and structure of the indictment in the present case, that the same offense was intended to be and is charged in each count? If so, that is all the law requires." In the case of People v. Rose, 39 N. Y. S. R. 291, 15 N. Y. Supp. 815, the court said: "The fair inference arising from these allegations shows that the offenses alleged related to one and the same transaction, and were intended to charge but one offense; that the pleader, to meet any variance of proof, has made the allegations to that end." In Bishop's Criminal Procedure, 2d ed. § 457, we find the following: "The general rule in felony is that the court will permit the prosecution to give evidence of only one felonious transaction, but when it appears, on the opening of the case and during the trial, that there is no more than one criminal prosecution involved, and the joinder of the different counts is meant only to meet the various aspects in which the evidence may present itself, the court will not restrict the prosecuting officer to particular counts, and will suffer a general verdict taken on the whole." See also M'Gregg v. State, 4 Blackf. 101; Kane v. People, 8 Wend. 203; McCollough v. State, 132 Ind. 427, 31 N. E. 1116; Mills v. State, 53 Neb. 263, 75 N. W. 761; State v. Mitton, 37 Mont. 366, 127 Am. St. Rep. 732, 96 Pac. 927.

The same considerations and conclusions apply to the second point, that the verdict does not find the defendant guilty or not guilty, and is indefinite because of the three counts. The verdict was "guilty of embezzlement as charged in the information." As we have before said, there was but one offense charged, and that was embezzlement; embezzlement, it is true, by a public officer, but every count contained this allegation. In the case of Mills v. State, 53 Neb. 263, 73 N. W. 761, the statute was identical with § 9205, Rev. Codes 1905. The information was in four counts, and the trial was on two of them; the one alleging embezzlement of $6,000 by conversion to the embezzler's

own use, and the other alleging embezzlement by loaning and converting $6,000 to the use of the defendant, who was charged in both counts as an abettor to the officer. The defendant attacked the proceeding, and claimed that one of the counts charged a different offense from that on which there had been a preliminary hearing. The court, on page 763, said: "In the case at bar the fourth count of the information charged the embezzlement of the same money, of the same party, and at the same time, as did the complaint; the sole difference being the manner or method alleged of the commission of the crime. It was not a charge of a different offense; the allegation of the manner in which the crime was committed was varied,— no doubt, to meet a possible contingency in the evidence. This was allowable." In the case of State v. Mitton, supra, there was a prosecution in two counts for forgery; one for forgery proper, and one for uttering the forged instrument, both acts being defined in the same statute as the crime of forgery. There was a demurrer for duplicity. The court said: "Where the statute declares an act unlawful when perpetrated in any one or all of several modes, an indictment may charge the act in separate counts, basing each count upon the different modes specified; and it is held that the indictment may contain, in one count, an enumeration of all the different modes or means by which the crime may be committed." See also Territory v. Poulier, 8 Mont. 146, 19 Pac. 594. In 1 Bishop on Criminal Procedure, § 457, we find the following: "When it appears . . . that there is no more than one criminal transaction involved, and the joinder of the different counts is meant only to meet the various aspects in which the evidence may present itself, the court will not restrict the prosecuting officer on particular counts, and will suffer a general verdict to be taken on the whole." In 12 Cyc. 693, we find: "When but one offense is charged in various forms in separate counts of one indictment, a general verdict of guilty, or of guilty as charged, without mentioning the count on which it is based, is sufficient." See also 12 Cyc. 693, note 25.

Counsel for appellant seems to admit that a plain verdict of guilty would have been sufficient, but claims that the verdict of "guilty of embezzlement as charged in the information" was a nullity. He also, in the same breath, claims that the jury should have specifically found that the defendant was a public officer, etc. Sec. 10044, Rev. Codes

1905, provides that "a general verdict upon a plea of not guilty is either 'guilty' or 'not guilty,' which imports a conviction or acquittal of the offense charged in the information or indictment." The verdict before us was a general verdict under the statute, with the addition of the words "as charged in the indictment." If the jury had found the defendant guilty merely, that would have imported a conviction of the offense charged in the information. We are asked to hold that the addition of the very words which the law would presume from the use of the word "guilty" alone renders the verdict invalid. The contention needs merely to be stated in order to be refuted. The word "guilty" alone would have found him guilty of all of the elements of the crime charged, including the fact of being a state officer. That fact cannot be obviated by the additional fact that the jury also found him guilty of the crime of embezzlement with which the information charged him.

It is also claimed that the state voluntarily selected the draft of May 15th, 1909, for $25,215.26, as the subject of the embezzlement charged in the information, and that the state thus voluntarily elected to ask conviction upon this item alone. It is claimed that no attempt was made to establish the embezzlement by showing that the books called for the production of $60,438.11 more than the cash on hand; that no demand was made upon the defendant for $60,438.11, or any other sum more than the payment of the certificates; and that the following objection should have been sustained: "Defendant objects to the introduction of any evidence tending to establish an embezzlement, or claimed to tend to establish an embezzlement, other than the $25,215.26 item that has been isolated and set apart by the testimony of the witnesses of the state at the present time, it now appearing that this remittance was made at one particular time and was separate and distinct from all other remittances, and that there was no additional remittance made by Mr. Halvorson, the county treasurer, until at least thirty days thereafter, for his testimony shows that the remittances were made not more often than monthly, and until there is some showing to the court that there is an intent to aggregate several payments to the embezzlement of a gross sum, the state should be limited to the particular transaction which by its own volition it has selected as being the subject of the charge contained in the information; the defense insisting that by

isolating the $25,000 transaction the state has voluntarily made an election which is just as binding upon the state as though such election and selection had been made in pursuance to an order of the court. That evidence as to all other transactions is incompetent, irrelevant, and immaterial to prove the embezzlement of the $25,000 item, and an attempt to establish a chain of crimes other than that, the one so isolated and selected by the state as the subject of the information and upon which the defendant is upon trial. . . . I will make that a little more specific. This relates to an offense other than and distinct from the offense already isolated and selected by the state as the basis of the prosecution; that by the selection of the $25,000 incident, being draft No. 9648, the state has voluntarily made its selection, which is binding upon it; and evidence of other transactions is entirely irrelevant and immaterial to the issues thus voluntarily made upon the No. 9648 draft transaction. It is not in the nature of a continuing offense in any way. They have voluntarily selected one particular incident as being the subject of embezzlement that they have sought to prove under the information. The information does not bind them either as to time or as to amount, but having made the selection it is entirely incompetent to show other similar transactions, or other separate and distinct and isolated transactions, for the purpose of cumulating them with the one thus voluntarily selected in order to make up the aggregate charged in the information." There is no merit in this objection, nor in the accompanying one that the state should have been required to elect between the three counts of the information, and that at any rate the prosecution should have been confined in its proof to the first item of $25,215.26, which was the amount of the first remittance from Barnes county. What the state was developing in its proof was not an isolated embezzlement, but a long-drawn out and intricate scheme. This, under its general charge in the information, it was entitled to do. The reasons for the rule are clearly set forth by the supreme court of Illinois in Ker v. People, 110 Ill. 627, 647, 51 Am. Rep. 706, 4 Am. Crim. Rep. 211, when in its opinion it says: "It is insisted the evidence shows a cumulation of offenses, and for that reason it was error in the court to deny defendant's motion to compel the prosecution to elect upon what alleged act of larceny or embezzlement a conviction would

be asked. The court, by its ruling, submitted all the evidence touching the embezzlement of funds and securities by defendant, to the jury, and it is not perceived how it could properly have done otherwise. Embezzlement is a crime defined by statute, and it was entirely competent for the legislature to declare what acts would constitute the crime, and fix the measure of punishment. One element that enters into the statutory definition of embezzlement is the fiduciary or confidential relation. Such relations afford the amplest opportunity to misappropriate money, funds, and securities, and often present great difficulty in proving exactly when and how it was done. This is especially true with regard to clerks and confidential agents in banks, or other corporations or firms doing a large business, and who are intrusted, in whole or in part, with the care or custody of funds, securities, and property belonging to banks or other corporations, or to a copartnership. It is difficult, in such cases, if at all possible, to prove with certainty when or how the embezzlement was affected. It is, of course, done with a view to avoid detection, and the confidential relations existing ward off suspicion. Embezzlement may, and most often does, consist of many acts done in a series of years, and the fact at last disclosed, that the employer's money and funds are embezzled, is the crime against which the statute is leveled. In such cases, should the prosecution be compelled to elect it would claim a conviction for only one of the many acts of the series that constitute the *corpus delicti,* it would be doubtful if a conviction could be had, under §§ 75 and 76 of the Criminal Code, against a clerk in a bank or other corporation, or a copartnership, although the accused might be conceded to be guilty of embezzling large sums of money in the aggregate. * * * Under this rule, which is certainly a wise one, it was proper the court should permit all the evidence of what defendant did by reason of his confidential relations with the banking firm whose clerk he was, to go to the jury, as was done, and if the jury found, from the whole evidence, any funds or securities for money had been embezzled or fraudulently converted to his own use by defendant, it was sufficient to maintain the charge of embezzlement, as that crime is defined in the 75th and 76th sections of the Criminal Code. Any other rule would render it exceedingly difficult to secure a conviction under either of these sections of the stat-

ute. The view taken by the defense, of this statute, is too narrow and technical to be adopted. It has a broader meaning, and, when correctly read, it will embrace all wrongful conduct by confidential clerks, agents, or servants, and leave no opportunity for escape from just punishment on mere technical objections not affecting the guilt or innocence of the party accused."

The crime of embezzlement as known under the codes and in North Dakota is not the common-law offense of larceny. It is not necessary that the specific property appropriated should be identified, and that the prosecution should be based on the specific misappropriation of the aggregate sum charged. Sec. 9211 of the Revised Codes 1905, provides that "a distinct act of taking is not necessary to constitute embezzlement, but any fraudulent appropriation, conversion, or use of property, coming within the above prohibitions, is sufficient." Sec. 9864 provides: "In an information or indictment for larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities, or for a conspiracy to cheat and defraud a person of any such property, it is sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, bank notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof." Sec. 9204 defines the crime as being "the fraudulent appropriation of property by a person to whom it has been intrusted." There can be no doubt that under the authorities and under the modern statutes, the aggregate misappropriation may be treated as one crime and all the peculations as parts of the one offense, and that the aggregate shortage proven may be more or less than the sum stated in the information. It is not necessary even that the exact sum embezzled should be alleged, and it is not necessary to prove the exact sum charged. "In the case at bar," says the supreme court of Massachusetts, in Com. v. Hussey, 111 Mass. 432, 434, "the evidence that proved the embezzlement proved that the amount and value of the notes embezzled was $70, and not $65. And it is insisted on the part of the defendant that, as the indictment alleges an excuse for not giving a more specific description of the notes, the amount and value are made a part of the description of the offense and essential to its identity, in the same manner as an unnecessary averment as to the

color of a horse alleged to have been stolen becomes a matter of description which must be proved as alleged. In other words, that the grand jury have described the property merely by the amount and value, and that a variance in that respect entitles the defendant to an acquittal. But this objection is in our judgment untenable. The two cases above cited [Com. v. Sawtelle, 11 Cush. 142, and Com. v. Duffy, 11 Cush. 145] make it certain that where the crime is described as it is in this indictment, it is not a material variance to prove the larceny of less than the alleged amount and value. The number stated may be much larger than appears in proof, and yet furnish no ground of objection on account of variance. The amount and value in this indictment do not appear to us to be descriptive of the offense, in such a manner as to fix its identity. The property is described as 'divers promissory notes, payable to bearer, current as money in this commonwealth.' No attempt is made to give the number or denominations of the notes, but it was necessary to state that they had a value, in order that they should be subjects of larceny; and in the case of notes current as money, the amount and value would ordinarily be synonymous terms. Except on the ground of variance, the defendant cannot object that less is charged against him than was proved. If proof of less than the amount and value charged is not a variance, it is difficult to see why proof of more should be. If the indictment had contained a more particular description, the proof must have been limited accordingly. But it was not necessary to give a more particular description, for that given was already sufficient to support a judgment; and the allegation that a more particular description was unknown to the grand jurors was therefore an immaterial allegation, and proof that a more particular description was in fact known to them did not create a fatal variance between the indictment and the proof." And to the same effect are 7 Enc. Pl. & Pr. 454; 15 Cyc. 526; United States v. Fish, 24 Fed. 585; State v. Ring, 29 Minn. 78, 11 N. W. 233; State v. Lewis, 31 Wash. 75, 71 Pac. 779, 782, 783; and see also Weimer v. People, 186 Ill. 503, 58 N. E. 378, 379; Bolln v. State, 51 Neb. 581, 71 N. W. 444; Brown v. State, 18 Ohio St. 496; Ker v. People, 110 Ill. 646, 51 Am. Rep. 706. 4 Am. Crim. Rep. 211; State v. Reinhart, 26 Or. 466, 38 Pac. 822, 826, 827; Jackson v. State, 76 Ga. 573; State v. Pratt, 98 Mo. 482, 11

S. W. 978; Carl v. State, 125 Ala. 89, 28 So. 505; Willis v. State, 134 Ala. 429, 33 So. 226; State v. Wise, 186 Mo. 42, 84 S. W. 954; State v. Wissing, 187 Mo. 96, 85 S. W. 557; State v. Shour, 196 Mo. 202, 95 S. W. 405; Bartley v. State, 55 Neb. 294, 75 N. W. 832; Morse v. Com. 129 Ky. 294, 111 S. W. 714; State v. Moyer, 58 W. Va. 146, 52 S. E. 30, 6 Ann. Cas. 344. There can be little doubt, indeed, that the defendant during his term of office embezzled a much larger sum than the amount found by the jury. In our opinion, also, the mere fact that there may have been in the cash drawer at the time that the defendant relinquished his office more than sufficient to equal the $54.-65 in no way atones for or expunges the crime. The crime of embezzlement by a public officer does not consist in failing to turn over all moneys due to the state at the time of the relinquishment of office, but in having fraudulently converted money or securities while in that office. The mere fact that a friend may come to one's rescue, and furnish money sufficient to make good a shortage on the final accounting, does not in any way negative the fact that prior to such final accounting money had been fraudulently converted, that is to say, embezzled. The above consideration and conclusion also apply to the claim that the verdict is a nullity because in it an embezzlement of $54.65 is found to have been committed, when the amount charged in the information is $60,438.11, as well as the point that there is no proof that the $54.-65 item was ever paid or loaned to the Bowbells bank. We merely desire to add that no matter what may be the case with the second and third counts, the first count says nothing about the Bowbells bank, and contents itself with merely charging the embezzlement of an aggregate sum. It does not specify or itemize the items, nor does it make the sum charged a necessary description of the offense. That proof of the embezzlement of a greater or less sum than that charged is admissible under such a count is well established in the authorities. See Com. v. Hussey, 111 Mass. 432, 434, and cases just above cited.

We next come to the defense that the state depository banks were already filled to their limit with state funds at the time of the defendant's taking office, and that something had to be done with the money in his possession. It is claimed that even though the defendant may not have had the right to make general deposits to these banks, he had

the right to make special deposits for the safe keeping of the money and that in any event a mere deposit in a bank is not a loan to such bank or a violation of the statute which makes it an offense to "use the same, or any portion thereof, by way of investment in any kind of securities, stocks, loans, property, land, and merchandise, or in any form whatever not authorized by law, or shall loan the same, or any portion thereof, with or without interest, to any company or corporation, association or individual." It is argued with great force, and in spite of its economic falsity the proposition no doubt finds support in many authorities, that a deposit of money in a bank does not constitute a loaning to or conversion thereof to the use of the bank. Whether true or not, however, as a general proposition, the intention is after all controlling. The real question was, did the defendant really loan the money as a special deposit, or did he intend that the bank, in which he was heavily interested, should have the use and benefit thereof. If merely a special deposit, and not a loan or intended for a loan, why did the defendant so sedulously keep the fact from the various bank examiners and from the public at large, and why did he make fictitious entries and fictitious deposits and withdrawals in other banks in order to cover up the matter? It is idle to claim that the deposit in the Bowbells bank was a special deposit. A special deposit is a bailment of certain specified property which can and is to be identified and returned. There was no pretense even of any such thing in the case at bar. It would appear that on these matters the trial court thoroughly and correctly instructed the jury. He, among other things, said: "You are instructed that the state treasurer has the right to deposit moneys in the bank designated by the state board of auditors as a depository, and it is not necessary that such deposit shall be upon open account. It is sufficient if such deposit is subject to payment on demand, and before you can find a verdict of guilty against the defendant for the embezzlement of any funds so deposited you must be satisfied beyond a reasonable doubt that the defendant deposited such moneys with the intent, at the time of so depositing the same, to fraudulently convert same to his own use and benefit, or to the use and benefit of such bank. I charge you as a matter of law that the defendant had the right during the year of 1910 to deposit funds, either by way

of special deposit or for safe keeping, in the State Bank of Bowbells; and if such deposit was not made with a fraudulent intent to deprive the state of the use of such moneys, and with specific fraudulent intent to convert the same to his own use or to the use of such bank, then such deposit would not be illegal, and you must find the defendant not guilty. The law of this state permits the state treasurer to deposit the public moneys in his control in only two forms: First, a deposit; second, a special deposit. A general deposit in a bank is the ordinary form of bank deposit, where the banker is entitled to mingle the money deposited with the other funds of the bank, and use it in the ordinary course of business. A general deposit of state money by the state treasurer can be lawfully made only in those banks which have been designated by the state board of auditors and have qualified as state depositories, and such general deposits cannot rightfully exceed the maximum amount for which the depository bank has qualified as such. *A special deposit of money by the state treasurer in a bank is a placing of the money in the bank merely for safe keeping, so that the banker is a mere bailee, and must keep the identical money without mingling it with the other funds of the bank, to be returned in kind to the state treasurer, or such person or persons as he may direct.* A special deposit, as before defined, may be made in any bank, but the banker holding such special deposit cannot lawfully use the money so specially deposited." It appears to us that these instructions correctly state the law. Under the statute all that the defendant could legally do was to make a special deposit of the excess funds. The statutes in regard to the state depositories otherwise would be meaningless, and so would the section of the Penal Code under which the defendant was prosecuted. If deposits in excess of the amount allowed can be made in banks at the will of the treasurer, and loaned out by those banks at will, all of the security aimed at by the law is taken away.

"Deposits made with bankers," says the supreme court of Alabama, "are either general or special. In the case of a special deposit the bank merely assumes the charge or custody of property, without authority to use it, and the depositor is entitled to receive back the identical money or thing deposited. In such case the right of property re-

mains in the depositor, and, if the deposit is of money, the bank may not mingle it with its own funds. The relation created is that of bailor and bailee, and not that of creditor and debtor." Alston v. State, 92 Ala. 124, 13 L.R.A. 659, 9 So. 732. See also 7 Words & Phrases, p. 6574. Koetting v. State, 88 Wis. 502, 60 N. W. 822, 823; Bank of Blackwell v. Dean, 9 Okla. 626, 60 Pac. 226; Officer v. Officer, 120 Iowa, 389, 98 Am. St. Rep. 365, 94 N. W. 947, 948; Catlin v. Savings Bank, 7 Conn. 487, 492; Ruffin v. Orange County, 69 N. C. 498, 509; Talladega Ins. Co. v. Landers, 43 Ala. 115, 138; Collins v. State, 33 Fla. 429, 15 So. 214, 217; Keene v. Collier, 1 Met. (Ky.) 415, 417; State v. Carson City Sav. Bank, 17 Nev. 146, 30 Pac. 703, 704; McLain v. Wallace, 103 Ind. 562, 5 N. E. 911, 912; Wright v. Pain, 62 Ala. 340, 343, 34 Am. Rep. 24; First Nat. Bank v. Graham, 100 U. S. 699, 703, 25 L. ed. 750, 751; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 90, 36 Am. Rep. 582; National Bank v. Speight, 47 N. Y. 668; Marine Bank v. Fulton County Bank, 2 Wall. 252, 256, 17 L. ed. 785, 787; Mutual Acci. Asso. v. Jacobs, 141 Ill. 261, 16 L.R.A. 516, 33 Am. St. Rep. 302, 31 N. E. 414, 416 (citing Anderson's Law Dict. 344). The deposits, then, in the case at bar, were not special deposits, and the statute was to that extent violated. The money was put to a use that was not permitted by the law. Paragraph 14 of § 111, Rev. Codes 1905, describes as one of the duties of the state treasurer the duty "to keep all moneys belonging to the state *in his own possession until disbursed according to law,*" but nothing in the subdivision prohibits him from making *special deposits for the safe-keeping of public moneys.* Sec. 232 provides: "All funds of the state shall be deposited by the treasurer in one or more designated state or national banks in the state of North Dakota on or before the first day of each month, in the name of this state. Such bank or banks shall be designated by the board of auditors in conjunction with the governor; . . . provided that the amount deposited in any bank shall not exceed 50 per cent of its paid-up capital and surplus." Sec. 9205 makes it embezzlement for a public officer "to convert to his own use, or to the use of any other person or persons, body corporate, association, or party whatever, in any way whatever, such public moneys or securities, or any portion thereof, by way of investment in

any kind of securities, stocks, loans, property, land, and merchandise, *or in any form whatever not authorized by law,* or shall loan the same, or any portion thereof, with or without interest, to any company or corporation, association or individual." It would seem that a general deposit of $60,000 in excess of the legal limit of a depository bank, coupled with a sedulous system of concealment, would sufficiently indicate an intention to violate, and a violation of, the statute in question. The crime of embezzlement, indeed, may be committed by a fraudulent failure to account for funds, as well as by their physical confiscation. Champion Ice Mfg. & Cold Storage Co. v. American Bonding & T. Co. 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197, 198. Where, therefore, prior to and in the various examinations of the state bank examiners and the general reports that were required by law to be made to the governor, the defendant kept concealed in his private cash drawer the various certificates of deposit, some of which at any rate were made payable to no particular party, as well as the receipt from the Bowbells State Bank, and concealed the making of such deposits and his dealings in relation to the Barnes county remittance by means of fraudulent entries, he to all intents and purposes, and in the eye of the law, embezzled the money, and the jury was justified in so holding. The same is true of the $54.65. He made no record of its receipt. He obtained it as part of a fraudulent transaction, and the jury was perfectly justified in holding that it had been embezzled. These facts, at any rate, the state's evidence tended to show, and the conclusion to be drawn therefrom was for the jury and not the court, to make.

There is much to be said in support of the proposition that the mere making of a general deposit in excess of the amount allowed by the statute in itself constituted an embezzlement. This, however, it is not necessary to decide. The trial judge did not instruct the jury that it did. He, it is true, charged the jury that no sum above the prescribed amount could be legally deposited, but at the same time he charged them that "the state treasurer has the right to deposit moneys in the bank designated by the state board of auditors as a depository, and it is not necessary that such deposit shall be upon open account. It is sufficient if such deposit is subject to payment upon demand; and

before you can find a verdict of guilty against the defendant for the embezzlement of any money so deposited, you must be satisfied beyond a reasonable doubt that the defendant deposited such moneys *with the intention, at the time of so depositing the same, to fraudulently convert the same to his own use and benefit, or to the use and benefit of such bank.*" It is quite clear that the defendant desired, and during his term of office succeeded in concealing the fact of these excess deposits in the Bowbells bank. Unless he thought the act in itself criminal, the only other motive for such concealment could have been the fear lest the board of auditors and state bank examiners would, if it were known, order the withdrawal of the funds and thus deprive the bank of their use. This is a motive, indeed, which is apparent throughout all of the evidence and throughout all of the shifting of accounts. If the desire to preserve this use in the bank was the reason of these concealments, and this use was unlawful, even though not necessarily criminal, then there was an embezzlement committed on the occasion of each and every concealment, and the reason for such concealments was for the jury to determine.

These considerations practically dispose of all of the criticisms as to the instructions given and refused. We find that the jury was correctly and fully and fairly instructed as to the law of the case, and that the instructions refused were either fully covered, or were not in conformity to the law as applied to the facts in evidence. We find no prejudice to the defendant in the refusal of any of them, or in the rulings of the trial court generally.

The jury was, in our opinion, fully justified in finding that at any rate the amount of $54.65 had been embezzled. The $5,000 certificate of deposit was cashed in order to raise the sum of $1,900 to effect the substitution of funds in connection with the fictitious deposit of $23,215.26 in the Union National Bank of Grand Forks, which was, as we construe the evidence and as the jury had the right to believe, itself made to cover up a previous false entry in the account of the First National Bank of Fargo, which in turn had, as we believe, and as the jury also had the right to believe, also been made to conceal previous misappropriations. The $5,000 certificate even had, for some reason which was unexplained upon the trial, been taken, not in the

name of the state or of the state treasurer, but in that of one Bertle Nelson, though it admittedly represented state funds. When the defendant desired the same cashed he wrote the following personal letter to the President of the Flaxton Bank:

Friend Burgett:

Enclosed please find C. D. No. 505, for $5,000. Please place $1,900 of this to the credit of the state and send me draft for the balance, $3,100. Also please *send me separate draft for $50,* the amount of interest due on same.

The defendant himself testified that he did not know that it was ever credited to the state, and the witness Mrs. Mitchell testified that it was not. The jury found that it was not, and was embezzled, and we can hardly set aside their verdict. The mere fact that when the defendant gave up his office in January, 1912, and after the refusal of his successor to accept the Bowbells certificates of deposit, there was a surplus of $150 in the cash drawer, and which he afterwards withdrew without saying anything about the $54.65 item, cannot be considered proof in any sense that he had not before embezzled it. The matter, at any rate, was one for the jury to pass upon.

There is no merit in the contention that the testimony as to the fact that the $54.65 item was not entered upon the books was elicited in rebuttal. The order of proof is largely within the control of the trial court, and his discretion must largely control. Bowman v. Eppinger, 1 N. D. 22, 44 N. W. 1000; State v. Ekanger, 8 N. D. 559, 80 N. W. 482; State v. Albertson, 20 N. D. 512, 516, 128 N. W. 1122; F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109; Pease v. Magill, 17 N. D. 166, 115 N. W. 260. The defendant had before admitted that he had received the amount, and it is to us quite conclusively shown that he received it in the course of a series of fraudulent transactions. The evidence was competent not merely to show the embezzlement of the particular item, but a general criminal intent throughout the entire transactions. On cross-examination he stated that he did not know whether it had been accounted for or not. At the end of the trial and on rebuttal the witness Mrs. Mitchell testi-

fied that the item had not been credited to the state. The only objection made to her testimony was that the testimony was "not the best evidence, incompetent as such, irrelevant, and immaterial." The witness was the bookkeeper, and had given much testimony in relation to the state of the books. There was no objection made that such a question was not proper on rebuttal, and the point here made does not seem to have been specifically raised on the trial. The defendant could, however, have been recalled, and proof introduced to show that it had been credited, if that was the fact. We think that the allowance of the question and answer was fully within the discretion of the trial judge, and that the objection made upon the trial was not specific enough in its form to raise the point here made, or to justify a review thereof. See Thomp. Trials, 2d ed. §§ 693, 694; Goldberg v. Sisseton Loan & Title Co. 24 S. D. 49, 140 Am. St. Rep. 775, 123 N. W. 266, 271; Jones v. Angell, 95 Ind. 376; Davis v. Holy Terror Min. Co. 20 S. D. 399, 107 N. W. 374.

The case as a whole is simply this: The defendant is charged with embezzling public moneys, bank drafts, notes, bills of exchange and valuable securities of the *aggregate* value and sum of $60,438.11. There is no specification of the items in the information, though this amount equals several specific items proved on the trial. The authorities are unanimous that in an action for embezzlement the specific sum need not be alleged, and that a verdict may be sustained for an amount smaller or greater than that charged. The embezzlement of the $60,438.11 is conclusively shown by the evidence; at least, there is evidence from which the jury might well find it. There is evidence that during the transaction the defendant kept a draft for $54.65; in other words, embezzled not merely $60,438.11, but $60,492.76. It is, however, shown that all of this money except the $54.65, and possibly the interest on some open account deposits, the amount of which is not to be found in the evidence, was returned by the defendant after an accounting had been demanded of him. The later return, however, did not in any way atone for the prior crime. Rev. Codes 1905, § 9215. The statute in such cases allows not merely a verdict of guilty, but a verdict which shall specify the amount embezzled, and make the amount a lien upon the property of the defendant, so that it may be collected

by the state. The jury found the defendant guilty as charged in the information, but merely stated the sum embezzled as $54.65, evidently thinking that, the rest of the money being returned, the lien of the judgment should only extend to that amount. As we have said, there is no specific allegation in the information of the specific sums or amounts embezzled, merely the aggregate; and that a verdict can be sustained for a greater or less amount is well established. The $54.65 item was interest upon a certificate of deposit which was itself manipulated in furtherance of the aggregate embezzlement. It bore much of the relationship of the wool on the back of a stolen sheep, which a man cuts and keeps, although he afterwards returns the shorn animal. It would be a travesty on justice to hold that the embezzlement of such a sum was not included in the general offense charged and was not a part of it.

The judgment of the District Court is affirmed.

FISK, J., dissenting. I am unable to concur in the conclusion arrived at in the majority opinion. While I do not disagree with much that is therein said by my brother Bruce, and am willing to concede that defendant, under the record facts, was guilty of the grossest irregularities, and perhaps embezzlements, in the exercise of the trust reposed in him by the people of this state, I am compelled to the view that the jury, by its verdict, in legal effect acquitted him of the crime charged in the information, and attempted to find him guilty of another and distinct offense not charged therein.

In this dissenting opinion I deem it unnecessary to consider any other point in the case, and shall merely endeavor to briefly make clear my views upon the one point above mentioned.

The verdict finds the defendant guilty of embezzling the sum of $54.65. This is the exact amount of the interest draft, Ex 105, sent to defendant at his request by the Flaxton bank, and it is entirely clear that this check constitutes the item for the embezzlement of which the jury found defendant guilty. The record unmistakably demonstrates this to be a fact. To justify the verdict, therefore, the court must be able to say that such item is embraced within the charge contained in the information, for, of course, it is elementary that a

person cannot legally be convicted of an offense of which he has not been formally accused. The inquiry, therefore, logically arises as to whether such draft is embraced within either count of the information. And this suggests the thought that, inasmuch as concededly but one offense may be charged in such information, each count thereof must necessarily relate to the same offense or criminal transaction, merely stating or alleging the same to have been committed in different forms or methods. Turning to the information, we find that defendant is charged in each count with having embezzled items aggregating the sum of $60,438.11, and turning to the evidence of the state in chief we find proof of five specific items consisting of drafts and checks aggregating that amount to the cent, and for which sum defendant, on January 3, 1911, held certificates of deposit issued by the Bowbells bank, and it is strikingly apparent that the check for $54.65 is not included therein. Manifestly, the same could not be included therein for the obvious reason that there is no pretension that such item was embezzled by depositing or loaning the same or the proceeds thereof to the Bowbells bank, and the items as charged in each count, as before stated, must be held to be the same, for otherwise separate offenses are alleged. Therefore it cannot be correctly said that count one embraces the $54.65 item. This item was not mentioned nor heard of in the state's main case, nor until near the close of the trial, and on the cross-examination of the defendant on rebuttal, when the same was accidentally disclosed. It is stated in the majority opinion that there is no merit in the appellant's contention that the testimony as to the fact that the $54.65 item was not entered upon the books was elicited in rebuttal. It is said: "The order of proof is largely within the control of the trial court and his discretion must largely control. The defendant admitted that he had received the amount, and it is quite conclusively shown that he received it in the course of a series of fraudulent transactions. On cross-examination he stated that he did not know whether it had been accounted for or not. At the end of the trial and on rebuttal, the witness Mrs. Mitchell testified that the item had not been credited to the state. The only objection made to her testimony was that the testimony was 'not the best evidence, incompetent as such, *irrelevant,* and immaterial.' . . . There was no

objection made that such a question was not proper on rebuttal, and the point here made does not seem to have been specifically raised on the trial." The majority opinion then states in conclusion that the allowance of such testimony was within the trial court's discretion, and also that the objection was not sufficiently specific in form to raise the point. This portion of the opinion must have been written on the assumption, which I think is erroneous, that the $54.65 item is embraced in the information, for otherwise it cannot be justified under any rule or decision, so far as my knowledge extends. I have no quarrel with the abstract propositions of law therein stated, but I do not think they apply in the case at bar. It requires no argument to show that a citizen ought not to be sent to the penitentiary for an offense which he has neither been charged with nor convicted of, except through the failure of his counsel to interpose technically proper objections. Even conceding his guilt of such offense, the interests of the state do not demand his conviction in such a manner. Quite the contrary is true. Courts will not ordinarily resort to technical rules in order to sustain a conviction, especially a conviction of an offense not charged. The crucial and decisive question on the point under consideration, therefore, is as to whether this item of $54.65 is included as a portion of the funds covered in the information. In answering this question we must not overlook the fact that in employing three separate counts in the information the public prosecutor did not and could not have intended to charge more than one offense or criminal transaction, and each count must be construed as alleging merely different methods of embezzling the *same* funds. These different methods might have been charged in one count, provided they were stated in the alternative. This proviso also applies where different counts are employed, but the pleader seems not to have observed this in drawing the information in question. However, this failure is not material to the point we are here discussing.

A fair test as to whether the $54.65 item is included in the information is whether a conviction or acquittal under such information could be successfully urged in bar of an attempted prosecution under another information specifically charging the embezzlement of such check. I think it could not.

In the majority opinion it seems to be assumed, however, that the charge in the information is a general charge, entitling the state to maintain the same by proof of the embezzlement of any items involved in any of the transactions relating to the defendant's official duties as treasurer; but I think such assumption is clearly unauthorized. If the pleader had seen fit to specify and minutely describe each of the four or five drafts and checks aggregating the sum of $60,438.11, I apprehend it could not be argued that such charge would be general, so as to authorize proof of the embezzlement of any other drafts or checks; yet the pleader just as effectually described these items aggregating $60,438.11 as though he had mentioned them in detail, for he saw fit to characterize them as having been wrongfully turned over to the Bowbells bank. This effectually excluded items not thus misappropriated, and precluded the state from proving such other items.

Had the state seen fit to charge in general terms that defendant embezzled at a certain time or during a certain period, public funds entrusted to him as state treasurer, consisting of moneys, drafts, checks, etc., aggregating a certain sum or a sum in excess of a certain designated amount, by feloniously converting the same to his own use or to the use of another, I am willing to concede that the state would have a wider latitude in proving the charge, and perhaps it might, under such general allegation, properly have proved the embezzlement of the $54.65 interest item aforesaid. But where, as in this case, the state's attorney has elected to specifically point out and identify the particular funds claimed to have been embezzled, by alleging the precise manner in which such acts of embezzlement were committed, as by appropriating and converting the same to the use of the First State Bank of Bowbells, as charged in count two; or by loaning the same to said bank, as charged in count three, I think the state should be restricted in its proof to funds thus specifically designated, and which it has elected to single out in this manner. By such election it seems to me that the state has, in legal effect as it had the right to do, excluded other funds or embezzlements from the information. I do not believe that the authorities cited and relied upon in the majority opinion, when carefully examined, will be found to hold otherwise.

The case of Ker v. People, 110 Ill. 627, 51 Am. Rep. 706, 4 Am.

Crim. 211, cited in the majority opinion, and therein quoted from at length, is, I think, plainly distinguishable from the case at bar. That portion of the quotation after the stars is somewhat misleading, because it refers not to language preceding the stars, but to a statutory rule in Illinois (§ 82 of the Criminal Code) which is held controlling.

The foregoing views, inadequately expressed, afford sufficient reasons why I think the conviction should not be upheld, and I deem it unnecessary to express any opinion upon the other questions presented.

I am authorized to state that Mr. Chief Justice SPALDING concurs in these views.

On Rehearing.

BRUCE, J. It has been urged for the first time on the petition for a rehearing that the statute (§ 9205, Rev. Codes 1905) under which the defendant was tried and convicted is unconstitutional. The act provides that upon conviction "such officer shall be punished by imprisonment in the penitentiary for a term of not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also to pay a fine equal to double the amount of money or other property so embezzled as aforesaid; which fine shall operate as a judgment at law on all the estate of the party so convicted and sentenced, and shall be enforced by execution or other process for the use of the state, county, precinct, district, town, city, or school district whose moneys or securities have been so embezzled." It is contended that the provision "shall be enforced by execution or other process for the use of the state, county, precinct, district, town, city, or school district whose moneys or securities have been so embezzled" is in violation of § 154 of the Constitution of North Dakota, which provides that "the interest or income of this (land grant) fund, together with the net proceeds of all fines for violation of state laws, and all other sums which shall be provided by law, shall be faithfully used and applied each year for the use of the common schools of the state."

If the point raised were one of ordinary practice, we would not now consider it, as it should have been raised both upon the trial in

the district court and upon the original hearing upon appeal. Since, however, it is a constitutional objection and is directed to the whole proceeding, we have given it due consideration, as we believe that it can never be the policy of the law that one shall be punished under an unconstitutional act, even though the objection is not seasonably made.

It has been argued by the state that the money judgment provided for in § 9205 is in the nature of a reimbursement to the municipality which is defrauded, and that there is nothing in the Constitution which prohibits such recovery, even though in a criminal action. There is much support for this proposition to be found in the cases of Coffey v. Harlan County, 204 U. S. 659, 51 L. ed. 666, 27 Sup. Ct. Rep. 305, and Whitney v. State, 53 Neb. 287, 73 N. W. 696. In these cases (which construe statutes almost identical with the one under consideration before us) the courts hold that the fine is a part of the punishment, and that it is immaterial whether it is called a penalty or a civil judgment, or whether restitution of the money embezzled has been made, or not. There is too, in Nebraska, as here, a constitutional provision providing that fines shall be for the benefit of the school fund. See Constitution of Nebraska, article 8, § 5. "As a part of the consequences of a conviction of the crime of embezzlement of a public officer," says Mr. Justice Moody, in Coffey v. Harlan County, supra, "the law of Nebraska provides that a fine double the amount embezzled shall be inflicted, which shall operate as a judgment against the estate of the convict. It is not of the slightest importance whether this fine is called a penalty, a punishment, or a civil judgment. Whatever it is called, it comes to the convict as the result of his crime. The amount of the judgment is fixed by the amount of the embezzlement, and not by the amount remaining due on account of the embezzlement, and the only question left open to the accused is the fact and amount of the embezzlement. It is provided that the judgment shall issue for double that amount, entirely irrespective of the question whether restitution has been made in whole or in part. . . . The law itself was justified by the plenary power of the state, and neither it nor its administration in this case discloses any violation of a right secured by the Constitution of the United States."

It is to be noticed, however, that neither on the appeal to the Su-

preme Court of the United States, nor apparently in the Nebraska court itself, was the point raised that the state Constitution required the proceeds of fines to be paid into the school funds, and the only point relied on seems to have been that the fine or penalty was imposed, irrespective of whether the money embezzled had been returned or not, and was therefore hardly due process of law. Though the cases, therefore, are conclusive upon the proposition that a provision is not unconstitutional which in the case of embezzlement exacts a fine double the amount of money or property embezzled, and this whether the money or property has been returned or not, they are not conclusive upon the proposition as to whether such a statute is valid where the Constitution provides that the proceeds of fines shall be put into the school funds, and the statute requires the recovery to be for the benefit of the municipality or party injured.

Although we are of the opinion that it is within the province of the legislature to impose a fine double the amount of the money embezzled, irrespective of whether it has been returned or not, we are nevertheless of the opinion that that part of the act under consideration is invalid which provides that the money collected shall be "for the use of the state, county, precinct, district, town, city or school district whose moneys or securities have been so embezzled. Waiving the question as to whether compensation for an injured individual or municipality can be recovered as a part of the judgment in a criminal action against the offender, we are quite sure that the recovery provided for under § 9205 is in the nature of a fine, and is not to be looked upon as compensation for the party injured. In the first place the word "fine" is used; in the second place, the fine is double the amount of the embezzlement, and is irrespective of whether the money has been returned or not. In the third place the officer is under bonds, and the state, county, or municipality is abundantly protected. In the fourth place, any person aiding or abetting in the act might also be indicted and punished as a principal, and in such a contingency the state, county or municipality would recover not merely twice, but many times the amount of money embezzled, and this irrespective of whether it has been returned or not. It is clear to us, therefore, that the punishment of the offender, and not the compensation of the injured state or mu-

nicipality, was the primary purpose and intention of the act. Such being the case, the recovery was a fine. Atchison, T. & S. F. R. Co. v. State, 22 Kan. 17.

Being a fine, the clause which diverted the money from the school fund was invalid, for even if we concede with the state of Wisconsin (State v. De Lano, 80 Wis. 259, 49 N. W. 808; Contra; Ex parte McMahon, 26 Nev. 243, 66 Pac. 294; Atchison, T. & S. F. R. Co. v. State, 22 Kan. 17; School Directors v. Asheville, 137 N. C. 503, 50 S. E. 279) that the word "proceeds," which is generally used in the acts which are construed, merely applies to the balance left after the cost of collection is paid, and that, under certain reward and *qui tam* statutes, compensation to the informer or prosecuting attorney may be looked upon as a cost of collection, the rule could hardly apply where the whole recovery goes to the injured state or municipality, and irrespective of the services rendered. Dutton v. Fowler, 27 Wis. 427; School Directors v. Asheville, 137 N. C. 503, 50 S. E. 279; State v. Parkins, 67 W. Va. 385, 61 S. E. 337; Lynch v. The Economy, 27 Wis. 69.

We have, therefore, a case in which a fine is rightfully imposed, but in which the legislature, after properly defining the crime and providing a punishment therefore, has, in a subsequent clause of the act, provided for a use of the money in a manner which is forbidden by § 154 of the Constitution. The question for consideration is whether such subsequent clause invalidates the whole act.

We think that the whole provision for the fine, providing, as it does, that the money shall be for the use of the state or municipality injured, instead of the general school fund, is invalid. There is, it is true, much to be said in favor of the proposition that that part only should be nullified which provides for the diversion from the school fund after the fine has been collected, and that not only the provision for the imprisonment, but the provision for the fine, should be allowed to stand, and that all the court is required to do is to strike out the clause which provides that said fine shall be "for the use of the state, county, precinct, district, town, city, or school district whose moneys or securities have been embezzled." This, of course, would leave the fine to be collected and disbursed as the Constitution provides. See

Lynch v. The Economy, supra; Harrod v. Latham Mercantile & Commercial Co. 77 Kan. 466, 95 Pac. 1; St. Louis, I. M. & S. R. Co. v. State, 55 Ark. 200, 17 S. W. 806; Pennsylvania Co. v. State, 142 Ind. 428, 41 N. E. 437.

Although we are prepared to say and to hold, however, that the legislature would have imposed a term of imprisonment at least for the period provided for in the act, irrespective of the provision for the fine, we are not prepared to say or to hold that the fine would have been as great if the legislature had realized that the proceeds must go to the general school fund, and not to the state or municipality injured. Having this doubt, we hardly can hold the provision for the fine to be valid. That the legislature, however, would have provided for a term of imprisonment and for a term as long as that provided for, irrespective of the validity or invalidity of the provision for the fine, we have no doubt. Such being the case, and the act, after the provision for the fine is eliminated, being complete and comprehensive in itself, we sustain the act as a whole, after eliminating therefrom the provision for the fine.

The District Court is directed to modify its judgment to the extent of striking therefrom the requirement for the payment of the fine. In all other respects the judgment of the District Court is affirmed and as so modified will be sustained.

SPALDING and FISK. We concur in the above, but adhere to the dissent to the original opinion.

L. C. JOHNSON, as Administrator of the Estate of John Rutherford, Deceased, Appellant, v. MARY RUTHERFORD.

L. C. JOHNSON, as Administrator of the Estate of John Rutherford, Deceased, v. MARY RUTHERFORD, Appellant.

(147 N. W. 390.)

This is a creditors' bill in equity to obtain a decree that the real and personal

property formerly belonging to John Rutherford, deceased (transferred by deeds and bill of sale to his wife one day before he died), is a part of the decedent's estate and subject to administration, and that the transfers were made in fraud of creditors. *Held:*

Transfers — without valuable consideration — to avoid administration — grantor — property — estate — insolvent — debts — fraud of creditors.

1. Where such transfers are made without valuable consideration, and to avoid administration, though with no specific intent in the grantor or grantee to defraud the grantor's creditors, but when the conveyances devested the grantor of all his property, rendered his estate insolvent, and operated to defeat the collection of debts owing by decedent, the conveyances must be held to have been made in fraud of creditors.

Fraudulent conveyance — title in grantee — administration — subject to — debts of deceased — liable for.

2. A fraudulent conveyance vests title in the grantee, who takes the property subject to its being charged by administration proceedings, aided by an equitable action as this, with any debts owing by the estate, for the payment of which the property or its proceeds may be taken.

Property — resort to personalty — deficiency — resort to realty.

3. In taking the property for such purposes, resort should be had first to the personalty, and then, for any deficiency unpaid, to the realty.

Decree in equity — property — subject to payment of debts — claimant — estate — insolvency of — transfer — fraud of creditors — debts — validity.

4. The decree in equity, holding property thus subject to payment of debts, to be established by county court administration, should designate the claimant, and adjudge that his claim has been approved by the county court for a stated amount, that the plaintiff suing has been appointed the personal representative and maintains the action for the benefit of said claimant, the facts concerning the transfer and the insolvency thereafter of the grantor and his estate, that the transfer was in fraud of creditors, the identity of the property conveyed, and the order in which it may be resorted to and applied, and that the same is subject to the payment of the approved claim exhibited in the creditors' bill, with administration costs of its collection; and by interlocutory decree require and direct the property be held *in statu quo* subject to the final determination of the debt in the course of administration, whenever it shall appear that the grantee in good faith desires to litigate in probate court the validity of the debt on which the claim is asserted. After the final determination of the county court on the validity of the debt, a final decree in this equitable action may be entered, dealing with both the property and the costs of this action on trial and on this appeal.

Indebtedness — question of — for county court — judgment.

5. The question of the indebtedness of the estate to the claimant, and the

amount of such indebtedness, if any, cannot be an issue in the equitable action; and the judgment in such action should not pass upon such question, or find such indebtedness, but leave that for the determination of the county court or the district court on appeal taken.

County court — record of — administration — appointment and qualification — pleading — allegations necessary.

6. The county court's record of the appointment of the administrator, and its approval of the creditor's claim against the estate, so far as the district court action is concerned, incontestably establishes the power of the plaintiff to sue, and that there is prima facie a debt owing by the estate, and its amount, for which the property shall respond, if it be determined to have been conveyed in fraud of creditors and the estate be insolvent.

Decedent — estate — transfer — in fraud of creditors — administration — petition by creditor — claim of — property — subject to administration.

7. Where the decedent leaves no estate, but leaves debts unpaid, and where property has been transferred, shortly before his death, by fraudulent conveyances, to avoid payment of claims or administration of his estate, and where no personal representative has been appointed, the order of proceedings to enforce payment of claims is by statute intended to be: (a) A petition by the creditor for administration, reciting his claim to establish his interest or right to petition; (b) the appointment thereon of an administrator; (c) giving of usual notice by the administrator to present claims within the statutory period; (d) presentment by the creditor who petitioned for administration, of his verified claim to the administrator, and its allowance and approval by the representative and the court; (e) suit by the administrator to recover, under § 8173, for the benefit of those creditors whose claims shall be approved by the county judge in usual course, the property so fraudulently conveyed, and which may thus be held subject to administration for the payment of claims to be established in county court.

Demurrer — district court — jurisdiction —payment of claim — evidence — claim approved by county court — prima facie case — equitable action — conclusive upon district court.

8. The district court sustained a demurrer to a plea of payment, and rejected evidence tending to prove full payment of the claim approved by the county court and as such the basis of this action, it being the sole claim made against the estate in administration proceedings. *Held* proper, the district court having no jurisdiction to entertain a joinder of issue, or receive evidence thereon of payment. The approval by the county court, even though *ex parte*, is a prima facie determination sufficient under the statute to furnish a basis for the equitable action, and as such conclusive upon the district court upon the question of debt.

Constitution — county courts — exclusive jurisdiction — validity of claims — estates.

9. By § 111 of the state Constitution the county court "shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians." This constitutional provision confers upon the county court exclusive original jurisdiction to determine and enter judgment upon the validity of claims against estates of decedents, and the district court has no jurisdiction to pass upon the validity of the debt of estates to claimants other than appellate jurisdiction, and therefore the district court in the equitable action has no jurisdiction to determine or pass upon the validity of the claim in question.

Administrator — appointment of — transfer of property — grantee — fraud — claims against estate — approval.

10. Neither the appointment of the administrator, nor the approval by the county judge of claimant's claim against the estate, affords an opportunity to litigate the validity of his claim, or constitutes, as against this grantee of property fraudulently conveyed, an adjudication of the validity of the debt, even though the grantee participated in a hearing had for such purpose. The law does not contemplate that the validity of claims shall be litigated, or preference in establishment of claims afforded, merely on hearing on the petition for administration, or on proceedings had on approval of the claim. The approval of a claim on its presentation is an *ex parte* matter affording no opportunity to contest, and from which approval there is no appeal allowed.

Probate procedure — claims — validity of — hearing — appeal — district court — order judgment.

11. Probate procedure contemplates that claims allowed by the administrator and the county court shall not be fully litigated on presentation for such allowance, but the validity of a claim so allowed may be tried on the hearing to be had on the personal representative's accounting, or upon his application to sell property, had on notice, from any of which an appeal from the judgment passed by the probate court may be taken, on the items of the account thus litigated, to the district court, and there retried. An appeal is also allowed from a claim established in county court by the confirmation of the report of a referee appointed by consent, and from which an appeal to the district court may be taken. The district court, on such appeal, acts as an appellate tribunal, with judgment to be entered under its order in the probate court.

Equitable action — ancillary to administration in county court — defense of payment — interposed in county court — res judicata.

12. This equitable action in district court is but ancillary to and in aid of the administration proceedings in county court, wherein the grantee may hereafter, in the course of administration, interpose the defense of payment sought

to be urged in this district court action, and upon which the judgment herein entered is not *res judicata* as to further litigation of the debt in county court.

Trial on merits — accounting — property — grantee — execution — county court — trial judgment.

13. Pending trial on the merits of the claim, that may be had on an accounting of the administrator, under § 8123, before he shall take charge of any property in the grantee's possession, the court properly stayed execution of judgment or sale of property until final judgment in the county court as to the validity of claimant's claim against the estate.

Opinion filed April 16, 1914. Opinion on petition for rehearing filed May 25, 1914.

From a judgment of the district court of Cass county, *Pollock,* J., both the administrator and Mary Rutherford separately appeal, and trial *de novo* is had.

Modified and affirmed.

M. A. Hildreth, for appellant Mary Rutherford.

Fraudulent intent must be alleged and proved in an action to set aside a deed or gift as a fraud upon creditors; and such an intent is a question of *fact.* Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557; Emmons v. Barton, 109 Cal. 662, 42 Pac. 303; Murphy v. Clayton, 114 Cal. 526, 43 Pac. 613, 46 Pac. 460; Ackerman v. Merle, 137 Cal. 157, 69 Pac. 982; Aigeltinger v. Einstein, 143 Cal. 614, 101 Am. St. Rep. 131, 77 Pac. 669; Dalrymple v. Security Loan & T. Co. 9 N. D. 307, 83 N. W. 245; Stevens v. Meyers, 14 N. D. 398, 104 N. W. 529.

There must be allegations and proof that the personal property was transferred as a *gift* in view of death. Rev. Codes 1905, §§ 4993, 5000.

Plaintiff's right to maintain this action as administrator must rest upon the statute, as it is purely a statutory proceeding. Janes v. Throckmorton, 57 Cal. 368; San Francisco v. Pennie, 93 Cal. 465, 29 Pac. 66; Field v. Andrada, 106 Cal. 107, 39 Pac. 323; Murphy v. Clayton, 114 Cal. 526, 43 Pac. 613, 46 Pac. 460; Sayward v. Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44.

Plaintiff must stand or fall on the complaint and proof as made. Long v. Long, 142 N. Y. 552, 37 N. E. 486; Murphy v. Clayton, 113 Cal. 157, 45 Pac. 267, 114 Cal. 536, 43 Pac. 613, 46 Pac. 460;

Baker v. Kingsland, 10 Paige, 366; Emmons v. Barton, 109 Cal. 663, 42 Pac. 303; Harris v. Harris, 59 Cal. 623; Eberstein v. Oswalt, 47 Mich. 254, 10 N. W. 360; Hogan v. Kavanaugh, 138 N. Y. 417, 34 N. E. 292; Patteson v. Ongley Electric Co. 87 Hun, 462, 34 N. Y. Supp. 209; Dunning v. Dunning, 82 Hun, 462, 31 N. Y. Supp. 719; Cory v. Leonard, 56 N. Y. 503; Platt v. Platt, 105 N. Y. 489, 12 N. E. 22; Kingsland v. Murray, 133 N. Y. 170, 30 N. E. 845; Reeves v. Howard, 118 Iowa, 121, 91 N. W. 896; Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415.

The heirs and next of kin of the deceased should have been made parties defendant, and plaintiff's failure to do so is fatal. Butts v. Genung, 5 Paige, 254; Mooers v. White, 6 Johns Ch. 360, and cases cited in notes; Thompson v. Brown, 4 Johns. Ch. 619; Webb v. Atkinson, 122 N. C. 683, 29 S. E. 949, 3 Prob. Rep. Anno. 513; Mayer v. Gilligan, 2 N. Y. S. R. 702; Haines v. Haines, 69 N. J. L. 39, 54 Atl. 401; Holmes v. Bush, 35 Hun, 639.

W. J. Courtney, for Administrator on cross appeal.

A creditor of an intestate decedent has the right to administer the estate if no administration is granted to those prior in right of order. Rev. Codes 1905, § 8022.

The result, where one conveys all his property in anticipation of death and to avoid administration, is to avoid the right of the creditor to have the estate administered. Rev. Codes 1905, § 8173.

It is not necessary to show that it was the purpose of decedent to place his property beyond the reach of his creditors. The transfer itself and alone is sufficient. Walker v. Cady, 106 Mich. 21, 63 N. W. 1005; Early v. Owens, 68 Ala. 174; McKeown v. Allen, 37 Fla. 490, 20 So. 558; Whitehouse v. Bolster, 95 Me. 458, 50 Atl. 243; 2 Bigelow, Fr. pp. 30, 39.

The honest intentions of the grantor are immaterial. If his acts in effect hinder and delay his creditors, the intent is sufficiently established. The standard is external, not internal in the grantor's mind. 2 Bigelow, Fr. pp. 80–83, 173, 178, 347, 375.

In voluntary conveyances, the intention to defraud, required by the statutes, does not necessitate a bad motive or a dishonest purpose. These may be wanting, and the conveyance still be fraudulent. 14 Am. & Eng. Enc. Law, 301, notes 1 & 2, 302.

The rult of evidence as to the manner in which the fact may be established is not changed. Marston v. Vultee, 12 Abb. Pr. 143; Edgell v. Hart, 9 N. Y. 216, 59 Am. Dec. 532; Newell v. Wagness, 1 N. D. 68, 44 N. W. 1014; Coburn v. Pickering, 3 N. H. 415, 14 Am. Dec. 375; Bergman v. Jones, 10 N. D. 529, 88 Am. St. Rep. 739, 88 N. W. 284.

W. J. Courtney, for Administrator.

Proceedings of a county court in the exercise of its jurisdiction are construed in the same manner and with like effect as are proceedings of courts of general jurisdiction, and its records, orders, and decrees are accorded like force and effect. Joy v. Elton, 9 N. D. 428, 83 N. W. 875; Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008.

If the execution of a voluntary conveyance, however meritorious in itself, leave the donor with insolvent property to meet his existing liabilities, it is fraudulent and void. May v. State Nat. Bank, 59 Ark. 614, 28 S. W. 431; Freeman v. Burnham, 36 Conn. 469; Clayton v. Brown, 30 Ga. 490; Aultman v. Huddlestun, 31 Ill. App. 556; Gable v. Columbus Cigar Co. 140 Ind. 563, 38 N. E. 474; Stewart v. Rogers, 25 Iowa, 395, 95 Am. Dec. 794; Ware v. Purdy, — Iowa, —, 60 N. W. 526; Blue v. Schurtz, 115 Mich. 690, 74 N. W. 178; Van Wyck v. Seward, 18 Wend. 375; Seybold v. Grand Forks Nat. Bank, 5 N. D. 469, 67 N. W. 682; Kaehler v. Dibblee, 32 Wis. 19.

Donations in view of death are not regarded as bona fide. Swartz v. Hazlett, 8 Cal. 126; Annin v. Annin, 24 N. J. Eq. 184; Stevens v. Meyers, 14 N. D. 398, 104 N. W. 529; Rev. Codes, § 5000.

M. A. Hildreth, for Mary Rutherford, respondent on cross appeal.

There is no allegation in the complaint to the effect that the transfer of the personal property was as a gift, as the trial court found, and such part of the judgment cannot be reviewed. Salemonson v. Thompson, 13 N. D. 183, 101 N. W. 320.

The complaint does not entitle plaintiff to any relief upon the theory that the transfer of the personal property was a gift in view of death. Field v. Syms, 2 Robt. 35; Bradley v. Aldrich, 40 N. Y. 504, 100 Am. Dec. 528; Ross v. Mather, 51 N. Y. 108, 10 Am. Rep. 562; Barnes v. Quigley, 59 N. Y. 265; Beach v. Eager, 3 Hun, 610; Peck v. Root, 5 Hun, 547; Combs v. Dunn, 56 How. Pr. 169; McMichael v.

Kilmer, 76 N. Y. 36; Stevens v. New York, 14 Jones & S. 274, S. C. 84 N. Y. 296; Evans v. Burton, 5 N. Y. S. R. 216.

The recovery must be in accordance with the complaint. Arnold v. Angell, 62 N. Y. 508; Hollister v. Englehart, 11 Hun, 446; Volkening v. DeGraaf, 12 Jones & S. 424; Southwick v. First Nat. Bank, 84 N. Y. 420.

One may give away his property, and if he does so in good faith and without intent to hinder and delay his creditors, the transaction is not fraudulent. Threlkel v. Scott, 89 Cal. 353, 26 Pac. 879; Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557; Daugherty v. Daugherty, 104 Cal. 221, 37 Pac. 889; Emmons v. Barton, 109 Cal. 662, 42 Pac. 303.

Goss, J. This action in equity is brought to have property owned by John Rutherford, now deceased, and by him transferred to his wife, Mary Rutherford, declared subject to an alleged debt of decedent. The administrator was appointed to collect said claim, approved by the county judge as a valid demand for $789.50. At his death Rutherford left no estate. On trial this action was dismissed as to the real estate, but the personal property was held subject to disposition by the probate court to the amount of the claim. The widow attempted to prove that said claim had been fully paid, and offered in evidence canceled checks and receipts for about $900, asserted to have been paid thereon. This proof was excluded, and the approval of the claim by the county judge was held to be *res judicata* of its validity in this action, and that the matter of payment was one within the sole cognizance of the probate court, except as it might reach the district court by appeal from probate court. The trial court found that all the property was both transferred and received with no actual intent to defraud, hinder, or delay collection of debts. From this finding the administrator appeals, demanding trial *de novo* of the entire case. The trial court further found that the note was an unpaid, outstanding, valid claim against the estate of the decedent; that the transfers by deed and bill of sale were made without consideration and with full knowledge of the impending and approaching death of Rutherford; that the real estate so transferred consists of a section of land and of $3,000 of personal property; that the personal property in excess of exemptions to the widow should be subject to the debt of Harvey, in so far as it "may be

shown to be a just and equitable claim against said estate;" and that the transfer of personal property thus made was a gift *causa mortis,* which, under § 5000, Rev. Codes 1905, must be treated as a legacy so far as the creditors of the deceased are concerned. From these findings the widow appeals on separate specifications of fact, as to which only a review is demanded.

The administrator has moved to dismiss the appeal of Mary Rutherford on the ground that the specifications of fact are insufficient to confer jurisdiction of her appeal, and cites Douglas v. Richards, 10 N. D. 366, 87 N. W. 600; Salemonson v. Thompson, 13 N. D. 182, at page 189, 101 N. W. 320; and Stevens v. Meyers, 14 N. D. 398, 104 N. W. 529, in support of the motion. Specifying merely ultimate conclusions of law to be reviewed is insufficient to warrant any retrial, but the defendant has specified both conclusions of fact and evidentiary facts in relation to particular findings, with parts of the complaint upon which the same are based, with sufficient particularity as to facts desired reviewed to authorize a retrial thereof. The motion is denied. Nothing can be gained by treating the appeals separately, as all matters are before the court on one appeal or the other, and the cause will be tried *de novo.* The complaint is sufficient to charge that the decedent transferred his property, and that the same was received with the intent of both transferrer and transferee to hinder, delay, and defraud the decedent's creditors in the collection of their debts. Paragraph 3, in the words of § 8173, Rev. Codes 1905, pleads a transfer and reception of property with such intent and without consideration.

There is no dispute in the facts. The husband died one day after the transfers to the wife. These transfers were made as a mere business precaution to avoid administration of the estate, and it does not appear that the debt, the basis of these proceedings, was considered at all. But the claim having been approved by the county judge, it must be taken as prima facie valid and existing, and that upon such hypothesis its payment will be avoided if these transfers are valid and the estate be not subject to its payment; and that ever since said transfers were made there has been no estate with which to pay claims. The act of insolvency was the delivery of the transfers.

The complaint avers a fraudulent conveyance of real and personal property. It is framed under § 8173, Rev. Codes 1905, covering any

fraudulent conveyance of real or personal property, and authorizing the personal representative to pursue and apply property so transferred by decedent for the benefit of creditors of his estate. The widow claims and the court found the transfers in question were not in fact fraudulent. But the court applied § 5000, Rev. Codes 1905, reading: "A gift in view of death must be treated as a legacy so far as relates only to the creditors of the giver," and thereunder adjudged the personalty subject to probate administration for payment of debts. Both §§ 8173 and 5000, Rev. Codes 1905, are found in the early Codes of California, some years prior to their appearance here, and in neither state has any amendment or change been made since 1872. Wisconsin has the same statute (Andrew v. Hinderman, 71 Wis. 148), 36 N. W. 624, as have most of the states, the statute being but a declaration of the common law on fraudulent conveyances. The law in California, under this statute § 8173, may be considered settled as to every question presented. The defendant contends that, in the absence of specific proof of fraudulent intent on the part of the decedent, the action must be dismissed; that fraud is a matter of fact, to be established by proof, like any other fact, and that there is an utter failure of proof thereon. Such was the conclusion of the trial court in finding the fact to be that the conveyances were not fraudulent. On the same evidence the contrary would be the holding of the California courts. Shiels v. Nathan, 12 Cal. App. 604, 108 Pac. 34. Bernard Shiels, the decedent, before his death transferred his personal and real estate to his brother Michael, from whom Bernard's wife, Mary Shiels, sought to recover a claim allowed by the probate court. "It is urged that there was no evidence of actual fraudulent intent in conveying the property to Michael. . . . The complaint avers that Mary Shiels was a creditor of Bernard at and before the date of the transfer, and that 'he, without any valuable or adequate consideration therefor,' conveyed to Michael the land and the money on deposit, and thenceforward to the date of his death 'he had no property out of which said debt could be paid, and he thereby rendered himself insolvent,' and so continued until he died. . . . It was, however, necessary to show further that the conveyance was with fraudulent intent. It was held in Emmons v. Barton, 109 Cal. 662, 42 Pac. 303, that where the consideration was love and affection alone, it was not sufficient unless made with intent to defraud the

creditors; that the intent is a question of fact, and that a voluntary conveyance is not prima facie fraudulent, and fraudulent intent is not to be arrived at as a presumption of law. It was further held in that case, 'Pronounced insolvency at the time of the grant would no doubt be a strong circumstance tending to show fraudulent intent; and in the absence of other controlling facts it would be sufficient to justify a finding of such intent.'

"It appeared from the evidence that Bernard was mortally ill and in the hospital when he made the conveyance, and died five days thereafter; that he declared that it was his intention to convey all the property he possessed, and so far as known he did so; that his brother Michael served for a time as executor of Bernard's estate, and could find no property belonging to him, and for that reason asked to be and was discharged. We think the evidence was sufficient to justify the finding that by the conveyance he rendered himself insolvent. Strictly he was not insolvent when he made the conveyance, but coincidentally with and by that act he became insolvent, and this we think brings the case within the rule in Emmons v. Barton, supra, and justifies the finding that the conveyance was with fraudulent intent to defraud his creditors."

In Emmons v. Barton, supra, the court said: "It is clear that a conveyance made by a husband or father to his wife or child is valid as against creditors, although the consideration was love and affection alone, unless it was made with intent to defraud his creditors. Peck v. Brummagim, 31 Cal. 441, 89 Am. Dec. 195; Barker v. Koneman, 13 Cal. 9; Wells v. Stout, 9 Cal. 480; Re McEachran, 82 Cal. 219, 23 Pac. 46; Cohen v. Knox, 90 Cal. 266, 13 L.R.A. 711, 27 Pac. 215; Knox v. Moses, 104 Cal. 502, 38 Pac. 318. . . . But the intent is a question of fact, and must be averred and proved. A voluntary conveyance is not prima facie fraudulent, and a fraudulent intent is not to be arrived at as a presumption of law. Civil Code, § 3442; Threlkel v. Scott, 89 Cal. 351, 26 Pac. 879; Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557; Bull v. Bray, 89 Cal. 286, 13 L.R.A. 576, 26 Pac. 873. . . . There must be evidence upon which the jury or court can base a finding of the fact that the intent of the grantor at the time of the grant was to defraud his creditors." But in Shiels v. Nathan, supra, this case is cited with approval, and held applicable because the con-

veyance devesting the decedent of all his property rendered him insolvent, and brought him within the rule announced in Emmons v. Barton, supra.

Sec. 8173 covers both realty and personalty, authorizing the recovery of either or both under the facts. This renders unnecessary a discussion of § 5000, further than to state that it is already settled in Seybold v. Grand Forks Nat. Bank, 5 N. D. 460, 67 N. W. 682, that the statute declares but the common law, and announces the necessity of the same essentials, except proof of fraudulent nature of the transfer, to subject a gift *causa mortis* to the payment of debts against a decedent's estate as is required by § 8173, Rev. Codes 1905. But to prevent confusion in the application of this precedent, it is well to determine the status of this property, so far as the estate of the grantee and transferee is concerned. The transfers are not void, and the administrator standing in the shoes of the decedent who executed the fraudulent conveyances can assert their invalidity only for the purpose and so far as necessary to pay debts, and can take the property transferred only to that extent. Tully v. Tully, 137 Cal. 60, 69 Pac. 700. "The transfer was valid as between the parties, and it could not be considered as void in law in the absolute sense." Statutes as to fraudulent conveyances are designed to protect creditors, and are not intended to affect in any manner the rights of the parties themselves to the conveyances, or their heirs. Charles v. White, 214 Mo. 187, 21 L.R.A.(N.S.) 481, 127 Am. St. Rep. 674, 112 S. W. 545; Brasie v. Minneapolis Brewing Co. 67 L.R.A. 865, and note at page 889 (87 Minn. 456, 94 Am. St. Rep. 709, 92 N. W. 340). Though these transfers are fraudulent the judgment should be that the property fraudulently conveyed, or so much thereof as is necessary, be applied to the satisfaction of their debts, and that the residue, if any, go to the grantee; and the property cannot go into the assets of the estate for any other purpose than the payment of the debts. Re Vance, 141 Cal. 624–628, 75 Pac. 323. Emmons v. Barton, supra, announces a rule for the entry of judgment in this case, should plaintiff eventually recover. Ackerman v. Merle, 137 Cal. 157, 69 Pac. 982. "If the unfortunate holders of the fraudulent conveyances think that there is a large margin of value in their property in excess of the creditors' claims, that ought not to be handled by the administrator, the law leaves

them to remedy their ills by paying off the creditors that they sought to defraud. The creditors once paid, there would be no creditors and no ground of action for the benefit of creditors," under § 1589, California Civil Code, same as § 8173, Rev. Codes 1905. The administrator, if he finally recovers, is entitled to select so much of the personal property as shall be reasonably necessary and sufficient to pay this claim and all costs, inclusive of costs of county court; have title decreed in him for the purposes of sale; sell the same and pay the debts and costs and render the surplus, if any, back, with an accounting, to defendant. After personalty is sold, any deficiency may be taken from real estate, to which, to that extent, resort may be had. Shiels v. Nathan, 12 Cal. App. 604, at page 622, 108 Pac. 34.

The defendant offered to show payment of the note. A demurrer was sustained, the court holding the defense of payment not available in this action. Proof tending to show that the claim had been paid in full was likewise disregarded on objection "that the matter of the debt is *res judicata,* and is not open to a collateral attack in this court," the approval of the claim by the county judge being conclusive in this action. Proceedings had in the probate court are in evidence, and show a formal order reciting its presentation November 15, 1910, and its approval of that date, and later an appointment of plaintiff as administrator.

There is thus presented the question, new in this jurisdiction, of whether the litigation of the merit of this claim in this equitable action would be an invasion of the exclusive original jurisdiction of the county court to administer estates of decedents. An extended search of the authorities discloses a demarcation in jurisdiction, in cases similar to this, often more theoretical than actual. Sec. 111 of our Constitution provides: "The county court shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, the sale of lands by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law." Administration of estates, and particularly "the settlement of the accounts of executors and administrators," necessarily includes the establishment and payment of debts of the decedent's estate, and belongs to the "exclusive original jurisdiction in

probate and testamentary matters, "so vested in the county court. And this includes the power to litigate the validity of claims against estates and to enter final judgment thereon as against the estate. No other court possesses this power, except as an exercise of appellate jurisdiction, as a judgment against the decedent must be filed and ranked as a claim against the estate, and a judgment in a court of law against the administrator has but the force of an approved or established claim against the differing from ordinary judgments of courts of law in that it is no lien upon real estate in course of administration, and in that no execution can be issued or levied; otherwise a preference might thus in effect be obtained thereby. The appellate jurisdiction of the district court at law is exerciseed on an appeal from the confirmation of the report of a referee taken under §§ 8110 and 8111; or on an appeal from the allowance of an administrator's account (§§ 8189–8199 and 7985), which to be valid must be had on notice (Sjoli v. Hogenson, 19 N. D. 82–96, 122 N. W. 1008); or on an appeal from the sale of the property (§§ 7964, 7965). There is no appeal from the *ex parte* allowance and approval of a claim by the personal representative and the county judge. And in this action, brought under § 8173, in equity (a creditors' bill to recover assets that would, but for a fraudulent conveyance, be a part of and inventoried as assets of the estate, and subject to the exclusive original jurisdiction of the probate court to administer thereon), the administrator is but the personal representative of the estate, as to creditors and heirs, legatees and devisees, and exercises thereunder a statutory power conferred in aid of probate jurisdiction by §§ 8173, 8160 and 8161. This equitable action is but ancillary to administration, to aid which it is brought; that the administration claims, prima facie established as debts by the approval of the administrator or by judgment against the estate, may be paid in course of administration by applying the property procured in equity to the payment of the debts established as such in probate. So viewed, the debt remains for final adjudication as a part of the administration, the establishment of claims in turn but a part of the judgment determined in the "settlement of the accounts of the administrator," the exclusive, original jurisdiction of which is in the county court under constitutional mandate. Equity will not lend its powers to determine

issues properly triable at law, neither will it do so to pass upon debts,—a determination properly belonging to and a part of the administration of estates. But as in law, in aid of the enforcement of legal rights and after a party has exhausted his legal remedy, or when all further pursuit of the debt in law must be useless and remediless, equity will assume jurisdiction in aid of law and as supplementary thereto; so here it likewise brings into administration, to pay debts established in course of administration, property in equity belonging to the estate, but held by third persons through fraudulent conveyance by the intestate. Note to Ladd v. Judson, 66 Am. St. Rep. 276, 20 Cyc. 672C and 282E. This but leads inevitably to the conclusion that this equitable action is necessarily but secondary to and in aid of administration, which primarily, in this case, is to pay the debts of the estate, there being no legacy, devise, or inheritance to effectuate. The approval of the claim by the county judge established the claim conclusively, so far as the district court action was concerned, the issue in which is not to litigate the debt, but the recovery of property alleged to belong to the estate, the right or power to sue being established by the probate record of the administrator's appointment and the approval of the claim. The district court findings should not attempt to establish that the claim is a debt owing by the estate, but only the identity of the claimant and the amount at which his claim has been approved by the probate court, leaving open to further adjudication in that court the actual validity of the claim not yet conclusively established in the probate court as a debt, but only prima facie established, the validity of which debt may yet be drawn in question by the fraudulent grantee of the intestate upon the hearing for the allowance of the administrator's account, or upon application made in probate to sell any property, real or personal, that may be decreed to be a part of the estate in this suit in equity. But any hearings involving the validity of the debt are adjudications necessarily to be had in the first instance in county court, from any order so entered an appeal to the district court being allowable. It is to be emphasized that the denial of the defendant's right to prove payment, under her plea of payment in the district court action, is not based upon any theory of estoppel by judgment, as the great weight of authority is that the *ex parte* approval of the county

veyance devesting the decedent of all his property rendered him insolvent, and brought him within the rule announced in Emmons v. Barton, supra.

Sec. 8173 covers both realty and personalty, authorizing the recovery of either or both under the facts. This renders unnecessary a discussion of § 5000, further than to state that it is already settled in Seybold v. Grand Forks Nat. Bank, 5 N. D. 460, 67 N. W. 682, that the statute declares but the common law, and announces the necessity of the same essentials, except proof of fraudulent nature of the transfer, to subject a gift *causa mortis* to the payment of debts against a decedent's estate as is required by § 8173, Rev. Codes 1905. But to prevent confusion in the application of this precedent, it is well to determine the status of this property, so far as the estate of the grantee and transferee is concerned. The transfers are not void, and the administrator standing in the shoes of the decedent who executed the fraudulent conveyances can assert their invalidity only for the purpose and so far as necessary to pay debts, and can take the property transferred only to that extent. Tully v. Tully, 137 Cal. 60, 69 Pac. 700. "The transfer was valid as between the parties, and it could not be considered as void in law in the absolute sense." Statutes as to fraudulent conveyances are designed to protect creditors, and are not intended to affect in any manner the rights of the parties themselves to the conveyances, or their heirs. Charles v. White, 214 Mo. 187, 21 L.R.A.(N.S.) 481, 127 Am. St. Rep. 674, 112 S. W. 545; Brasie v. Minneapolis Brewing Co. 67 L.R.A. 865, and note at page 889 (87 Minn. 456, 94 Am. St. Rep. 709, 92 N. W. 340). Though these transfers are fraudulent the judgment should be that the property fraudulently conveyed, or so much thereof as is necessary, be applied to the satisfaction of their debts, and that the residue, if any, go to the grantee; and the property cannot go into the assets of the estate for any other purpose than the payment of the debts. Re Vance, 141 Cal. 624–628, 75 Pac. 323. Emmons v. Barton, supra, announces a rule for the entry of judgment in this case, should plaintiff eventually recover. Ackerman v. Merle, 137 Cal. 157, 69 Pac. 982. "If the unfortunate holders of the fraudulent conveyances think that there is a large margin of value in their property in excess of the creditors' claims, that ought not to be handled by the administrator, the law leaves

them to remedy their ills by paying off the creditors that they sought to defraud. The creditors once paid, there would be no creditors and no ground of action for the benefit of creditors," under § 1589, California Civil Code, same as § 8173, Rev. Codes 1905. The administrator, if he finally recovers, is entitled to select so much of the personal property as shall be reasonably necessary and sufficient to pay this claim and all costs, inclusive of costs of county court; have title decreed in him for the purposes of sale; sell the same and pay the debts and costs and render the surplus, if any, back, with an accounting, to defendant. After personalty is sold, any deficiency may be taken from real estate, to which, to that extent, resort may be had. Shiels v. Nathan, 12 Cal. App. 604, at page 622, 108 Pac. 34.

The defendant offered to show payment of the note. A demurrer was sustained, the court holding the defense of payment not available in this action. Proof tending to show that the claim had been paid in full was likewise disregarded on objection "that the matter of the debt is *res judicata,* and is not open to a collateral attack in this court," the approval of the claim by the county judge being conclusive in this action. Proceedings had in the probate court are in evidence, and show a formal order reciting its presentation November 15, 1910, and its approval of that date, and later an appointment of plaintiff as administrator.

There is thus presented the question, new in this jurisdiction, of whether the litigation of the merit of this claim in this equitable action would be an invasion of the exclusive original jurisdiction of the county court to administer estates of decedents. An extended search of the authorities discloses a demarcation in jurisdiction, in cases similar to this, often more theoretical than actual. Sec. 111 of our Constitution provides: "The county court shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, the sale of lands by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law." Administration of estates, and particularly "the settlement of the accounts of executors and administrators," necessarily includes the establishment and payment of debts of the decedent's estate, and belongs to the "exclusive original jurisdiction in

probate and testamentary matters, "so vested in the county court. And this includes the power to litigate the validity of claims against estates and to enter final judgment thereon as against the estate. No other court possesses this power, except as an exercise of appellate jurisdiction, as a judgment against the decedent must be filed and ranked as a claim against the estate, and a judgment in a court of law against the administrator has but the force of an approved or established claim against the differing from ordinary judgments of courts of law in that it is no lien upon real estate in course of administration, and in that no execution can be issued or levied; otherwise a preference might thus in effect be obtained thereby. The appellate jurisdiction of the district court at law is exerciseed on an appeal from the confirmation of the report of a referee taken under §§ 8110 and 8111; or on an appeal from the allowance of an administrator's account (§§ 8189–8199 and 7985), which to be valid must be had on notice (Sjoli v. Hogenson, 19 N. D. 82–96, 122 N. W. 1008); or on an appeal from the sale of the property (§§ 7964, 7965). There is no appeal from the *ex parte* allowance and approval of a claim by the personal representative and the county judge. And in this action, brought under § 8173, in equity (a creditors' bill to recover assets that would, but for a fraudulent conveyance, be a part of and inventoried as assets of the estate, and subject to the exclusive original jurisdiction of the probate court to administer thereon), the administrator is but the personal representative of the estate, as to creditors and heirs, legatees and devisees, and exercises thereunder a statutory power conferred in aid of probate jurisdiction by §§ 8173, 8160 and 8161. This equitable action is but ancillary to administration, to aid which it is brought; that the administration claims, prima facie established as debts by the approval of the administrator or by judgment against the estate, may be paid in course of administration by applying the property procured in equity to the payment of the debts established as such in probate. So viewed, the debt remains for final adjudication as a part of the administration, the establishment of claims in turn but a part of the judgment determined in the "settlement of the accounts of the administrator," the exclusive, original jurisdiction of which is in the county court under constitutional mandate. Equity will not lend its powers to determine

issues properly triable at law, neither will it do so to pass upon debts,—a determination properly belonging to and a part of the administration of estates. But as in law, in aid of the enforcement of legal rights and after a party has exhausted his legal remedy, or when all further pursuit of the debt in law must be useless and remediless, equity will assume jurisdiction in aid of law and as supplementary thereto; so here it likewise brings into administration, to pay debts established in course of administration, property in equity belonging to the estate, but held by third persons through fraudulent conveyance by the intestate. Note to Ladd v. Judson, 66 Am. St. Rep. 276, 20 Cyc. 672C and 282E. This but leads inevitably to the conclusion that this equitable action is necessarily but secondary to and in aid of administration, which primarily, in this case, is to pay the debts of the estate, there being no legacy, devise, or inheritance to effectuate. The approval of the claim by the county judge established the claim conclusively, so far as the district court action was concerned, the issue in which is not to litigate the debt, but the recovery of property alleged to belong to the estate, the right or power to sue being established by the probate record of the administrator's appointment and the approval of the claim. The district court findings should not attempt to establish that the claim is a debt owing by the estate, but only the identity of the claimant and the amount at which his claim has been approved by the probate court, leaving open to further adjudication in that court the actual validity of the claim not yet conclusively established in the probate court as a debt, but only prima facie established, the validity of which debt may yet be drawn in question by the fraudulent grantee of the intestate upon the hearing for the allowance of the administrator's account, or upon application made in probate to sell any property, real or personal, that may be decreed to be a part of the estate in this suit in equity. But any hearings involving the validity of the debt are adjudications necessarily to be had in the first instance in county court, from any order so entered an appeal to the district court being allowable. It is to be emphasized that the denial of the defendant's right to prove payment, under her plea of payment in the district court action, is not based upon any theory of estoppel by judgment, as the great weight of authority is that the *ex parte* approval of the county

court, were the assault thereon made in that court, would not be given force of a judgment or estop the heir or grantee. Freeman, Judgm. § 163; Black, Judgm. § 558–560; Cooley, Const. Lim. §§ 81, 82; 18 Cyc. 510B; Simons, Prob. Pr. §§ 468, 469; Ross, Prob. Law & Pr. 545; 1 Church, New Prob. Law & Pr. 724; Noe v. Moutray, 170 Ill. 169–175, 48 N. E. 709; Note to 65 Am. Dec. 118, at page 125. Especially is this true as to real property, title to which descends direct from the intestate to the heir or devisee, though, in this state, encumbered by or subject to valid debts of the estate. Rev. Codes 1905, §§ 8071–8160 and 8162. Instead, it is the exclusive original jurisdiction of the county court to determine the validity of this claim in the first instance that excludes the proof here offered. But it might be urged that the *ex parte* approval of the claim is a prima facie determination of it sufficient to clothe the administrator with the power to sue under the statutes, but with the suit in its progress to be governed, as to proof and defenses, as is the ordinary suit in equity. But this, though plausible, disregards the fundamental principle that it is not a question of the power or procedure of the court of equity or of the administrator to invoke the aid of that court that is in question, but, instead, the real question is which court has original jurisdiction to determine the validity of debts asserted against estates of decedents. This is answered by our Constitution. Morgan's Estate, 46 Or. 233, 77 Pac. 608, and again in 78 Pac. 1029; 1 Woerner, Am. Law of Administration, §§ 150–155. It may be urged that the suit in equity is but an indirect appeal on the question of debt, but this contention is condemned by the entire theory upon which creditors' bills in equity are allowed, they being not to review the debt, but to enforce its payment. Besides, the defendant is by statute afforded ample opportunity, after this judgment, to litigate in county court, or on appeal therefrom, the question of debt. Nor can the court permit defendant to controvert the indebtedness on any plea that the administrator has entered a court of equity, and that it would be inequitable or useless for equity to aid in the enforcement of a debt that was paid. Under the statute the approval of the debt by the county judge has the force and effect, so far as this creditors' bill is concerned, of a judgment. Rev. Codes 1905, §§ 8108–8109. Proof of its approval, or that the claim is in judgment

and has been filed with the administrator, is necessary to prove power to sue. The validity of the debt cannot be drawn in issue. In addition thereto the administrator must establish a deficiency of assets of the estate to pay the claim or claims, that is, proof of the insolvency of the estate; and that the conveyance by which grantee obtained title was made in fraud of his creditors, and that the claimant was a creditor so defrauded by the decedent, that is, was a creditor before the transfer was made. Upon the court finding these facts, the grantee, by operation of the judgment rendered thereon, continues the owner of the title thus determined to be fraudulently received, but with the property charged with the right in the administrator to sell the same, in the course of administration, to satisfy debts determined by the probate court as owing by the estate. Whether the administrator can sue upon this claim, and apply the property taken to the payment of claims other than or in addition to the one exhibited in the equity action, is doubtful, but we do not determine the question. It is well to here indicate the course of procedure to be followed to collect claims as this against insolvent estates, and where no personal representative has been appointed. The creditor first petitions for administration (§ 8024), establishing his interest as a party in suit by alleging his claim. The validity of his claim is not in issue on this petition. Otherwise a petitioner would have his claim thus established by the granting of letters of administration to himself or some other party. The law requires that the personal representative shall then give notice to creditors to present claims, during which period the petitioning creditor must present his claim for allowance, as must all other creditors. It is thereafter approved by the county judge, and as an approved claim constitutes a basis upon which an equitable action, such as this, may be maintained by the administrator. Not that it is necessary that the four or six months' period for presentation of claims shall expire before the commencement of the creditors' bill in equity, as suit may be immediately begun upon such allowance, and after the expiration of the period within which to present claims the administrator may, by supplemental bill, allege all the claims then approved, and thus establish the amount for which the property fraudulently obtained and held shall respond for the payment of claims prima facie but not yet conclusively estab-

lished in administration until the administrator's accounting is approved. This is an outline of the procedure contemplated in the Probate Code in cases of this kind.

The result of a review of the authorities would not be complete without distinguishing some that may be cited apparently until the Constitutions and statutes are investigated—opposed to this holding. Some states have held that the claimant may maintain a creditors' bill for the same purpose as this one is intended, and establish his claim thereon, without going into probate. California has so held. Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358, though contrary to its line of holdings; Mesmer v. Jenkins, 61 Cal. 151; Aigeltinger v. Einstein, 143 Cal. 609–615, 101 Am. St. Rep. 131, 77 Pac. 669; Shiels v. Nathan, 12 Cal. App. 604, 108 Pac. 34, and cases cited in these reports. While California has, in the main, our statutory procedure in probate, and a great portion of our statute evidently was taken from that state, yet in applying our statutes, under our constitutional provisions clearly defining the jurisdiction of our probate court, it is necessary to distinguish between the present and past California constitutions and our own as to probate jurisdiction. That state has had three different constitutions, and the question of whether probate jurisdiction was there conferred by statute or by the constitution has been much in question. Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458. And the second matter of much significance is that probate and administration matters are not there handled in a separate court, but, instead, are vested in the court of general jurisdiction of law and equity and probate, the superior court. The result has inevitably been a tendency to ignore jurisdictional lines of demarcation, or give them less importance than though probate jurisdiction was vested in a separate court and under clearly defined constitutional enactments. In this state our Constitution guarantees stability of probate jurisdiction in the matters therein defined, and confers upon the legislature power to further define the same by legislative act as to other matters not plainly within the original jurisdiction of other courts. See Constitution, § 111. Other states, as New York, have not conferred upon the probate court jurisdiction to litigate disputed claims (2 Williams, Exrs. & Admrs. 249), but, instead, leave that to courts of general jurisdiction. When this is kept in mind one can see why cases otherwise on all fours with this, as

illustrated by Sharpe v. Freeman, 45 N. Y. 802; Johnson v. Johnson, 63 Hun, 1, 17 N. Y. Supp. 570; Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502; Butler v. Johnson, 41 Hun, 206–211; Cook v. Ryan, 29 Hun, 249; Platt v. Platt, 105 N. Y. 488, 12 N. E. 22; Burnham v. Burnham, 46 App. Div. 513, 62 N. Y. Supp. 120, and similar holdings apparently contrary to this, are inapplicable, in many of which defendants were permitted to litigate the validity of the claim upon which the administrator sued to recover assets for an estate. Besides, in New York, the right of a creditor to sue is especially conferred by statute, and which statute would in no wise conflict with any constitutional provisions, inasmuch as the power to establish the claim by suit is in courts of general jurisdiction. For a general discussion and classification of these statutes see § 1152, and extensive note in Pomeroy's Equity Jurisprudence, Third Edition; O'Connor v. Boylan, 49 Mich. 209, 13 N. W. 519; Woerner, Am. Law of Administration, § 392; 3 Williams, Exrs. & Admrs. 665, and note; and 2 Williams, Exrs. & Admrs. 249, and note. Nor is our holding contrary to the right of recovery for death by wrongful act, permitted by our statutes, wherein the administrator sues, as such a recovery is not for the estate, but for the next of kin, and the proceeds of such recovery are not subject to administration. Satterberg v. Minneapolis, St. P. & S. Ste. M. R. Co. 19 N. D. 38, 121 N. W. 70. Construing § 7698, Rev. Codes 1905. See also Willard v. Mohn, 24 N. D. 390, 139 N. W. 979.

The judgment of the lower court in staying action by the administrator on the judgment is under review. The administrator is seeking relief on behalf of the estate. It is proper and the duty of the court of equity to not only permit the property to be subjected to the payment of the claim proven in course of administration, but also to conserve said property, and keep the same as a fund to which resort may be had by the administrator only after hearing had in probate court on his accounting, as may be had under § 8123; and upon which hearing this grantee and heir may be heard to urge her defense of payment of the claim, and, if decided adversely to her, a review be had in the district court on appeal. An interlocutory judgment may be entered in this action, with equitable relief to abide the event of the final determination of the issue of payment in the probate court or on appeal, if taken. The findings and judgment should not determine the amount, but merely

that the administrator sues for the benefit of a claimant whose claim has been approved by the county court at a certain amount, as prima facie a creditor of the estate. The district court is without jurisdiction to otherwise pronounce judgment upon the debt, it not exercising appellate jurisdiction. The findings and judgment will also describe all the property so fraudulently conveyed and received, and adjudge that the grantee holds title to the same subject to the claim in suit; and that the property may be taken to the amount necessary for its payment, in addition to costs of administration incurred in its collection. The property may be inventoried, and report thereof, with this claim, made to the probate court, upon which an accounting may be had, and further order made concerning this property (§ 8123), wherein all parties interested may participate, and thus, without a sale thereof, the issue of payment be decided in the county court in advance of dispossessing defendant of her property. Should the issue of payment be eventually determined in favor of the claimant, the administrator should exhaust the personal property before resort to realty, notwithstanding the apparently contrary final provision of § 8093, Rev. Codes 1905, which must be construed with § 8130, et seq. But all property conveyed is held subject to the payment of this claim, but personalty to be first applied thereto. Thus the rights of both creditor or administrator and grantee may be protected in this equitable action.

With the slight modifications as herein indicated, to be made in the judgment appealed from, the same is affirmed. The administrator will recover his taxable costs and disbursements on both appeals, if he shall, on final judgment in county court, establish the validity of his claim, on hearing after notice to Mary Rutherford. If final judgment of the county court be for a dismissal of claimant Harvey's claim, as invalid or fully paid, final decree shall be entered herein dismissing this action and taxing all Mary Rutherford's costs and disbursements, on trial and on this appeal, to be entered as a judgment against the administrator plaintiff, who, we assume, has indemnified himself against loss by security taken from creditor claimant Harvey.

Let judgment be entered accordingly.

Goss, J. (on petition for rehearing filed May 21, 1914). Counsel for Mary Rutherford has filed what, speaking mildly, may be called a

vigorous petition for rehearing. Counsel protests against the conclusion that the transfers are to be deemed fraudulent.

He insists that fraud is dependent upon the intent of the grantor at the time of the grant, and that a fraudulent intent in the grantor must be found to have existed in fact, before the transfer can be held to have been fraudulent, and that, as the trial judge has found that the conveyances were not in fact made with intent of the grantor to defraud, such transfers cannot be held fraudulent under §§ 6637 and 6640, Rev. Codes 1905. He calls attention also to the fact that in 1895 the California statute (corresponding to our § 6640) was amended by adding thereto: "provided, however, that any transfer or encumbrance upon property, made or given voluntarily or without a valuable consideration, by a party, while insolvent or in contemplation of insolvency, shall be fraudulent and void as to existing creditors." Prior to such amendment the California statutes under discussion were identical with our own, and the courts of that state held, as our court has held in Stevens v. Meyers, 14 N. D. 398, 104 N. W. 529, that under the mandate of the statute (our present § 6640) "the question of intent is always one of fact; it must be alleged, proved, and found in order to avoid the transfer." Such is the interpretation to be given to § 6640. Counsel asserts that this court is astray in following Shiels v. Nathan, 12 Cal. App. 604, 108 Pac. 34, because that opinion was based upon the California statute as so amended.

That a conveyance may be held to be fraudulent the question of fact arises on the intent; and the determination thereof involves a question of fact, and not of law. Such is our statute and such its construction under Stevens v. Meyers, supra. And under § 8173 the intent to defraud must be present under the express terms of that portion of the statute so prescribing, as well as under that portion thereof having reference to an estate so conveyed, "that by law the deeds or conveyances are void as against creditors." The issue thus presented on trial *de novo* is one of fact, and to be determined as such under the evidence, with the usual presumptions to be drawn therefrom. And each case of alleged fraudulent transfer must stand largely on its own facts. What is said in Stevens v. Meyers, supra, concerning an attachment levied some four months after a transfer, and wherein it was necessary to prove intent to cheat and defraud creditors of the transferrer, must

have reference to the facts of that case, and read in the light of its facts. Those before us disclose a grantor and owner of much property, with approaching dissolution close at hand, desirous of transferring all his property to his wife for the only possible purpose of vesting his estate in her after his death, and avoiding administration or probate proceedings thereon, and with a debt of considerable size outstanding and unpaid, for which he made no provision for payment. This transfer was made after the owner had been informed "that the instrument would be perfectly good if the debts were paid." Whether this statement be construed as a caution given him that the transfers would not be valid if there were outstanding debts, and the conveyance to be made did not provide for their payment; or whether the conveyance was made to the wife for her to thereafter pay the debts to remove any chance of invalidity, is immaterial, except that, in the latter case, the present refusal of the wife to pay would evidence an actual intent on her part to now defraud decedent's creditors, and discredit her present declared claim of having no fraudulent intent toward her husband's creditors at the time she accepted the conveyance, and the persistence of her defense in this equitable action, built around averred absence of intent on the decedent's part and her own as well,—a defense that is more unequitable than meritorious, inasmuch as this court has left the door open for her to establish, if she has it, her alleged defense of payment in full—but emphasize the necessity of care in determining the fact of whether the conveyance should be held fraudulent or not, that an open door to defraud may not be established by this precedent. "Evidence of the fraudulent use subsequently made of a deed or mortgage may be shown to prove the fraudulent intent with which the instrument was made." Moore, Fraudulent Conveyances, § 926.

That the fraudulent intent is to be established as a fact, under § 6640, does not bar application of the usual presumptions of fact from the evidence. Bigelow, Fraudulent Conveyances, 1911 ed. 78, 79, and note. The evidence concerning intent should be weighed no differently than usual in cases where the intent must be found. Even in criminal cases, where the presence of an intent constitutes the gist of the crime, and the absence thereof establishes innocence, intent nevertheless is determined by the application of presumptions of fact to facts in evidence, and it is therefore proper to instruct the jury that the law

will permit them to assume that, in the absence of evidence to the contrary, one is presumed to intend the natural and probable consequences of his voluntary acts; and that, in determining intent, such presumption may be considered with the evidence of intent. Such presumption has equal application here in determining the fact of the presence of the fraudulent intent at the time of the transfer, the rule being as applicable in cases triable by a court as in those determinable by a jury.

There is evidence determinative of intent, besides the fact of the voluntary conveyance made without consideration, which fact in itself, by the terms of § 6640, is insufficient to establish a prima facie case of fraudulent transfer. The grantor intentionally transferred title to, and control of, every vestige of his property, and this without having made any provision for the payment of his debts, unless it be construed under the evidence that he intended his wife to pay his debts out of the property transferred to her. It cannot be said that the grantor supposed he had no debts, as, under the record, he is presumed to have known that he was owing this claim, and, with such knowledge, voluntarily alienated all his property. He could not in his lifetime, after this transfer, be heard to say that he did not know the effect of such alienation would be to "obstruct the enforcement by legal process of his creditor's right to take the property affected by the transfer" (Rev. Codes 1905, § 6629), as, when proof is made of the intentional act, the law, in the absence of evidence to the contrary, presumes that the person acting intended the natural and probable consequences of his act, voluntarily creating his insolvency. Nor does the fact that the grant was a death-bed transfer change the situation from the ordinary voluntary transfer without valuable consideration by a debtor of all his property to his wife. This transaction is to be regarded in no different light because the debtor, shortly thereafter, died, than it would be regarded had he recovered and were still living. The subsequent fact of death cannot change the nature of the transfer from fraudulent to valid. If this transfer was fraudulent during the period after delivery of the deeds to the death of the grantor, it still remains a fraudulent transfer. If it be contended that a grantor *in extremis* is not in all probability in such a frame of mind as to intentionally defraud, and that the transfer is therefore valid, it follows that no transfer made under such circumstances could ever be attacked successfully, should he

have reference to the facts of that case, and read in the light of its facts. Those before us disclose a grantor and owner of much property, with approaching dissolution close at hand, desirous of transferring all his property to his wife for the only possible purpose of vesting his estate in her after his death, and avoiding administration or probate proceedings thereon, and with a debt of considerable size outstanding and unpaid, for which he made no provision for payment. This transfer was made after the owner had been informed "that the instrument would be perfectly good if the debts were paid." Whether this statement be construed as a caution given him that the transfers would not be valid if there were outstanding debts, and the conveyance to be made did not provide for their payment; or whether the conveyance was made to the wife for her to thereafter pay the debts to remove any chance of invalidity, is immaterial, except that, in the latter case, the present refusal of the wife to pay would evidence an actual intent on her part to now defraud decedent's creditors, and discredit her present declared claim of having no fraudulent intent toward her husband's creditors at the time she accepted the conveyance, and the persistence of her defense in this equitable action, built around averred absence of intent on the decedent's part and her own as well,—a defense that is more unequitable than meritorious, inasmuch as this court has left the door open for her to establish, if she has it, her alleged defense of payment in full—but emphasize the necessity of care in determining the fact of whether the conveyance should be held fraudulent or not, that an open door to defraud may not be established by this precedent. "Evidence of the fraudulent use subsequently made of a deed or mortgage may be shown to prove the fraudulent intent with which the instrument was made." Moore, Fraudulent Conveyances, § 926.

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recover. Such a presumption must at best be a mere speculation, dependent largely upon the individual characteristics of the grantor, and whether his anxiety to reimburse his creditors would outweigh, or, on the other hand, be subordinated to, his desire to leave his property beyond their reach, and for the benefit of the family surrounding the death-bed, desire for adequate property provision for whom might naturally induce a disregard by the grantor, even under such circumstances, of the rights of his creditors to his property. On the whole, it would seem that the transfer should be regarded as though intentionally made under ordinary circumstances, with knowledge of debts unpaid, and with the usual presumptions of fact and law applying. If deceased were still alive, and both he and his wife were contending that this property should not be applied to his debts, because at the time of the transfer he honestly believed that his death would soon occur, and the transfer was so made as a provision for his family, notwithstanding his admitted insolvency and his knowledge of the effect of the transfer upon the rights of his creditors at the time that he executed a conveyance, all precedent would condemn the transfer as fraudulent as to existing creditors. And to sustain the contention of the widow under the facts before us is in practical effect the equivalent of repealing to that extent Rev. Codes 1905, § 8173, under which the administrator seeks this property. If this transfer is not fraudulent as to creditors, one thus made a considerable time before death is not fraudulent. If this decedent can clothe his wife in this manner with ownership of his estate freed from his debts, there is force in the contention of the administrator, that all one needs to do to provide for his family after death is to so manage his business affairs that he may die seized of much real estate, while keeping his debts unsecured, no matter what their amount, and then, shortly before death, deed it over to his family, thereby avoiding not only administration of his estate, but the payment of his honest debts, although their payment might consume the entire property. The size of the claim in relation to the property transferred must be largely immaterial, as the right of the creditor to payment is the same whether the estate comprises one or ten sections. Sec. 8173 takes care of any inequality of the debt to the estate, by providing that only so much of the estate as is necessary to pay the debt may be

taken, and to all the world beside the creditor, or the administrator acting for him, the conveyance is valid.

But counsel contends that the California precedent we have followed has been influenced by the 1895 amendment thereto, adding the provision, that any transfer or encumbrance of property, made or given "voluntarily, or without valuable consideration by a party while insolvent or in contemplation of insolvency, shall be fraudulent and void as to existing creditors." Counsel contends that this statute influenced the decision of Shiels v. Nathan, 12 Cal. App. 604, 108 Pac. 34, and that, in following that precedent, we are indirectly following a case based upon construction of a statute, and when we have no corresponding statutory provision. Counsel's contention is without foundation, and contrary to the California decisions. If the opinion in Shiels v. Nathan be taken at its face, it is based entirely and alone upon that court's construction of § 1589, Code Civil Procedure of California, identical with § 8173, Rev. Codes 1905. In Shiels v. Nathan, the court is careful not to base its decision upon the 1895 amendment, as appears from the following excerpt from the opinion, found at page 621 of 12 Cal. App., at page 41 of 108 Pac.: "Whether § 1589, Code Civil Procedure, is to be given the same effect as § 3442 of the Civil Code [containing the 1895 amendment], need not be decided." The court refrains from placing its decision upon the statute as amended, but, instead, announces that it is following Emmons v. Barton, 109 Cal. 662, 42 Pac. 303. By reference to that case we find a decision filed November 7th, 1895, presumably upon an appeal taken before the statute of 1895 was enacted, and upon a transfer made in 1890, five years before the amendment. Hence, Emmons v. Barton, supra, must have been decided without reference to the 1895 amendment. It holds: "Pronounced insolvency at the time of the grant would no doubt be a strong circumstance tending to show fraudulent intent, and in the absence of other controlling facts *it would be sufficient to justify a finding of such intent;*" and is again quoted in Shiels v. Nathan, as the presumption of fact applying when, as there stated, "by the conveyance he rendered himself insolvent. Strictly he was not insolvent when he made the conveyance, but, coincidentally with and by that act he became insolvent. And this we think brings the case within the

rule in Emmons v. Barton, supra, and justifies the finding that the conveyance was with fraudulent intent to defraud his creditors." No cases cited by counsel conflict with or modify Emmons v. Barton, or Shiels v. Nathan, supra. Nor is this precedent based upon any except statutes identical with our own. Nor does our holding conflict with or overrule in any particular Stevens v. Meyers, 14 N. D. 398, 104 N. W. 529. Colorado has an exact duplicate of our § 6640, Rev. Codes 1905 in § 2033, Mills's Anno. Stat. of 1891, or § 3073, Mills's Anno. Stat. of 1912, construed in Wells v. Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809, reviewing decisions of that state. After quoting that statute the court says: "It may be and doubtless is true that no corrupt motive prompted Hosea in making the settlement [gift of real estate as a settlement for a daughter by her father]; nor was there any participation in the wrongful intent, if any, upon the part of the grantee. But where, as here, the conveyance is in the nature of a gift, it is not necessary to show participation in the fraud by the grantee." Knapp v. Day, 4 Colo. App. 21, 34 Pac. 1008.

Minnesota has our statute § 6640. See Revised Laws of Minnesota of 1905, § 3500; Gen. Stat. Minn. of 1913, § 7015, construed by the Federal circuit court of appeals of that district, in Hessian v. Patten, 83 C. C. A. 545, 154 Fed. 829, in which it is declared: "A voluntary conveyance by an insolvent grantor is fraudulent in itself because such a deed cannot be made without hindering and defrauding his creditors;" having reference to a voluntary conveyance without a valuable consideration, and citing, among others, the case of McCord v. Knowlton, 79 Minn. 299, 82 N. W. 589.

This is clearly a gift by the husband to the wife, made in the form of deed, instead of a will, to avoid necessity of probate or administration. For all purposes she has no equities or interest in the property except it be subject to creditors. No good reason in fact or law exists why it should be treated in equity, as to existing creditors, other than as a will or devise, if the fact of the death of donor be considered at all.

Petition is denied.

BOVEY-SHUTE LUMBER COMPANY, a Corporation, v. CHARLES LAKEFIELD.

(147 N. W. 720.)

Judgment by default — motion to vacate — failure of attorney to answer — denial of motion — abuse of discretion.

Facts examined, and *held* that denial of defendant's motion to vacate a default judgment, taken against him because of failure of his attorney to answer, was an abuse of judicial discretion, and erroneous.

Opinion filed May 27, 1914.

Appeal from the County Court of Increased Jurisdiction of Ward County, *N. Davis,* J.

Reversed.

Grace & Bryans, for appellant.

There was a clear abuse of discretion on the part of the trial court in denying defendant's motion to set aside the judgment taken against him by default. Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; Bloor v. Smith, 112 Wis. 340, 87 N. W. 870; Whereatt v. Ellis, 70 Wis. 207, 5 Am. St. Rep. 164, 35 N. W. 314; 23 Cyc. 942; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75; Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

Affidavits presented by the moving party cannot be contradicted as to merits. Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Griswold Linseed Oil Co. v. Lee, 1 S. D. 531, 36 Am. St. Rep. 761, 47 N. W. 955; Gracier v. Weir, 45 Cal. 53.

Greenleaf, Bradford, & Nash, for respondents.

On application to reopen default judgment, defendant is not entitled to an order vacating judgment as a matter of right, but such application is directed to the sound discretion of the court. Freeman, Judgm. § 106; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Nichells v. Nichells, 5 N. D. 125, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73.

Where the motion is heard on contradictory affidavits, and is denied, the decision will rarely be disturbed. Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962; Swanstrom v. Marvin, 38 Minn. 359, 37 N. W. 455; Flanigan v. Duncan, 47 Minn. 250, 49 N. W. 981; Buttz v. Campbell, 15 S. C. 614; Palmer v. Harris, 98 Ill. 507.

Aside from a meritorious defense, the moving party must show diligence to prevent a default. Cline v. Duffy, 20 N. D. 525, 129 N. W. 75; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; Smith v. Watson, 28 Iowa, 218; 6 Enc. Pl. & Pr. 185; Harlan v. Smith, 6 Cal. 173; Jelley v. Gaff, 56 Ind. 331.

Affidavits in opposition to the motion may be presented to show avoidance or to traverse the facts submitted by the moving party. Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581.

Goss, J. This is an appeal from a judgment of the county court of Ward county, denying defendant's application to vacate a default judgment. The application is accompanied with proposed answer and affidavits of merit. Personal service *of summons and complaint* was had August 7, 1912. The same are subscribed by a firm of attorneys of Minot, who, according to the affidavit of one of them, maintain a branch office at Sherwood, with one Lee as their associate attorney at that place. After service of summons and complaint upon defendant, and on August 10, 1912, defendant consulted and discussed his case with Lee in Sherwood, near which place defendant resided, and Lee, either pursuant to defendant's request or at his own suggestion, communicated by letter with his Minot associates concerning the matter in suit. The time to answer expired August 17th, and Lee interposed no answer. His explanation is that he acted under the supposition that defendant understood that he, Lee, was an associate counsel for plaintiff with the Minot firm, and that, from statements made by defendant, he assumed that defendant desired to pay the claim, and that settlement was but a matter of ascertaining the amount due. Lee recites by affidavit that defendant deposited with a Sherwood bank $105 "to prevent the attorneys from taking a judgment against him until he could be informed as to the correct amount," and that defendant further deposited in said bank "on the 30th day of August the additional sum of $11.60; that thereafter on the 31st day of August

defendant came to the residence of deponent (Lee), and then and there stated to deponent that he thought he would fight the case, as he had changed his mind about the matter, and would go to Minot and procure attorneys there to handle the case for him . . . that deponent stated to him that he had a poor chance of winning, but that it was his privilege." "Deponent further deposes that he has never represented to Lakefield that he was not in the employ of his Minot associates, and distinctly stated to Lakefield, in response to his request that deponent fight the case for him, that deponent was in their employ, and that he would have to go to some other place for an attorney." It is also shown that the firm sign of the Minot attorneys is displayed at the "doorway of the office of said firm at Sherwood," wherein Lee had his office. Judgment was entered as by default for want of answer on September 5th, and on the succeeding day proposed answer, together with affidavits of merit and notice of motion, were served on the Minot counsel by the present attorneys for defendant.

Plaintiff's affidavit of merit alleges that after he was served with summons and complaint he went to Lee and employed him "to look after and handle for him said action in all respects." "That he turned over to him the summons and complaint, and all receipts he had in connection with said action, and that Lee informed him that he would look after the case for him, and that he would put in an answer . . . that the said Lee led affiant to believe that he was looking after the case for him and in his behalf, and that he had put in an answer to the complaint, thereby misleading affiant until the plaintiff took judgment against him by default. And that after such judgment was taken Lee informed this affiant that no judgment would be taken, that he was looking after the same, and that Lee informed this affiant that, if he could not handle the same, he would inform him, that he would let him know in time so that he could get other counsel before judgment would be taken against him by default; . . . that on the 30th day of August, 1912, affiant received a letter from the attorneys for the plaintiff, stating that they understood through Lee, of Sherwood, that affiant wanted to settle the case, and that, if settlement was not made, they would proceed to take out execution on the judgment that they had recovered on the same. That this was the first information that your affiant had as to the said Lee being associated with the firm

of attorneys for the plaintiff. That he then immediately went to Sherwood and saw Lee, who then informed him that he could do nothing with the case; that affiant then went right to the city of Mohall . . . and employed his present counsel to look after his interest in the case. That Lee had at all times been misleading this affiant and working for the plaintiff in the action, and leading affiant to believe that he was working for him; that, by reason of said misrepresentation and fraud on the part of Lee, judgment has been taken against affiant by default, of which he had no knowledge or information until he received the letter from attorneys for the plaintiff."

Justice to Lee requires mention in this connection of the fact that no judgment was taken until September 5th, five days after this affidavit was signed, also that plaintiff does not deny depositing the money in the Sherwood bank to meet this claim. The complaint is for a balance of $95.70 claimed upon a promissory note dated November 8, 1907, for $157.35 and interest, and due December 1, 1907. The verified answer denies execution of this note, but alleges that another was given which has been paid in full, and now is in the possession of the defendant; and this answer is accompanied by the affidavit of one of his present attorneys that he "now has the receipts and notes that show that said account has been paid in full, about five years ago, and that defendant has a good defense to said action." The moving papers are dated August 30th and 31st, the latter the date of the verification to the affidavits of merit and proposed answer. These seemingly corroborate defendant's statement of his belief that judgment had been taken against him by default prior to August 31st, on which date he terminated Lee's employment, if Lee was employed by him as an attorney, and this in turn lends credence to defendant's statement that his first knowledge of any association of Lee with the record attorneys of plaintiff was when he received the information from them that they had taken judgment against him prior to August 31st.

It is not necessary to this decision to determine upon *ex parte* affidavits whether the charges of fraud made against Lee are true. The counter affidavit of Lee does not deny plaintiff's statement that he actually employed Lee as his attorney, while it does affirmatively disclose that it was on August 31st that Lee first informed defendant that he was indirectly in the employ of the plaintiff. The fair inference is that

Lee had not earlier disclosed this fact, or he would certainly have stated so. The reasonable inference from these affidavits then is that Lee assumed that defendant knew his connection, virtually as a member of the firm of attorneys who had subscribed the summons and complaint in the action, and, from what transpired, assumed that the case would be settled and that a defense would be unnecessary, and supposedly negotiated with defendant, with no intent to mislead him, and this is borne out by the fact that judgment was not actually taken against defendant for nearly a week after he had procured other counsel. If Lee is to be criticized, it is because he did not actually inform defendant of the fact of his employment on the other side of the case, immediately upon defendant's coming to him. It is not shown that he charged or received of defendant any retainer for his services, and if defendant had retained him, no doubt it would be disclosed. But the decisive fact is that it is very probable that defendant consulted and confided in Lee as his attorney, and depended upon him to put in an answer, or do whatever was necessary to protect his interests and prevent default judgment being taken against him, if defendant had, or thought he had, a defense at that time. As to the merit of the defendant's defense, we must take his affidavits of merit and the proposed answer at their face, and therefore assume that he has a meritorious defense. The deposit transactions can be considered only on the question of excusing delay in interposition of answer, and not to impeach the merit of the defense. If Lee be considered as an associate with the attorneys of plaintiff in the case, as he must be taken to be under his own and the other affidavits, then the act of the plaintiff's associate attorney must be considered as having contributed to, if not wholly caused, defendant's default in answer, and this without defendant's knowledge thereof and without his intent to default. Even in case of doubt as to whether he has been thus misled or not, the doubt should be resolved in his favor, and bring about a trial upon the merits, instead of a denial of defense on the merits under these circumstances. The denial of the application to vacate judgment, and for leave to answer, was clearly an abuse of discretion; and the order for judgment and the judgment entered will be vacated, and the proposed answer will be filed. Appellant will recover his costs and disbursements taxable on this appeal.

AUGUST GAST v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and Thomas Costello.

(147 N. W. 793.)

Damages — collision with train — evidence — contributory negligence.

1. In an action to recover damages for injuries received in a collision with defendant's train at a public crossing, evidence examined, and *held* that plaintiff was guilty of contributory negligence as a matter of law and that the trial court did not err in so holding.

Contributory negligence — discovered peril — last clear chance — pleading — excessive speed — crossing — approaching — reasonable care.

2. Notwithstanding his contributory negligence, plaintiff invokes the rule of discovered peril, or last clear chance. *Held*, that such rule is inapplicable, both under the complaint, which alleges merely specific acts of negligence consisting of excessive speed in approaching the crossing and failure to give suitable warnings, and under the proof, which conclusively shows that the engineer used reasonable care to avoid the accident upon discovering plaintiff's peril.

Specific acts of negligence — proof on trial — restriction.

3. Where plaintiff in his complaint alleges merely specific acts of negligence on defendant's part, he will be restricted on the trial to proof of such acts. Had the complaint contained a general allegation of negligence in the operation of the train at the time in question, plaintiff might have relied upon the doctrine of discovered peril, or last clear chance rule if the facts had brought the case within such rule.

Opinion filed May 28, 1914.

Appeal from District Court, Foster County, *Coffey*, J.

From a judgment in defendants' favor, plaintiff appeals.

Affirmed.

George H. Stillman and *C. E. Scott*, for appellant.

Where a verdict has been directed for defendant at the close of plaintiff's testimony, the court must construe the testimony most strongly

Note.—The authorities on the applicability of the doctrine of last clear chance where danger not actually discovered are discussed in notes in 55 L.R.A. 418, and 36 L.R.A.(N.S.) 957. And on the question whether wantonness or wilfulness, precluding defense of contributory negligence, may be predicated of the omission of a duty before the discovery of a person in a position of peril on a railroad or street railway track, see note in 21 L.R.A.(N.S.) 427.

in favor of the plaintiff, and assume as true every material fact which plaintiff's testimony tends to prove. Harris-Emery Co. v. Howerton, 154 Iowa, 472, 134 N. W. 1068; Central Trust Co. v. Chicago, R. I. & P. R. Co. 156 Iowa, 104, 135 N. W. 721.

Contributory negligence of plaintiff no bar to a recovery for injuries which defendants could have avoided by the exercise of ordinary care and diligence. Bogan v. Carolina C. R. Co. 55 L.R.A. 418, and note, 129 N. C. 154, 39 S. E. 808; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; Lathrop v. Fargo-Moorhead Street R. Co. 23 N. D. 246, 136 N. W. 88; Welch v. Fargo & M. Street R. Co. 24 N. D. 463, 140 N. W. 680.

There being a dispute in the testimony as to certain necessary facts to establish negligence and contributory negligence, the case should have been submitted to the jury. Bogan v. Carolina C. R. Co. 129 N. C. 154, 55 L.R.A. 418, 39 S. E. 808 and cases cited; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; Lathrop v. Fargo-Moorhead Street R. Co. 23 N. D. 246, 136 N. W. 88; Rober v. Northern P. R. Co. 25 N. D. 394, 142 N. W. 22.

The doctrine of last clear chance, being a rule of law, may be urged under a general allegation of negligence. Welch v. Fargo & M. Street R. Co. 24 N. D. 463, 140 N. W. 680.

Watson & Young and *E. T. Commy,* for respondents.

Where the undisputed testimony shows that plaintiff was guilty of contributory negligence as a matter of law, the case should be taken from the jury. Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997; West v. Northern P. R. Co. 13 N. D. 221, 100 N. W. 254; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 535; Garlich v. Northern P. R. Co. 67 C. C. A. 237, 131 Fed. 837; Davis v. Chicago R. I. & P. R. Co. 16 L.R.A.(N.S.) 424, 88 C. C. A. 488, 159 Fed. 10; Kelsay v. Missouri P. R. Co. 129 Mo. 362, 30 S. W. 339; Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316.

The doctrine of last clear chance cannot be urged without any pleading to support it. Hanlon v. Missouri P. R. Co. 104 Mo. 381, 16 S. W. 235; Powers v. Des Moines City R. Co. — Iowa, —, 115 N. W. 494; 6 Thomp. Neg. § 7466; Welch v. Fargo & M. Street R. Co. 24 N. D. 463, 140 N. W. 686; 29 Cyc. 584, ¶¶ II. and III., and authorities

cited, 587; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; Hart v. Northern P. R. Co. 196 Fed. 181.

The doctrine of last clear chance has no application to this case. 2 Moore, Facts, § 704; 1 Moore, Facts, §§ 397, 406.

FISK, J. Plaintiff seeks to recover damages for personal injuries received by him at a public crossing in the village of McHenry, in this state, and also for the loss of one horse and injuries to other horses, through the alleged negligence of the defendant. The answer puts in issue the allegation of the complaint as to the negligence of the defendant, and alleges that the accident was caused by plaintiff's own negligence.

At the conclusion of the testimony the trial court directed a verdict in defendant's favor, and this appeal is from the judgment entered pursuant to the verdict thus directed.

The assignments of error all relate to the ruling of the court in directing such verdict.

The accident happened about 2 o'clock P. M. on November 24, 1909. Plaintiff, a farmer living some few miles out of town, had hauled a load of grain to the "farmers' elevator," and after depositing his grain in the elevator was in the act of attempting to cross defendant's tracks at such public crossing on his way to the center of the village, when the accident occurred. The highway at such crossing runs north and south, and is about 150 feet east of the railway depot. Plaintiff approached such crossing from the north, and his view to the east, the direction from which the defendant's passenger train came, was completely obstructed until he reached a point some 30 or 40 feet from the track. He was familiar with such crossing, and knew the situation as to obstructions by buildings, etc., having used it many times during the preceding eight years. He was also familiar with the time such passenger train was due to arrive at McHenry, and had seen it come into town frequently prior thereto, and knew it was about due at the time he attempted to cross the tracks. He was driving a four-horse team,—one team ahead of the other,—and had a double wagon box or grain tank. The ground was frozen solid. We here quote from plaintiff's testimony as follows: "I unloaded the wheat, and drove out, and tied my team on the north side of the elevator, some little distance from

the elevator, and went in and got my checks for the grain, and after I got my checks, drove west up town. I had to go the length of the P. V. elevator, and this elevator and a long addition, west, and the crossing. I could not say as to the exact distance. My best judgment is about 200 feet. While I was in the act of walking from the office to where the team was tied, I listened and heard no sound, I heard no train, or any signals. As soon as I got on the first side track, that is, the side track north of the main track, I saw the danger I was in. I saw the train about 50 or 60 feet, or such a matter. After seeing the train, I pulled back the horses, was struck the instant I pulled. The leaders came quickly back. The pole team was coupled on loose to the end of the pole with two clevices, and the pulling of them back, the pole team pushed onto them with the pole, and they gave a lunge and jumped out of my control. I didn't know anything after that. I don't know whether the engine struck the team or not. I did not hear the bell on the engine ring. I became unconscious." He then narrates his injuries received through the accident, and also the extent of the damage done to his horses, harness, and wagon.

Plaintiff's witness, Ole N. Eide, testified: "I was on the platform in front of the depot in McHenry at the time of this injury and accident. I saw the plaintiff, Gast. I think the train was early that day. I think it was fifteen minutes until one of the trains came in, it was along in that neighborhood. I should judge it was nearly 100 feet from the depot to the crossing. I was about 100 feet west from the crossing. I was looking right at plaintiff coming across the tracks, and at the train. I think the train was between the farmers' and Great Western elevators when the team was coming pretty close to the crossing. From the farmers' elevator to the crossing should judge it would be about 300 feet. I don't know the rate of speed the train was approaching. They were going pretty fast. I suppose the power was shut off some. When the team and train got together, it struck both the pole team and the leaders. Of course the leaders lunged against the end of the tongue, and the tongue broke, and both teams turned to run away, and went down. They turned toward the depot. The nigh horse was killed, and I could not see the other horse. I should say the engine was driven 30 feet after it struck the team. I never measured it. About the length of the wagon and horses I should judge, or a few feet

further. I did not hear the bell ring nor whistle blow. I think the whistle blew, I would not be positive. It was awfully windy, storming and cold. The wind was blowing northwest. I was standing there freezing on the platform. The wind was blowing a pretty good North Dakota wind."

The witness Malmstad testified: "I was on the depot platform in front of the Northern Pacific depot in the village of McHenry at the time of the accident. I was on the east side of the platform, the extreme east end, about 140 feet from the P. V. elevator. I saw the accident. I just went to look towards the Monarch elevator, and saw the team coming from the east going towards the crossing, and the train was right there, and I see they were going to collide together, and the minute the team got on the crossing the engine hit the team right there. The crossing is about 30 to 40 feet from the P. V. coal shed as near as I could judge. As near as I can recall, the train was on this side of the coal shed when Gast's team swung into sight on the way past the tracks. I should judge the engineer could not see the team when they first came past the coal shed. The coal sheds would have obstructed the view of the engineer, but nothing after that. A man has to get past the coal shed before the engineer would be able to see him. It was somewhere around 40 feet from the coal shed to the crossing. After the team swung around the coal shed the engine was on the far side of the coal shed, about 300 feet away. I did not hear or see the whistle or bell ring. I saw no effort to stop the train. I don't know how fast the train was going. The engine moved something over 60 feet after striking the team. When the engine struck the team he had four horses, two in the lead and two on the pole; and as the team come from the north, going south, the lead team was partially across the track and was cut off by the engine right between the leaders and the pole team, and either broke the tongues and chains, anyway the lead team went to the south of the cowcatcher on the engine, and it caught the horses and they got tangled upon the engine, and it drug the pole team and wagon, and the whole thing was drug right off. Something over two rail lengths. The lead team broke away. The pole team stuck right to the engine."

The witness Ruttle, among other things, testified: "I saw the plaintiff on the day of this accident. He had been doing business with my

elevator a few minutes before. Just a few minutes before the train came in I saw him. The train, when first I saw it, was going past the elevator. The train was directly south of the office (of the farmers' elevator). I was standing by the east window of the office. I do not know anything about the speed of the train; only an estimate is all. From my office directly across to the crossing would be about 300 feet. When I first saw the train, my best judgment is that it was going anywhere from 15 to 20 miles an hour. I do not recall whether it whistled or the bell rung at this time. I was attracted more by the rumbling which the rails made, and the building trembling. It jars the building. This office is, I should say, 300 feet from the crossing. I should say the train was going from 15 to 20 miles per hour. I did not see the plaintiff, he was hid by the elevator. I don't know where he was."

The defendant Thomas Costello was called by plaintiff for cross-examination under the statute. He was the engineer on the passenger train, and had been in defendant's employ for about eight years. He described the train as consisting of a combination mail and baggage car, combination smoker and passenger coach with smoking compartment in one end, and a day coach, engine, and tender. He testified that the engine was fully equipped with air brakes, safety appliances, drivers, and tender brake. He says the air brakes were in perfect condition and responded perfectly to operation; that they were the Westinghouse standard brakes, and would throw a pressure of about 70 pounds to the square inch upon the drive and coach wheels. In describing the accident he testified: "I was approaching the crossing at the rate of 10 or 12 miles per hour. The steam was shut off. I shut off the steam down in the yards, about half a mile before I came to the crossing. The train was drifting, sliding in on its momentum. If the brakes were working properly I think I could stop the train at a distance between 150 to 200 feet. I was about 200 feet from the usual stopping place at the time of the accident. I knew where the farmers' elevator was. I usually put on the air brakes just about at that crossing, and apply them lightly and bring the train to a gradual stop. I think that crossing is about 250 or 300 feet from the usual stopping place. I apply a slight pressure, from 5 to 7 pounds. This will bring the train to a gradual stop from within 200 feet. That would be the first application, and the second application would be more to bring the train to a

gradual stop. The additional 63 or 65 pounds pressure would not bring the train to a gradual stop in much less time. You could not get full 70 pounds pressure on the brake. We give 70 pounds pressure, but we don't get that much in braking power. There is not extra or reserved power at all. In an emergency stop you would have full pressure on. In this instance I applied the full emergency pressure as soon as I saw danger in sight, about 80 feet from the crossing. I was at that time nearly opposite the farmers' elevator company's elevator, engine house, and coal shed, and possibly the coal shed near the crossing. I made the emergency application by the brake valve. I turned on the full pressure with this valve. I was sitting on the seat, on the right-hand side of the cab. My hands were probably on the brake valve. I had sand on the engine at the time, but did not use it as I did not have time. There was no time to use sand from the time I saw this danger. I did not try to use it. It occurred to me to use it, but it takes some time to get the sand running, as it runs slow in short time. It takes about six or seven seconds to get it running so the sand would be flowing on the track. It would probably be thirty seconds from the time I pulled the lever up before the sand would get from the sand box to the rail. I obeyed the rules of the company on that occasion. The rules provide for the use of sand if you can. I did not try to use sand, but used all the means possible to make the train stop in that length of time. I can't tell exactly how fast I was going an hour. Was going from 10 to 15 miles. I have made that crossing every day except Sunday. I knew the crossing was there, and always look from the opposite direction to see if there were teams or anything, and took care to have the bell sounding in going over the crossing. I started sounding it upon going into the yard, and kept it going until I stopped at the depot. The bell was ringing from the time I entered the yard, about a half a mile distance. I sounded the whistle at the switch, pretty nearly a half mile east of the crossing. I knew this crossing was between me and the station, and that it was in general use by the public. I cannot see anybody on the street until I get by this coal shed approaching the crossing. I could not see them approach there until right on the sidetrack, owing to the fact that the coal shed shuts off the view. When I first saw the team it was on the side track. The first team, the lead team, was on it. I took hold

of the valve about 80 feet from the crossing. I did not sound the whistle. After we get in sight of the yard we are not supposed to sound the whistle, as there are teams along there, and the whistle would scare them. I would have sounded the whistle if it had done any good. I thought of it, but it would have been foolish to sound the whistle. It would not have done any good. I did not see the team until after they passed the corner. The team was trotting along a pretty fast trot, and the man was urging them along at that. He was shaking the lines. That was after I had applied the emergency stop. The engine traveled about 55 feet after applying the brake, the emergency appliance. I did not hit the man or wagon, but hit the horses. The engine stopped just over the crossing; the tender was just clear of the end of the crossing and about 10 feet of the baggage car. The engine and tender are about 48 feet long. I made the stop in about 150 feet. Stopped the train with a jerk, and the wheels kept on turning."

The witness Niles testified that he had been in the employ of the defendant company for two years as engineer, and three years as fireman, and understood the operation of starting and stopping a passenger train, and gave his opinion as an expert that if "everything was working to the advantage of the engineer, and the equipment was in first-class shape, a class 'C' engine, pulling a train consisting of three cars (such as the train in question) the train traveling at from 10 to 12 miles per hour on a level track with the power shut off sometime before, should make the stop at from 30 to 50 feet without using sand on the rails. If rails are slippery, wet or ice-covered, you would not have the braking power, as if the rails were in good condition. The emergency brake is the brake that is applied with full force, where you make use of all the braking power. The sand is applied as a part of the emergency brake or application. The sand valve should work immediately at full force until the train is all on the sand."

The foregoing is substantially all the testimony offered by plaintiff, in the light of which we are asked to reverse the action of the trial court in granting defendant's motion for a directed verdict. Under the well-settled rule we are to view such testimony in its most favorable light for plaintiff; and we shall assume, for the purposes of this case, that the defendants were guilty of a lack of due care in approaching the crossing in question at the time of the accident, and will consider the

sole question of the alleged contributory negligence of the plaintiff. Viewing the testimony in its most favorable aspect for the plaintiff, can it be said that reasonable men might draw different inferences or conclusions therefrom upon the question of the exercise of due care by the plaintiff? We think not. There is but very little conflict in the testimony, and we think the uncontroverted testimony conclusively discloses not only want of due care on plaintiff's part, but the most wanton and reckless conduct directly contributing to the accident. His own testimony discloses that the only precaution taken by him before attempting to cross defendant's tracks was in listening, while he was walking from the office of the elevator to the place where his team was tied, some distance north, for the approach of a train which he knew was about due; and in so far as the testimony discloses he thereafter untied his team and drove a distance of from 150 to 200 feet over frozen ground to the crossing, without the slightest effort to ascertain whether a train was approaching in close proximity to the crossing. In view of the fact that his vision was completely obstructed, it was his plain duty, before attempting to cross, to listen, and if necessary in order to efficiently exercise his sense of hearing owing to the noise of the wagon and the strong wind which was blowing, to stop before driving upon defendant's track, and his failure to exercise such prudence constituted such negligence as bars his recovery.

See Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997, which is a case involving facts very similar to those in the case at bar; also Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. post, 128, 147 N. W. 791; also West v. Northern P. R. Co. 13 N. D. 221, 100 N. W. 254; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531.

As stated by the supreme court of Ohio in the recent case of New York, C. & St. L. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130, 12 Am. Neg. Rep. 343: "To drive upon a crossing without first looking for passing trains is also negligence. The looking should usually be just before going upon the crossing, or so near thereto as to enable the person to get across in safety at the speed he is going before a train within the range of his view of the track, going at the usual speed of fast trains, would reach the crossing. There should be such looking before going upon the track, even though there was a looking farther

away when no train was seen approaching. A train at the usual speed will go quite a distance, while a team on a walk or trot will go a much shorter distance. The care to be taken in such cases should correspond with the danger." Applying this reasoning to the case at bar, it was, we think, clearly plaintiff's duty, owing to the known obstruction to his view, to listen for an approaching train before driving upon the crossing and at such close proximity thereto as to reasonably render such precaution effective.

Indeed, appellant practically concedes that he was guilty of contributory negligence in approaching such crossing; but he argues that such contributory negligence is no bar to his recovery, for the reason, as stated, that defendants, under the doctrine of "last clear chance," might, by the use of due care, have avoided the accident. Appellant cites and relies upon Welch v. Fargo & M. Street R. Co. 24 N. D. 463, 140 N. W. 686, and authorities cited. Also Bogan v. Carolina C. R. Co. 129 N. C. 154, 55 L.R.A. 418, 39 S. E. 808.

As we view it, there are two insurmountable barriers to plaintiff's recovery under the rule of "discovered peril or last clear chance." First, negligence of the defendants in not using reasonable care to avoid injuring the plaintiff after discovering his dangerous situation is not alleged in the complaint. On the contrary, the negligence alleged in the complaint consists of specific acts as follows: ". . . defendants ran one of their locomotives with a train of cars attached, across said highway at said crossing, at a great and negligent rate of speed and without warning of any kind." Having alleged the specific acts of negligence relied upon, it is well settled that plaintiff is restricted in his proof accordingly. Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; 14 Enc. Pl. & Pr. 342, and numerous cases cited; Hart v. Northern P. R. Co. 196 Fed. 181. The authorities relied upon by appellant are not in point. They are cases involving complaints charging negligence under a general allegation. This court, in line with numerous authorities from other jurisdictions, has adopted the rule in Welch v. Fargo & M. Street R. Co. supra, and the other cases cited therein, that "the doctrine of discovered peril or the last clear chance can be urged under a general allegation of negligence in the complaint;" but our attention has been called to no decision by this court extending such rule to cases like the one at bar where specific

acts of negligence only are pleaded, and no request for an amendment of the complaint was made. Second. But even if the issues were broad enough to permit proof by plaintiff under the doctrine of discovered peril, we would have no hestitancy in concluding that plaintiff wholly failed to bring himself within such rule, for, as before stated, he testified: "As soon as I got on the first side track, that is, the side track north of the main track, I saw what danger I was in. I saw the train about *50 or 60 feet* or such a matter. After seeing the train I pulled back the horses, was struck the instant I pulled." Moreover, the undisputed evidence is to the effect that the engineer instantly applied the full emergency brake upon discovering plaintiff's danger, and did everything in his power to stop the train and avert the accident, and we do not think the mere opinion of the so-called expert, Niles, that the train might have been stopped within the space of from 30 to 50 feet, raised a sufficient conflict to make it a question for the jury. Taking the testimony of the plaintiff himself, together with that of the engineer who fixes the distance that he was from the crossing when he first discovered plaintiff's peril, there is no room for the application of the rule of "last clear chance," even if the complaint was broad enough to permit plaintiff to rely on such rule.

Affirmed.

BURKE, J., disqualified.

THOMAS CHRISTOPHERSON v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, a Corporation.

(— L.R.A.(N.S.) —, 147 N. W. 791.)

Driver of private conveyance — collision with train — obstructions to views — contributory negligence.

1. The driver of a private conveyance who collides with a train while attempting to cross a railroad track at a public crossing known by him to be a

Note.—The question of the duty of a traveler approaching a railway crossing as to place and direction of observation is discussed in a note in 37 L.R.A.(N.S.)

very dangerous one on account of complete obstructions to his view of the defendant's train, and who, knowing that a train was about due, concededly did not stop and listen or exercise any precaution to ascertain whether a train was approaching, except to look around as he was driving when he knew his vision of the track was completely obstructed, is guilty of contributory negligence as a matter of law.

Care — railroad crossing — contributory negligence.

2. Where the facts respecting the failure to exercise care by the driver of a team about to cross a railroad track are conceded or uncontradicted, and it can be said that reasonable men could not draw different conclusions or inferences therefrom, the question of the contributory negligence of such driver is one of law for the court.

Private conveyance — driver of — negligence of — recovery — negligence — imputed to plaintiff.

3. Where the plaintiff and the negligent driver of a private conveyance were, at the time of plaintiff's injury resulting from a collision with defendant's train at a railroad crossing, engaged in a joint enterprise, the driver's negligence is imputed to such plaintiff, and no recovery can be had.

Opinion filed May 28, 1914.

Appeal from District Court, Barnes County, *J. A. Coffey,* J.

From a judgment in defendant's favor, and from an order denying a new trial, plaintiff appeals.

Affirmed.

Page & Englert, for appellant.

The plaintiff cannot be held guilty of contributory negligence as a matter of law, because he did not stop and listen before crossing the track. The test is, the use of ordinary care. Coulter v. Great Northern R. Co. 5 N. D. 568, 67 N. W. 1046; Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co. 20 N. D. 642, 127 N. W. 993; Messenger v. Valley City Street & Interurban R. Co. 21 N. D. 82, 32 L.R.A.(N.S.) 881, 128 N. W. 1023; Code 1905, § 7295.

135. And upon the duty of the driver of an automobile where view is obstructed, see note in 46 L.R.A.(N.S.) 705.

The authorities on the question of imputed negligence of driver to passenger are gathered in a note in 8 L.R.A.(N.S.) 597. See also note in 110 Am. St. Rep. 278.

The statute requiring notice to be given is a limitation statute. It amounts to no more. Arp v. Allis-Chalmers Co. 130 Wis. 454, 8 L.R.A.(N.S.) 997, 118 Am. St. Rep. 1036, 110 N. W. 386; Code 1905, § 6770.

The matter of the sufficiency of notice of claim is one of defense. It must be properly pleaded and proved. Mexican Nat. R. Co. v. Jackson, — Tex. Civ. App. —, 32 S. W. 230; Barnet v. Houston, 18 Tex. Civ. App. 134, 44 S. W. 689; Smith v. Power, 23 Tex. 29; Van Burg v. Van Engen, 76 Neb. 816, 107 N. W. 1006; White v. Century Gold Min. & Mill. Co. 28 Utah, 331, 78 Pac. 868; Wise v. Williams, 72 Cal. 544, 14 Pac. 204; Wright v. Ward, 65 Cal. 525, 4 Pac. 534; Haines v. Amerine, 48 Ill. App. 570; Hatch v. Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 490, 107 N. W. 1087; Pracht v. McNee, 40 Kan. 1, 18 Pac. 925; Hunter v. Hunter, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33; Moore v. Smith, 29 S. C. 254, 7 S. E. 485; Borland v. Haven, 37 Fed. 394.

Lee Combs & L. S. B. Ritchie, for respondent (*John L. Erdall,* of counsel).

When the view or hearing of a traveler approaching a railroad crossing is so obstructed that he cannot otherwise satisfy himself as to whether or not it is prudent to cross, it is his duty, where he is familiar with the crossing or aware of the facts, to stop and look or listen, before trying to cross the track. Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316; Pennsylvania Co. v. Frana, 112 Ill. 398; Moore v. Chicago, St. P. & K. C. R. Co. 102 Iowa, 595, 71 N. W. 569; Nosler v. Chicago, B. & Q. R. Co. 73 Iowa, 268, 34 N. W. 850; Atchison, T. & S. F. R. Co. v. Willey, 60 Kan. 819, 58 Pac. 472, 6 Am. Neg. Rep. 515; Philadelphia & B. C. R. Co. v. Holden, 93 Md. 417, 49 Atl. 625; Donnelly v. Boston & M. R. Co. 151 Mass. 210, 24 N. E. 38; Lau v. Lake Shore & M. S. R. Co. 120 Mich. 115, 79 N. W. 13; Houghton v. Chicago & G. T. R. Co. 99 Mich. 308, 58 N. W. 314; Clark v. Northern P. R. Co. 47 Minn. 380, 50 N. W. 365; Hunter v. Montana C. R. Co. 22 Mont. 525, 57 Pac. 140; Carter v. Central Vermont R. Co. 72 Vt. 190, 47 Atl. 797; Wilson v. Illinois C. R. Co. 150 Iowa, 33, 34 L.R.A. (N.S.) 687, 129 N. W. 340.

The driver of the team at the time of the accident was guilty of

gross negligence in his acts and conduct. Seefeld v. Chicago, M. & St. P. R. Co. 70 Wis. 216, 5 Am. St. Rep. 168, 35 N. W. 278; Keyley v. Central R. Co. 64 N. J. L. 355, 45 Atl. 811, 7 Am. Neg. Rep. 452; Blackburn v. Southern P. Co. 34 Or. 215, 55 Pac. 225; Lightfoot v. Winnebago Traction Co. 123 Wis. 479, 102 N. W. 30; Shufelt v. Flint & P. M. R. Co. 96 Mich. 327, 55 N. W. 1013; Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997, and cases cited; West v. Northern P. R. Co. 13 N. D. 221, 100 N. W. 254.

Where the pleadings and evidence show that more time has elapsed than that allowed by the statute, in which to bring the action, the burden is on the plaintiff to show that the statute is imperative. Paine v. Dodds, 14 N. D. 189, 116 Am. St. Rep. 674, 103 N. W. 931, and cases cited; Winter v. Winter, 101 Wis. 494, 77 N. W. 883, and cases cited; 25 Cyc. 1226, and cases there cited in the note, 1227, and note 55; Bruce v. Luck, 4 G. Greene, 143; Rock Island Plow Co. v. Masterson, 96 Ark. 446, 132 S. W. 216; Weaver v. Davis, 2 Ga. App. 455, 58 S. E. 786.

The rule is that the existence of causes of actions which are transitory in their nature is determined by the *lex loci,* and this same rule or law governs the defense. 38 Cyc. 549; Alabama G. S. R. Co. v. Carroll, 97 Ala. 126, 18 L.R.A. 433, 38 Am. St. Rep. 163, 11 So. 803; Mexican C. R. Co. v. Gehr, 66 Ill. App. 173; Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25, 56 L.R.A. 468, 92 Am. St. Rep. 293, 62 N. E. 488; Dorr Cattle Co. v. Des Moines Nat. Bank, 127 Iowa, 153, 98 N. W. 918, 4 Ann. Cas. 519, — Iowa, —, 102 N. W. 836; Johnson v. Chicago & N. W. R. Co. 91 Iowa, 248, 59 N. W. 66; Louisville & N. R. Co. v. Whitlow, 114 Ky. 470, 41 L.R.A. 614, 43 S. W. 711; Turner v. St. Clair Tunnel Co. 111 Mich. 578, 36 L.R.A. 134, 66 Am. St. Rep. 397, 70 N. W. 146, 1 Am. Neg. Rep. 270; Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977; Charlton v. St. Louis & S. F. R. Co. 200 Mo. 413, 98 S. W. 529; Kimball v. Kimball, 75 N. H. 291, 73 Atl. 408; Laird v. Connecticut & P. River Co. 62 N. H. 254, 13 Am. St. Rep. 564; Voshefskey v. Hillside Coal & I. Co. 21 App. Div. 168, 47 N. Y. Supp. 386; Alexander v. Pennsylvania Co. 48 Ohio St. 623, 30 N. E. 69; Knowlton v. Erie R. Co. 19 Ohio St. 260, 2 Am. Rep. 395; O'Reilly v. New York & N. E. R. Co. 16 R. I. 388, 5 L.R.A. 364, 6 L.R.A. 719, 17 Atl. 171, 906, 19 Atl. 244; East Tennessee, V. & G. R. Co. v. Lewis, 89 Tenn. 235, 14 S. W. 603; Southern P. Co. v.

Dusablon, 48 Tex. Civ. App. 203, 106 S. W. 766; Morrisette v. Canadian P. R. Co. 76 Vt. 267, 56 Atl. 1102; Shaver v. White, 6 Munf. 110, 8 Am. Dec. 730; Boston & M. R. Co. v. McDuffey, 25 C. C. A. 247, 51 U. S. App. 111, 79 Fed. 934; 38 Cyc. 556; Arp v. Allis-Chalmers Co. 130 Wis. 455, 8 L.R.A.(N.S.) 997, 118 Am. St. Rep. 1036, 110 N. W. 386.

Fisk, J. Plaintiff seeks to recover damages for personal injuries received by him through the alleged negligence of defendant in running its train over a certain public crossing near St. Croix Falls, in the state of Wisconsin, on November 2, 1905. Plaintiff's injury was caused by a collision at such crossing at about 6:30 A. M. on such date, and while plaintiff, his brother, and a lady friend were about to cross the railroad track at such point.

At the close of the plaintiff's testimony the defendant moved for a directed verdict upon the ground, among others, that such testimony disclosed that he was guilty of contributory negligence as a matter of law, which motion was granted and a verdict directed for the defendant. Thereafter plaintiff moved for a new trial, which motion was denied and judgment entered in defendant's favor for costs. The appeal is both from the judgment and from the order denying a new trial.

The assignments of error, of which there are three in number, relate to the rulings of the court aforesaid.

We deem it unnecessary to consider any question presented other than that constituting the first ground of defendant's motion for a directed verdict, for we are agreed that the learned trial court properly granted defendant's motion upon the ground that plaintiff was guilty of contributory negligence, barring his recovery.

The plaintiff's testimony discloses the following undisputed facts: Plaintiff and the other two occupants of the vehicle, which consisted of a single-seated top buggy drawn by two horses with the top down, were returning early in the morning from the home of plaintiff's father to St. Croix Falls, and they were required to cross a branch line of defendant's railroad at a point known as "Charlie Pickles' crossing." This crossing was a very dangerous one owing to the fact that the highway approaching thereto is about 20 feet deep and down hill through a narrow cut, just wide enough to permit teams to pass, being only

about 15 or 20 feet wide at the crossing, and the railroad track is also in a cut between 15 and 20 feet deep with bur oaks growing on top of either embankment, and extending to a considerable distance down on the sides thereof. These bur oaks were quite thick and from 10 to 12 feet in height. From 12 to 15 rods east of the crossing the railroad track makes a curve, and the cut extends back from the crossing from 15 to 20 rods. At the time of the accident it was somewhat windy, and the proof tends to show that the defendant's servants did not blow its whistle or ring its bell on approaching such crossing. The train came from a northeasterly direction. The plaintiff and his brother were well acquainted with the crossing in question, and knew that it was impossible to see a train approaching from the northeast until they arrived at a point very close to the crossing. They had lived in that community for five or six years prior to the accident, and had been over the crossing repeatedly. Plaintiff and his brother jointly hired the rig to make the trip on the preceding evening for the purpose of visiting their father's home, and plaintiff drove the rig going out and his brother Charlie drove on the return trip and at the time of the accident. Among other things, Charlie testified as follows: "I knew the crossing was a bad one. I knew that the train was about to come or was due at that time. I had been through there five or six times before. I knew it was a pretty bad crossing. I looked back to see if there was any train coming. I knew there was one coming, and I knew I could not see until I got close to the track had it been coming. I could not see any until I got down close to the track. I did not stop the team. I made no other investigation to see whether it was coming or not. You would have to go down on the track to see it. I knew that. We approached the track without stopping the team, knowing that we could not see it. Before the team heard the train I could have stopped and looked down the track. I did not do that. I knew it was about time for the train to come along there. After the horses sheared off to one side the engine passed over the crossing. The engine did not strike the horses from the head-end part. There was nothing that prevented me from getting out of the rig, and leaving the team in the hands of my brother, and going to the side of the track to look east and west, if I had elected to do so before the horses reached the crossing. I would not have been in danger myself if I had done that."

The evidence of the plaintiff and the lady who was in the rig, and who is now plaintiff's wife, was substantially the same as that of the witness Charlie Christopherson.

It will thus be seen that we are here confronted with an exceptional state of facts: First, an extremely dangerous crossing, and known to be such by the plaintiff and his brother, owing to the fact that it was impossible to see an approaching train from the northeast; second, the plaintiff's brother knew that a train was due at about the time in question; and, third, the only precaution taken on approaching the crossing to ascertain whether a train was coming was that testified to by Charlie, the driver of the rig, that he looked back to see if there was an approaching train, when he knew that to look would avail him nothing. It seems to us that to drive the team down to the crossing under these circumstances, without even stopping to listen for an approaching train, was, to say the least, most reckless and heedless conduct, and clearly constituted gross negligence as a matter of law.

Concededly, it was impossible to see the train as they approached this crossing, and the undisputed proof shows that they did not stop nor take any precaution whatever, except the driver testified that "I looked around as I was driving." Had they stopped the team a few seconds, and listened for an approaching train, the accident would not have happened.

Seefeld v. Chicago, M. & St. P. R. Co. 70 Wis. 216, 5 Am. St. Rep. 168, 35 N. W. 278; Keyley v. Central R. Co. 64 N. J. L. 355, 45 Atl. 811, 7 Am. Neg. Rep. 452; Blackburn v. Southern P. R. Co. 34 Or. 215, 55 Pac. 225.

We are not unmindful of the well-settled rule in this state that contributory negligence is usually a question of fact for the jury, and that it is only in very exceptional cases that a trial court is justified in taking from the jury the question of the exercise of care on the part of the plaintiff, commensurate with the known or reasonably apprehended danger. The following are some of the cases decided by this court in support of such rule:

Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co.

20 N. D. 642, 127 N. W. 993; Rober v. Northern P. R. Co. 25 N. D. 394, 142 N. W. 22. But we think each of the foregoing cases may be differentiated from the case at bar on the facts involved, and each case must, of course, be governed by its own peculiar facts. As before stated, the case at bar presents an exceptional state of facts which, we think, clearly disclose as a matter of law the negligence of the driver of the rig; for it is clear to our minds that reasonable men cannot differ or draw different conclusions or inferences from the facts disclosed, but would be forced to the one conclusion from the conceded facts, that the driver was guilty of recklessness and want of due care which directly contributed to the plaintiff's injury. See Haugo v. Great Northern R. Co. 27 N. D. 268, 145 N. W. 1053, and cases cited, where the rule respecting contributory negligence as a matter of law is stated.

The facts being undisputed, and there being no basis for reasonable minds to differ as to the inferences or conclusions to be deduced from such facts, it became merely a question of law for the court; and we are satisfied that the decision of the trial court was entirely correct, provided the contributory negligence of plaintiff's brother, the driver of the rig at the time of the accident, is imputed to plaintiff. Upon this latter point there is, we think, no room for doubt under the authorities. The undisputed proof discloses that these brothers were at the time engaged in a joint enterprise, they having hired the rig and agreed to share equally the expense of such hiring. Each, therefore, had as much authority and control over the manner of driving as the other had. This being true, the negligence of one was the negligence of both.

Lightfoot v. Winnebago Traction Co. 123 Wis. 479, 102 N. W. 30; Beaucage v. Mercer, 206 Mass. 492, 138 Am. St. Rep. 401, 92 N. E. 774; Nesbit v. Garner, 75 Iowa, 314, 1 L.R.A. 152, 9 Am. St. Rep. 486, 39 N. W. 516; McBride v. Des Moines City R. Co. 134 Iowa, 398, 109 N. W. 618; Koplitz v. St. Paul, 86 Minn. 373, 58 L.R.A. 74, 90 N. W. 794; Johnson v. Gulf, C. & S. F. R. Co. 2 Tex. Civ. App. 139, 21 S. W. 274; Donnelly v. Brooklyn City R. Co. 109 N. Y. 16, 15 N. E. 733; Schron v. Staten Island Electric R. Co. 16 App. Div. 111, 45 N. Y. Supp. 124, 3 Am. Neg. Rep. 61; Cass v. Third Ave. R. Co. 20 App. Div. 591, 47 N. Y. Supp. 356; Boyden v. Fitchburg R.

Co. 72 Vt. 89, 47 Atl. 409; Omaha & R. Valley R. Co. v. Talbot, 48 Neb. 628, 67 N. W. 599. See also note in 8 L.R.A.(N.S.) 628, and 29 Cyc. 542, 550, and cases cited.

For a correct statement of the rule as to when the negligence of the driver of a private conveyance is imputable to the injured person, and when not, see 7 Am. & Eng. Enc. Law, 2d ed. 447, 448, and authorities cited in notes.

Affirmed.

W. W. CORBETT v. GREAT NORTHERN RAILWAY COMPANY.

(148 N. W. 4.)

Railroad company — trespassing animals — owes no duty to owners to keep a lookout — discovery of animals on track — duty of engineer — must safeguard lives of himself, crew, and passengers — duty in this respect higher — prudent engineer — collision — speed of train.

1. A railroad company owes no duty to the owners of animals which are allowed to trespass upon its right of way to keep a lookout therefor, or to take steps to prevent striking them until it has discovered them; nor is it bound to presume that they may be there. Even after such discovery, the duty of the engineer to safeguard the lives of himself and the crew and passengers of his train is higher than his duty to protect the trespassing animals. If, therefore, it would appear to a reasonably prudent engineer, under all of the circumstances of the case, that a collision would be unavoidable, and that it would be safer to continue operating the train at the same rate of speed than to attempt to stop or to slow down the train, such action, and failure to stop or slow down the train, would not constitute a ground of recovery for the owner of the injured stock.

Negligence — contributory negligence — material conflict in testimony — questions for the jury.

2. The questions of negligence and of contributory negligence are, where

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Note.—The question of the duty of railroad employees to keep a lookout for live stock on track is treated in a note in 24 L.R.A.(N.S.) 858. And as to the duty to keep a lookout for horses on highway parallel with track, see note in 33 L.R.A. (N.S.) 128. And upon the duty to give crossing signals for protection of animals, see note in 46 L.R.A.(N.S.) 881.

there is any material conflict in the testimony, questions of fact for the jury, rather than the court, to pass upon.

Evidence — error — tracks of animals — railway track and right of way.

3. It is not error, in a case where horses have been run down by an approaching train and the question at issue is whether the action could reasonably have been avoided, to allow one who has shown himself reasonably qualified to testify, to testify concerning the tracks made by the animals in the mud and snow, and that they apparently galloped along said track, even though he cannot and does not testify as to whether the galloping was before or after the accident, the fact that they did gallop and that the tracks were made by the horses being undisputed.

Engineer — lookout — crossings — cross-examination — duty.

4. Where one of the questions at issue in a case is whether the engineer actually saw the stock on the track and the exact time at which he saw them, it is not error to question the engineer on cross-examination as to his duty to keep a lookout when approaching crossings.

New trial — appeal — theory of case — plaintiff — costs.

5. Where a new trial is granted as a matter of favor to the plaintiff, and is made necessary by the fact that on the former trial and appeal he entertained an incorrect theory of his case, the costs of such former trial should be borne by such plaintiff, even though he is successful on the second trial and on the second appeal.

Costs improperly taxed — review — terms on — error.

6. Where costs are improperly taxed against a party, it is error to impose terms upon him as a condition precedent to obtaining a review of such taxation.

New trial — cost fee — successful party — former appeal or trial.

7. The cost fee or charge of $5 which is allowed by ¶ 3 of § 7174, Rev. Codes 1905, "to either party when a new trial shall be had, for all proceedings after the granting of and before such new trial," does not belong to the former trial, nor yet to the former appeal, but to the successful party upon the second trial. Such costs are costs of the new trial or proceedings, and not of the former appeal.

Opinion filed June 4, 1914.

Appeal from the District Court of Williams County, *Fisk*, J.

Action to recover damages for the loss of horses killed upon a railroad track. Judgment for plaintiff. Defendant appeals.

Modified.

Murphy & Duggan, for appellant.

The plaintiff has not sustained his burden of proving negligence in the operation of the train by defendant. Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054.

It was only the duty of the engineer to use ordinary care when he discovered the animals on the track; his higher duty was to protect himself, the crew, and passengers on the train. Wright v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 159, 96 N. W. 324; McDonell v. Minneapolis, St. P. & S. Ste. M. R. Co. 17 N. D. 606, 118 N. W. 819.

The evidence shows that the engineer could not have stopped the train or prevented the accident after he discovered the animals on the track; every act in an endeavor to do so would have been attended with great danger to himself, crew, and train. It was not his duty to take such risk. Corbett v. Great Northern R. Co. supra; Rattenbury v. Pere Marquette R. Co. 172 Mich. 106, 137 N. W. 679; Hebron v. Chicago, M. & St. P. R. Co. 4 S. D. 538, 57 N. W. 494; Keilbach v. Chicago, M. & St. P. R. Co. 11 S. D. 468, 78 N. W. 951; Harrison v. Chicago, M. & St. P. R. Co. 6 S. D. 100, 60 N. W. 405; Wright v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 159, 96 N. W. 324; Miller v. Chicago & N. W. R. Co. 21 S. D. 242, 111 N. W. 553; Hodgins v. Minneapolis, St. P. & S. Ste. M. R. Co. 3 N. D. 382, 56 N. W. 139; Cumming v. Great Northern R. Co. 15 N. D. 611, 108 N. W. 798.

The undisputed evidence of the engineer cannot be arbitrarily rejected and a verdict rendered against it. A verdict rendered in conflict with such evidence is flagrantly against the weight of the evidence. Miller v. Chicago & N. W. R. Co. 21 S. D. 242, 111 N. W. 553; Anderson v. Chicago, R. I. & P. R. Co. 111 Minn. 531, 127 N. W. 455; Atchison, T. & S. F. R. Co. v. Henderson, 27 Okla. 560, 112 Pac. 986.

It is not enough to show that the horses might have been killed through the negligence of the defendant. Gibson v. Iowa C. R. Co. 136 Iowa, 415, 113 N. W. 927; Blid v. Chicago & N. W. R. Co. 89 Neb. 689, 131 N. W. 1027.

The evidence of the engineer overcame any presumption of negligence, and left the plaintiff with the burden of proving actual neg-

ligence. Huber v. Chicago, M. & St. P. R. Co. 6 Dak. 392, 43 N. W. 819; Smith v. Northern P. R. Co. 3 N. D. 17, 53 N. W. 173.

Where on the former trial the record showed defendant was entitled to judgment for costs, the mere fact of a new trial and judgment for plaintiff does not entitle him to the costs of the former trial and appeal. Swingle v. Indiana State Bank, 41 Ind. 423; Carbon v. Stout, 7 Bush, 609; 14 Enc. Pl. & Pr. 941; Becker v. Holm, 100 Wis. 281, 75 N. W. 999; Robinson v. Ransom, 12 Ind. 474.

The costs of a first trial must be taxed in favor of the successful party on appeal, notwithstanding a later trial resulted in favor of the other party. Doyle v. Kiser, 8 Ind. 396; Excelsior Draining Co. v. Brown, 47 Ind. 19; Eigenmann v. Kerstein, 72 Ind. 81.

Persons who are not subpœnaed as witnesses, who do not testify, and are not necessary witnesses, are not entitled to fees. They were not called by plaintiff, and the presumption, therefore, is that they were not necessary. Parsons Band Cutter & Self Feeder Co. v. Sciscoe, 129 Iowa, 631, 106 N. W. 164, 6 Ann. Cas. 1015; Fisher v. Burlington, C. R. & N. R. Co. 104 Iowa, 588, 73 N. W. 1070; Terry v. Montgomery, 166 Ala. 130, 52 So. 314; Goodwin v. Smith, 68 Ind. 301.

Knauf & Knauf, for respondent.

There is only one deduction to be made from the evidence in this case, and that is, that the death of the four horses was due to defendant's negligence, and that same was of such a degree as to be wilful. Sheldon v. Chicago, M. & St. P. R. Co. 6 S. D. 606, 62 N. W. 955; Lighthouse v. Chicago, M. & St. P. R. Co. 3 S. D. 518, 54 N. W. 320.

By the verdict the jury necessarily found that defendant did not use ordinary care to avoid the collision, after the horses were discovered in a dangerous place. McDonell v. Minneapolis, St. P. & S. Ste. M. R. Co. 17 N. D. 606, 118 N. W. 819.

The trial court refused a new trial, and the supreme court will not disturb the verdict and the ruling of the trial court, and hold that the evidence is insufficient to support the verdict. This will not be done. 9 Current Law, 215, and cases cited; Hardt v. Chicago, M. & St. P. R. Co. 130 Wis. 512, 110 N. W. 427; Graham v. Bryant, 7 Cal. Unrep. 288, 87 Pac. 232; Missouri Real Estate Syndicate v. Sims, 121 Mo. App. 158, 98 S. W. 783; Shively v. De Snell, 35 Mont. 508, 90 Pac. 749; 3 Century Dig. 3928, 3948–3950, and cases cited.

The proof shows such a high degree of negligence that it amounts almost to a wilful act on the part of defendant. Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972; Clair v. Northern P. R. Co. 22 N. D. 120, 132 N. W. 776; Bishop v. Chicago, M. & St. P. R. Co. 4 N. D. 536, 62 N. W. 605; Granby v. Michigan C. R. Co. 104 Mich. 403, 62 N. W. 579; Harris v. Missouri, K. & T. R. Co. 24 Okla. 341, 24 L.R.A.(N.S.) 858, 103 Pac. 758.

Where a judgment for plaintiff is reversed by the appellate court, and a new trial is awarded, if plaintiff recovers on the second trial he is entitled to his costs below, on the former trial. Stoddard v. Treadwell, 29 Cal. 281; Gray v. Gray, 11 Cal. 341; Ex parte Burrill, 24 Cal. 350; 3 Kerr, Cyc. Code Civ. Proc. § 1027; Walker v. Barron, 6 Minn. 508, Gil. 353; Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; Jeffery v. Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7; Garrison v. Singleton, 5 Dana, 160; Senior v. Anderson, 130 Cal. 290, 62 Pac. 563; Visher v. Webster, 13 Cal. 58; Fox v. Hale & N. Silver Min. Co. 122 Cal. 219, 54 Pac. 731; Franey v. Smith, 126 N. Y. 658, 27 N. E. 559; Jennings v. St. Louis, I. M. & S. R. Co. 59 Mo. App. 530; National Masonic Acci. Asso. v. Burr, 57 Neb. 437, 77 N. W. 1098.

Costs on *appeal* are the *only* costs to be recovered by the successful appellant; the costs of the former *trial* abide the event of the suit. Gray v. Gray, 11 Cal. 341; Duffy v. Hickey, 68 Wis. 380, 32 N. W. 54; Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054, 23 N. D. 1, 135 N. W. 665.

Bruce, J. This case has been before this court on two former occasions (19 N. D. 450, 125 N. W. 1054, 23 N. D. 1, 135 N. W. 665). It is an action to recover damages for the loss of certain horses killed by the defendant railway company upon its right of way. The appeal is based on certain errors of law alleged to have been committed in the introduction of evidence, in alleged erroneous instructions, and upon the claim that the case should have been taken from the jury on account of the fact that the evidence showed contributory negligence on the part of the plaintiff in failing to properly fence in his horses, and that there was at any rate no proof of any negligence or breach of duty on the part of the railway company.

The allegation of contributory negligence, however, may be entirely eliminated, as the whole case of the plaintiff is based upon the theory of what is known as the rule of the last clear chance. This theory, in fact, can in any event be the only theory advanced, as the horses in any view of the case were trespassers upon the track of the railway company. Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054. The sole and only questions in the case, indeed, are whether, after seeing the stock upon the right of way, the engineer could have stopped or slowed down his train without endangering the lives of himself, or his fellow employees, or the property of the patrons of the road, and have thus averted the accident, and whether a reasonably prudent and duty-regarding man would and should have attempted to do so. The rule of the case is well and properly laid down by the trial court in its instruction to the jury, that "the duty of the engineer, after discovering the presence of animals on the tracks, is to use reasonable care to avoid an accident, if possible, with the means within his power, and if he does use such reasonable care, and you are satisfied from the evidence that he did in this case, then you must find your verdict for the defendant; that is, if you are satisfied that the engineer, considering his train and the speed with which it was moving, the grade, the danger to himself, and the other members of the train crew that might result from a collision, the light, and all other circumstances of the case, used reasonable care in the running and management of his train, then he was not guilty of negligence, and your verdict will be for the defendant. In considering the conduct of the engineer to determine whether or not he was negligent, I would instruct you that he is not required to keep a lookout for cattle on the right of way, and is not bound to presume that they may be there. He owed no duty to the plaintiff to assume that his cattle might be on the railroad company's right of way or property, and was under no obligation to keep a lookout for or take steps to prevent striking them until after he discovered them on the tracks in a place of danger. If after he discovered them on the tracks then he could not avoid the accident, you must find that the defendant is not liable in damages. The only negligence that is charged against the defendant is negligence in running and managing the locomotive and cars making the train, and the only matters that you need to consider in determining whether the defendant was

negligent was the conduct of the engineer in charge of the engine. No other issues are before you on the matter of defendant's negligence, and unless you find that the engineer was negligent in handling the train as he did, then you must find for the defendant. In considering the action of the engineer after the discovery of the animals on the tracks, you may consider that the engineer owed a higher duty to safeguard the lives of himself and the crew on the train than he did to protect the animals that had strayed upon the track, and if it would appear to a reasonably prudent engineer under the circumstances of this case to be safer management of the train to continue at the same speed rather than to set the brakes under the circumstances, then such action was reasonable and proper, and cannot be considered negligence. I charge you that none of the animals of the plaintiff had any right to be on the tracks or the right of way of the defendant, and they were trespassers, and that as to them the engineer was under no obligation to keep a lookout, and he was not negligent in failing to see them earlier. The only issue relating to his negligence that you are to consider is whether he was negligent in not avoiding the accident after he discovered them on the tracks in a place of danger." See Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054; McDonell v. Minneapolis, St. P. & S. Ste. M. R. Co. 17 N. D. 606, 118 N. W. 819.

On these questions, that is to say, when the engineer first saw the horses, and whether after seeing them he exercised reasonable care to prevent the accident, taking into consideration his duty to himself and his fellow employees, there is serious conflict in the evidence, and there being such a conflict, we are of the opinion that the trial court did not err in submitting the case to the jury; nor do we believe that we are justified in asserting our judgment against that of the jury or in overruling its conclusion. The law in such cases has been repeatedly announced by this court. Farmers' Mercantile Co. v. Northern P. R. Co. 27 N. D. 302, 146 N. W. 550; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Thomp. Neg. §§ 3790, 3791; Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830; Rober v. Northern P. R. Co. 25 N. D. 394, 142 N. W. 22.

According to the engineer's own statement, he first saw the animals when he was running along a perfectly straight grade at about daylight, that is to say, about 6:25 in the morning of March 12, 1907, according

to the Buford or 7:25 according to the Williston time. The grade was a down grade for three quarters of a mile and to a point about 2,000 feet east of Buford. West of that point the grade was level, or, according to one witness, slightly up hill. The accident happened about ten car lengths from the depot, and after the train had run about forty car lengths on the level grade. The track, as far as vision was concerned, was clear and unobstructed for half a mile east of Buford. The train was going at the rate of about 30 miles an hour and was working steam. The engineer testifies that he first saw the stock when they were some 600 feet in front of him; that they then started to run; that they galloped a short way; that he was 600 feet back, and that they were galloping ahead of him; that he did not make any attempt to either stop or lessen the speed of his train. He also testified that he could not have stopped his train in less than half a mile.

It may be that if the engineer's testimony was true, he could not have stopped his train in time to have averted the accident, but was it true, and was the jury bound to so consider it? He testified, it is true, that he did not see the horses until he was within 600 feet of them, and that he saw them as soon as it was possible to see them with the light of the headlight on the engine; that it was just before daylight; was dark and cloudy; and that he could not see beyond the rays of the headlight. But the witness Corbett testified that he told him after the first trial that the reason he did not stop his train was "that he thought the damn fools would get off the track," and all of the witnesses agree that the horses galloped for some distance ahead of the engine, and that there was no attempt whatever to even slow down the train. The failure to stop, it is true, is explained by the engineer in the statement which is no doubt true, that if the accident had to happen, it would be safer to keep up full speed, as in that case the train would be less liable to be derailed. It is quite clear, however, that it is one thing to stop a train and another to slow it down; that much less time and space is needed for the latter operation, and that the difference in time and space might have materially aided the galloping animals, which were, of course, themselves making distance, and might, as far as we know, have been able to travel as fast as the slowed-down train. The testimony, too, of the engineer as to the distance at which he saw and could first have seen the horses, is by no means certain, and

under the conditions of the record was by no means undisputed. The witness Ryan testifies that he saw the horses when standing a distance of 80 rods away or 1,320 feet; the witness Holcomb when at a distance of from 25 to 40 rods; the witness Keplinger that they ran 50 or 60 rods ahead of the train before they were struck, and that he could have distinguished horses from cattle on the morning in question something like a quarter of a mile. The engineer also testifies that while he was approaching the cattle he was looking for the orders to be given upon the order board which was in front of the depot, and that he saw the green light while he was half a mile away. He could not very well have looked at this order board without looking along the track. It is true that the testimony is somewhat conflicting as to the degree of light which prevailed on the morning. The evidence, however, seems to show that the time of day was between break of day and sunrise, and though the engineer testifies that he could not see more than the length of the rays thrown by the headlight of his engine, one witness at least testifies that he could distinguish horses from cattle at a distance of a quarter of a mile. The testimony, too, of the engineer, is much weakened by the fact that, though he testified that he saw the horses some 600 feet, which is about fifteen car lengths distant, he testified at a former trial that he saw them only four or five car lengths ahead of him. It is also challenged by the statement of the witness Corbett that he told him in a conversation held soon after the former trial that the only reason why he did not stop was that he thought "the damn fools would get off the track."

The case was one for the jury to decide, and the court did not err in refusing to direct a verdict for the defendant. It is in many respects similar to those of Sheldon v. Chicago, M. & St. P. R. Co. 6 S. D. 606, 62 N. W. 955, and Lighthouse v. Chicago, M. & St. P. R. Co. 3 S. D. 518, 54 N. W. 320. In the former of these cases, the court said: "It is further contended that the court erred in admitting evidence as to the distance the animals could have been seen in the daytime on the track in the vicinity of the accident, but we are of the opinion that this evidence was properly admitted. Had the engineer stated how far the animals were ahead of the train when he first saw them, it would not have been conclusive upon the jury. They had a right to consider all of the facts and circumstances tending to show

that the engineer saw the animals sooner than his testimony would seem to indicate; and important among these facts would be the character of the track, the distance that objects could be seen thereon, the time of day, etc."

In the latter case, the court among other things said: "The engineer testified that he did not discover the horses on the track until he was within 30 or 40 feet of them. The conductor says he first saw them about the same time as the engineer, and when they were 25 or 30 feet from the engine. The jury by their special verdict found that they were 10 rods from the engine when they were first discovered by those in charge of the engine, and that reasonable efforts were not made after such discovery to stop the train. The only direct testimony as to when the horses were first discovered was as above stated, and necessarily comes from those in charge of the engine. The jury found against such direct testimony, so that we must look to the indirect and circumstantial evidence for support for the verdict, if it can be supported. The accident occurred in the evening, but the witnesses do not agree as to the conditions of the night. Defendant's witnesses say it was very dark, the engineer testifying, 'I don't know as I have ever seen it so dark.' On the other hand, one of the plaintiff's witnesses says that it was a bright night; that it was light enough so that he could and did distinctly see the horses at a distance of 120 rods. Another witness for the plaintiff says that he saw the horses immediately before the accident, running on the track before the engine, from his house, which was 140 rods from the track. How light or how dark it was, was material in assisting the jury to determine when the horses were in fact first discovered by those on the engine. The engineer had testified that the headlight was in proper order and was burning, that his eyesight was good, and that at the time of and immediately before the accident he was looking forward out of the front window of his engine, along the track. The conductor says that both he and the engineer were keeping a 'sharp lookout,' and each testifies that he did not discover the horses until within 30 or 40 feet of them. The jury might well regard these statements as conclusive under some circumstances, but not under others. They might accept it as a candid statement of the fact, if they believed from the evidence that it was a dark night, or they might decline to accept it if they found it was a bright, light night; for it is within the

ready knowledge of everyone that such a thing could hardly occur in the full light of midday, but might easily happen in the extreme darkness of a cloudy night. There was evidence from which the jury might have found that it was an extremely dark night, or that it was a very light night. Accepting the statement of plaintiff's witnesses that it was a bright night, that it was light enough so that they could and did see these horses at a distance of 120 or 140 rods, and the testimony of defendant's witnesses that they were at the time keeping a sharp lookout ahead, we think the jury might, without going outside the latitude of judgment and inference which a jury is entitled to exercise, regard the statements of defendant's witnesses as improbable in fact, and that they would be at liberty upon such evidence to find that these horses were discovered by those upon the engine sooner than as indicated by their testimony, unless they believed from the testimony of the engineer and other experts that the oscillating, vibratory motion of the engine, under the conditions of the track, filled in with cinders, the rate of speed, the dark color of the horses, and the fact that they were standing still in a bunch at the end of a bridge when they were struck, as testified to, would or did prevent such discovery. There was some evidence from experts tending to prove the difficulty of discerning, through partial darkness, objects standing still upon the track, from a moving engine, and as to the effect of atmospheric conditions upon the penetrating power of the rays from the headlight. While in our opinion this evidence was candid and intelligent, it was still for the jury to say how much such conditions interfered with the vision of those in charge of the engine, and to find whether under all the circumstances and conditions, the horses were in fact discovered in time to have prevented the accident. They found that they were . . . seen soon enough so that the engineer might, by reasonable effort, have avoided the collision. It is true the engineer and others upon the engine testified positively that they did not discover the horses until within 30 or 40 feet of them; but we are unwilling to say that even this unqualified statement might not be discredited by the jury if they believed from the evidence that surrounding circumstances and conditions made its truthfulness improbable. If it were very light, very bright, when this accident occurred, so that others could and did see these horses in motion at a distance of 140 rods, and if the

engineer was looking directly towards them, both of which facts there was evidence tending to prove, the jury might be justified in doubting the ingenuousness of that part of defendant's testimony. We think, too, that the jury would not be precluded from finding that the other unfavorable conditions, such as the condition of the track, the motion of the engine, and the difficulty of perceiving from it objects standing still, were not sufficient to explain the nondiscovery of these horses sooner than as testified to, accepting the statements of defendant's witnesses that they were keeping a sharp lookout ahead. The trial court, with superior advantages for judging of the candor and fairness and intelligence of all these witnesses, and with the impressions which the evidence made upon him still fresh in his mind, refused to disturb the verdict for any of the reasons now urged before us; and, while there may be doubt as to the correctness of the verdict, we think we should not be warranted in vacating it." See also McDonell v. Minneapolis, St. P. & S. Ste. M. R. Co. 17 N. D. 606, 118 N. W. 819.

Again in the case of Clair v. Northern P. R. Co. 22 N. D. 120, 132 N. W. 776, we find the following: "When the engineer first saw the horse on the track it was about 200 feet ahead. He testifies that he could have stopped the train within 300 feet that night. He also testifies that he did nothing to stop it until he was enabled by the light to see that the object or shadow was a horse. Owing to the curve in the track, he says he was unable to distinguish what the object was as soon as he could have done so if the track had been straight; and he further says that he set the emergency brake, although he knew that the train could not be stopped in time . . . to avoid killing the animal, if it did not jump from the track, as stock sometimes does. He also says that if he had gotten the train under control, or started to do so immediately, he would not have struck the horse nearly so quickly. The horse was running away from the train when the engineer first saw it, and when it was struck by the engine. In view of these undisputed facts it remains for us to determine whether a verdict should have been directed for the defendant. It has been held in this state, in several cases, that when animals are on the railway tracks between crossings, they are trespassers, and that railway companies owe no duty to watch for them, but that they are bound to use only ordinary and reasonable means to save the trespassing animals, after they are seen, consistent

with the safety of the train, its crew and passengers. Cumming v. Great Northern R. Co. 15 N. D. 611, 108 N. W. 798; Wright v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 159, 96 N. W. 824. It is admitted that the engineer did not sand the rails, and that doing this would have materially reduced the speed at once, in connection with the use of the emergency brake. The animal was running away from the train during all the time, which is a fact to be considered. In view of the entire record, we think it was a question for the jury to say whether all reasonable precautions were taken by the engineer, and whether the animal was killed by reason of not using ordinary and reasonable means to avoid the killing of it. . . . The rails were not sanded, and if this had been done the speed of the train would have been materially reduced at once. That the engineer should have endeavored to stop the train when he first discovered an object on the track is also a question concerning which the jurors and other impartial minds might disagree. Under the evidence it is shown that the animal was running, and that it would have had more time to escape if all precautions had been taken by the engineer. In view of these facts, we are satisfied that there was no error in submitting the issues to the jury, notwithstanding the conclusion of the engineer that no precautions on his part would have avoided the injury."

We realize that in his opinion in this case, Ex-Chief Justice Morgan distinguished the case from the one at bar as it appears upon the first appeal, in Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054, by saying: "The facts of this case are clearly distinguishable from the present case. In the Corbett Case the evidence of the engineer is unequivocal that he did everything in his power to stop the train," and that the learned judge held that no question presented itself to throw any doubt upon the evidence of the train employees as to the exercise of the diligence required to protect the trespassing animals. The learned chief justice, however, misunderstood or misstated the Corbett Case, as neither in the former trial nor in the present one was there any evidence of any attempt to stop or to lessen the speed of the train, but, on the other hand, the free admission of the engineer that no such an attempt was made. The only reason, indeed, why this court reversed the judgment on the former appeal was that the plaintiff had introduced no evidence as to the distance that one could see

along the track in the morning in question, or as to whether the horses had run ahead of the engine or not, and the defendant's engineer had positively testified that the horses when discovered were only four or five car lengths ahead, and which statement he materially modified upon the second trial.

We find no reversible error in the admission of the testimony of the witness Corbett as to the hoof tracks upon the right of way, and that the horses appeared to have galloped along such right of way for some distance. Even though he did not, and could not, testify as to the exact time at which they were made, or whether they were made before or after the animals were discovered by the engineer, these facts could be shown by the location of the tracks as compared with the tool house, which seems to have been a pivotal point in the testimony of the witnesses as to when the engineer could or must have seen the animals. The witness testified as to his ability to distinguish from the tracks of the animals whether they were galloping, trotting, or standing still, and that this is possible is a matter of common knowledge. The tracks and their condition, indeed, was a matter pertinent to the issues in the case. It is true that the answer that the horses had run ahead of the train was not responsive to the question asked, which was merely how far those horses were running down the track, or galloping, but that when they were galloping, they were galloping ahead of the engine, is so abundantly proved by the testimony of the other witnesses and even by that of the engineer himself, the distance merely being the matter at issue that we hardly can believe that the defendant was prejudiced by that answer or by its lack of responsiveness.

Nor do we think that an error was committed in permitting the cross-examination of the engineer as to his duty to keep a lookout when approaching crossings. The question at issue was whether the engineer had seen the horses or not, or whether he told the truth when he said that he did not see them until within 600 feet. The question was proper on cross-examination as tending to test his credibility in this respect. He, too, had before stated, and without objection on the part of his counsel, that the rules of his company provided that he should be constantly alert and watch the track.

Defendant and appellant next complains that the court erred in taxing against it the costs of the former trial in the court below. Al-

though the judgment in the former trial was for the plaintiff, the defendant was successful in the appeal taken, and obtained a reversal of the judgment, a new trial being ordered. The defendant was allowed costs on its former appeal, and now complains of the action of the trial judge in awarding to the plaintiff the costs of both trials in the district court.

We think that it is correct in its contention. The general rule seems to be that where "a new trial is granted on the ground that the evidence is insufficient to support a verdict, or that the verdict is contrary to the evidence, the applicant is required to pay the costs of the former trial, as a new trial is granted as a matter of favor, but where the verdict is perverse, that is, so clearly against the weight of evidence or contrary to the evidence as to create the presumption of mistake or improper motives of the jury, a new trial should be granted without imposing costs. The test applied seems to be whether the party has in any way been in fault and made the new trial necessary. See 14 Enc. Pl. & Pr. 941, 944; Schweikhart v. Stuewe, 75 Wis. 157, 43 N. W. 722; Becker v. Holm, 100 Wis. 281, 75 N. W. 999; Jarrait v. Peters, 151 Mich. 99, 114 N. W. 870.

On the former appeal the judgment was reversed because of incorrect instructions and failure of proof, largely due to an incorrect theory of the case which was entertained by the plaintiff. The defendant was hardly in fault, and the new trial was not made necessary by it. It was, as a matter of fact, in the nature of a privilege to the plaintiff. These costs being improperly taxed, it also follows that the trial court was not justified in imposing the $15 terms upon the defendant upon the motion for a review of the same.

We do not believe, however, that the defendant is entitled to the $5 charge claimed by it under ¶ 3 of § 7174, Rev. Codes 1905, and which provides among the cost items, "to either party when a new trial shall be had for all proceedings after the granting of and before such new trial, $5." These costs are clearly costs of the new trial or proceedings. The charge does not belong to the former trial, nor yet to the former appeal. It therefore belongs to the successful party upon the second trial.

The judgment of the District Court is modified by reducing the amount awarded to the plaintiff to the extent of $89.30, the amount of

the costs which were improperly allowed. In all other respects, but with this modification, the judgment is affirmed, neither party to recover costs on this appeal.

Goss, J., being disqualified, did not participate.

JULIA STENSON and Ole G. Flaagen v. H. S. HALVORSON COMPANY, a Corporation, et al.

(— L.R.A.(N.S.) —, 147 N. W. 800.)

Indebtedness by heir — prior equitable lien — distributive share — judgments against him.

1. An indebtedness owing by an heir to the estate, *held*, to constitute a prior equitable lien upon such heir's distributive share of the estate as against the liens of judgments docketed against him.

Evidence — findings — sustained.

2. Evidence examined, and *held* that the finding of the trial court that the extent of such heir's indebtedness to the estate exceeded the value of his distributive share in the estate is fully sustained.

County court — jurisdiction — decedent's estate — share of each distributee — determination — indebtedness — deduction.

3. The county court, having jurisdiction to make settlement and distribution of a decedent's estate, may determine the share of each distributee, and to that end it has authority to inquire into and determine the indebtedness of the distributee to the estate, and order a deduction of the same from his share.

Decree of distribution — county court — final.

4. The decree of distribution of a decedent's estate duly entered by the county court is final and conclusive as against a mere collateral attack.

Opinion filed June 6, 1914.

Appeal from District Court, Nelson County, *Charles M. Cooley*, J.

Action to determine adverse claim. From a judgment in plaintiffs' favor, defendants appeal.

Affirmed.

Note.—On the question of indebtedness of heir to estate as counterclaim or set-off against distributive share in proceeds of real estate, see note in 4 L.R.A.(N.S.) 189.

Barnett & Richardson and *Lyman N. Miller,* for appellants.

In the case of a person dying intestate, his estate vests at once in his heirs, subject only to the payment of his debts and expenses of administration, and the family allowance. 1 Ross, Prob. Law, § 112, citing, Brenham v. Story, 39 Cal. 179; Re Sullivan, 36 Wash. 217, 78 Pac. 945; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Elder v. Horseshoe Min. & Mill. Co. 9 S. D. 636, 62 Am. St. Rep. 895, 70 N. W. 1060; Re Schroeder, 46 Cal. 304; Smith v. Olmstead, 88 Cal. 582, 12 L.R.A. 46, 22 Am. St. Rep. 336, 26 Pac. 521; Murphy v. Clayton, 114 Cal. 526, 43 Pac. 613, 46 Pac. 460; N. D. Rev. Codes 1905, § 7890.

The distributive share of the real estate of an heir to the estate of his ancestor is not chargeable with such indebtedness, either as land or as the proceeds thereof in the hands of the administrator. Marvin v. Bowlby, 142 Mich. 245, 113 Am. St. Rep. 574, 105 N. W. 751, 7 Ann. Cas. 559; see case note in 4 L.R.A.(N.S.) 189; LaFoy v. LaFoy, 43 N. J. Eq. 206, 3 Am. St. Rep. 302, 10 Atl. 266; Mann v. Mann, 12 Heisk. 245; Parker v. Britt, 4 Heisk. 243; Close v. Van Husen, 19 Barb. 505; Smith v. Kearney, 2 Barb. Ch. 533; Kendall v. Mondell, 67 Md. 444, 10 Atl. 240; Dearborn v. Preston, 7 Allen, 192; Proctor v. Newhall, 17 Mass. 81; Hancock v. Hubbard, 19 Pick. 167; Jones v. Treadwell, 169 Mass. 430, 48 N. E. 339; Towles v. Towles, 1 Head, 601; Sartor v. Beaty, 25 S. C. 293; Olney v. Brown, 163 Mich. 125, 128 N. W. 241; Re Simon, 158 Mich. 256, 122 N. W. 544, 17 Ann. Cas. 723; Sprague v. Moore, 130 Mich. 92, 89 N. W. 712; Broas v. Broas, 153 Mich. 310, 116 N. W. 1077; Lodge v. Fitch, 72 Neb. 652, 101 N. W. 338; Milnes v. Sherwin, 53 L. T. N. S. 534, 33 Week. Rep. 927; Thompson v. Myers, 95 Ky. 597, 26 S. W. 1014; Power v. Power, 91 Mich. 587, 52 N. W. 60; Barton v. Rice, 22 Pick. 508.

Frich & Kelly, for respondents.

The distributive share of an heir should be retained in the hands of the administrator, and applied to his indebtedness to the estate. 23 Cyc. 1377; Koons v. Mellett, 121 Ind. 585, 7 L.R.A. 231, 23 N. E. 95; Oxsheer v. Nave, 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7; 1 L.R.A. Cases as Authorities, 926; Fiscus v. Moore, 121 Ind. 547, 7 L.R.A. 235, 23 N. E. 362; Hunter v. Citizens' Sav. & T. Co. — Iowa, —,

138 N. W. 476; School Dist. v. Peterson, 74 Minn. 122, 73 Am. St. Rep. 337, 76 N. W. 1126.

It matters not by what name the proceeding is called, whether retainer, advancement, or set-off, the result is the same, and it rests upon the wholesome principles of right and justice. Smith v. Kearney, 2 Barb. Ch. 533; Holmes v. McPheeters, 149 Ind. 587, 49 N. E. 452; Ramsour v. Thompson, 65 N. C. 628; Duffy v. Duffy, 155 Mo. 144, 55 S. W. 1002; Courtenay v. Williams, 3 Hare, 539, 13 L. J. Ch. N. S. 461, 8 Jur. 844; Jeffs v. Wood, 2 P. Wms. 128; Sims v. Doughty, 5 Ves. Jr. 243; Oxsheer v. Nave, 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7, and cases cited; Keever v. Hunter, 62 Ohio St. 616, 57 N. E. 454; Head v. Spier, 66 Kan. 386, 71 Pac. 833; Re Lietman, 149 Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307; Wilson v. Kelly, 16 S. C. 216; Allen v. Smitherman, 41 N. C. (6 Ired. Eq.) 341; Fiscus v. Fiscus, 127 Ind. 283, 26 N. E. 831; Gosnell v. Flack, 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411; Howland v. Heckscher, 3 Sandf. Ch. 519; Re Timerson, 39 Misc. 675, 80 N. Y. Supp. 639; Ex parte Wilson, 84 S. C. 444, 66 S. E. 675; C. A. Weston Co. v. Colby, 107 Me. 104, 77 Atl. 637; Esmond v. Esmond, 154 Ill. App. 357; Sanchez v. Forster, 133 Cal. 614, 65 Pac. 1077; Re Angle, 148 Cal. 102, 82 Pac. 668; Re Moore, 96 Cal. 522, 31 Pac. 584; Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119; Re Smith, 108 Cal. 115, 40 Pac. 1037; Cowen v. Adams, 24 C. C. A. 198, 47 U. S. App. 439, 78 Fed. 545; Batton v. Allen, 5 N. J. Eq. 99, 43 Am. Dec. 630; Hill v. Bloom, 41 N. J. Eq. 276, 7 Atl. 438; Bowen v. Evans, 70 Iowa, 368, 30 N. W. 638; Armour v. Kendall, 15 R. I. 193, 2 Atl. 311; Willock's Estate, 165 Pa. 522, 30 Atl. 1043; Ross, Prob. Law, § 541, p. 844; Allen v. Edwards, 136 Mass. 138; Blackler v. Boott, 114 Mass. 26; 2 Woerner, Am. Law of Administration, 2d ed. *1237, § 564.

The county courts of this state possess the necessary powers to administer remedies in accord with the general principles of equity, relating to matters of probate of wills and settlement of estates of persons dying intestate. Beach, Eq. Jur. § 1033; Williams v. Miles, 63 Neb. 859, 89 N. W. 451; Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459; Head v. Spier, 66 Kan. 386, 71 Pac. 833; Proctor v. Dicklow, 57 Kan. 119, 45 Pac. 86.

The probate court has the right to make distribution and to deter-

mine who is entitled to the funds of the estate. Re Lietman, 149 Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307; Dutoit v. Doyle, 16 Ohio St. 400; Earnest v. Earnest, 5 Rawle, 213; Batton v. Allen, 5 N. J. Eq. 99, 43 Am. Dec. 630; Martin v. Martin, 170 Ill. 18, 48 N. E. 694; Dickinson's Estate, 148 Pa. 142, 23 Atl. 1053; Esmond v. Esmond, 154 Ill. App. 357.

FISK, J. The statement of facts by appellants' counsel is conceded to be correct with one minor exception, which will be noted later. Such statement is as follows:

Martin G. Flaagan was the son of one Gunder O. Flaagan. Gunder O. Flaagan died October 28, 1911, intestate, leaving among his other heirs, the said Martin G. Flaagan.

Prior to the death of Gunder O. Flaagan he had loaned to his son approximately $900, evidenced by promissory notes, which appear in the record as exhibits A and B. In addition thereto, plaintiffs claim that Martin G. Flaagan was indebted to Gunder O. Flaagan in an open book account aggregating approximately $2,900. Under plaintiffs' claim, therefore, and under the findings of the court in that connection, at the time of the death of Gunder O. Flaagan, Martin G. Flaagan owed Gunder O. Flaagan, in the relation of debtor and creditor, $3,743.

Prior to the death of Gunder O. Flaagan, said Martin G. Flaagan was indebted to various other persons, among them the defendants in this case, these appellants. All of the claims held by appellants were reduced to judgment, prior to the death of Gunder O. Flaagan, and were duly of record in Nelson county, North Dakota.

Upon the death of Gunder O. Flaagan, intestate, he left as a part of his estate, real estate located in Nelson county, North Dakota, worth many thousands of dollars, which real estate was all unencumbered. Martin G. Flaagan was one of several heirs to this property.

Upon the probate of said estate, the probate court attempted to charge off the distributive share of the said Martin G. Flaagan, which distributive share was found in the final decree to be $4,413.41, the indebtedness which had been due from Martin G. Flaagan to Gunder O. Flaagan, and upon the death of Gunder O. Flaagan to the estate of Gunder O. Flaagan, which indebtedness was found in the decree to be $4,709.11, and the probate court therefore attempted to exclude the

said Martin G. Flaagan from participation in the distribution of said estate, for the reason that the indebtedness of the said Martin G. Flaagan to said estate exceeded the distributive share of the said Martin G. Flaagan, in said estate. The defendants, judgment creditors of the said Martin G. Flaagan, began proceedings to enforce their judgments against Martin G. Flaagan by having execution issued on such judgments, and levies made upon the one-seventh interest of the said Martin G. Flaagan in the real estate which constituted a part of the estate of Gunder O. Flaagan, deceased. One execution was actually levied upon the real estate and a sale thereon ordered, when the plaintiffs, who had come into the record ownership of such real estate, by successive conveyances from the other heirs, excluding Martin G. Flaagan, brought the pending action, asking for a permanent injunction restraining the defendants from attempting to collect said judgments against any interest of Martin G. Flaagan in said real estate, and further praying a decree quieting the title of such real estate in the plaintiffs, free from any interest or lien on the part of the defendants by reason of the said judgments against the said Martin G. Flaagan. The action was tried and the trial court found in favor of the plaintiffs and made findings of fact, conclusions of law, and order for judgment in favor of the plaintiffs, upon which order judgment was duly entered, and from which judgment defendants appealed.

The sole question upon this appeal, under the facts, therefore, is whether the indebtedness owing from Martin G. Flaagan to the estate of Gunder O. Flaagan is a prior lien upon the distributive share of Martin G. Flaagan in the real estate constituting said estate, as against valid judgments against the said Martin G. Flaagan, which judgments were in force and of record prior to the death of the intestate, and which, by force of the statute, became a lien upon any interest of the judgment debtor in real estate within the particular county, and upon which judgments, executions had been issued and levies made. The trial court held that the estate had a prior claim, as against the distributive share of the heir, for the payment of the debts due from the heir to the estate, to which prior claim the lien of defendants' judgments, together with the enforcement of the same by execution, was subordinate.

It is conceded that no action or proceeding was ever brought by or on behalf of the estate for the purpose of the collection of the indebt-

edness due the estate from Martin G. Flaagan; and it is conceded that no levy of execution, attachment, or any other process was had on behalf of the estate with respect to the indebtedness or distributive share of the said Martin G. Flaagan in such estate. It is further conceded that the indebtedness due from Martin G. Flaagan to Gunder O. Flaagan was not, in any respect, in the nature of an advancement, as defined by our statute, but that such indebtedness was a simple indebtedness establishing the relation of debtor and creditor between the father and son.

The statement above that all of the claims of appellants were reduced to judgment prior to the death of Gunder O. Flaagan is inaccurate. A portion only of such claims were in judgment prior to his death. This, however, is not of vital importance.

The action is a statutory one to determine adverse claims to real property. Defendants rely upon the alleged priority of their judgment liens over the rights of plaintiffs. The latter recovered judgment in the court below, and the cause is here for trial *de novo*. As stated by appellants' counsel, "The sole question upon this appeal, under the facts, therefore, is whether the indebtedness owing from Martin G. Flaagan to the estate of Gunder O. Flaagan is a prior lien upon the distributive share of Martin G. Flaagan in the real estate constituting said estate, as against valid judgments against the said Martin G. Flaagan."

The question thus presented is a new one in this jurisdiction, and is somewhat difficult of solution.

Counsel for appellants have presented a very able and plausible argument in support of their contention. They call our attention to Rev. Codes 1905, § 5186, which provides that "the property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the county court, and to the possession of any administrator appointed by that court for the purpose of administration," and they draw the conclusion therefrom that immediately upon the death of Gunder O. Flaagan his son Martin G. Flaagan succeeded to an undivided one-seventh interest in the real property, and that appellants' judgments immediately attached thereto as a lien. The strict accuracy of such conclusion is dependent, however, upon the existence or nonexistence of an equitable power in the

county court, in the distribution of the estate, to withhold from Martin G. Flaagan's distributive share an amount equivalent to his indebtedness to the estate. If such equitable power exists, then, under the facts, there would be nothing coming to Martin and therefore nothing upon which the judgment liens could attach, except, perhaps, the naked legal title to a one-seventh interest in such real property. But counsel for appellant argue, in effect, that we must look alone to the provisions of our Code for authority to make such equitable set-off; and they call attention to the fact that no such statutory provisions exist, and that the only provisions authorizing the interest of an heir to be applied in payment of an indebtedness due the ancestor is in case of advancements to such heir. Sections 5197, 5199, 5200, Rev. Codes 1905, relate to such advancements. It is entirely clear, as counsel contend, that the indebtedness owing by Martin to his father was not an advancement as defined by the sections of the Code above referred to. Indeed, an advancement does not involve an indebtedness at all, and it is equally clear that Martin became indebted to his father under a promise to repay such indebtedness. This created the simple relation of debtor and creditor between them, and cannot be considered, in any sense, advancements, within the meaning of the Code definition of that term; and if appellants are correct that the legislature intended to single out advancements as contradistinguished from indebtedness owing by an heir to the estate, and to create rights of equitable set-off with respect thereto, and withhold such rights as to indebtedness not in the nature of advancements, then, and in that case, the judgment of the district court is erroneous. In other words, unless a simple indebtedness from the heir to the estate should be treated upon the same basis and with the same force and effect as though created by way of advancements, the county court was unauthorized to make the equitable distribution of the estate in the manner attempted.

Counsel for appellants earnestly contend for the rule announced in Marvin v. Bowlby, 142 Mich. 245, 4 L.R.A.(N.S.) 189, 113 Am. St. Rep. 574, 105 N. W. 751, 7 Ann. Cas. 559, and cases cited.

We have examined these authorities, and have carefully noted the reasoning in the opinions. Most of them, as in the Marvin-Bowlby Case, recognize the general doctrine that the distributive share due an heir from personal estate may be applied by the administrator in pay-

edness due the estate from Martin G. Flaagan; and it is conceded that no levy of execution, attachment, or any other process was had on behalf of the estate with respect to the indebtedness or distributive share of the said Martin G. Flaagan in such estate. It is further conceded that the indebtedness due from Martin G. Flaagan to Gunder O. Flaagan was not, in any respect, in the nature of an advancement, as defined by our statute, but that such indebtedness was a simple indebtedness establishing the relation of debtor and creditor between the father and son.

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county court, in the distribution of the estate, to withhold from Martin G. Flaagan's distributive share an amount equivalent to his indebtedness to the estate. If such equitable power exists, then, under the facts, there would be nothing coming to Martin and therefore nothing upon which the judgment liens could attach, except, perhaps, the naked legal title to a one-seventh interest in such real property. But counsel for appellant argue, in effect, that we must look alone to the provisions of our Code for authority to make such equitable set-off; and they call attention to the fact that no such statutory provisions exist, and that the only provisions authorizing the interest of an heir to be applied in payment of an indebtedness due the ancestor is in case of advancements to such heir. Sections 5197, 5199, 5200, Rev. Codes 1905, relate to such advancements. It is entirely clear, as counsel contend, that the indebtedness owing by Martin to his father was not an advancement as defined by the sections of the Code above referred to. Indeed, an advancement does not involve an indebtedness at all, and it is equally clear that Martin became indebted to his father under a promise to repay such indebtedness. This created the simple relation of debtor and creditor between them, and cannot be considered, in any sense, advancements, within the meaning of the Code definition of that term; and if appellants are correct that the legislature intended to single out advancements as contradistinguished from indebtedness owing by an heir to the estate, and to create rights of equitable set-off with respect thereto, and withhold such rights as to indebtedness not in the nature of advancements, then, and in that case, the judgment of the district court is erroneous. In other words, unless a simple indebtedness from the heir to the estate should be treated upon the same basis and with the same force and effect as though created by way of advancements, the county court was unauthorized to make the equitable distribution of the estate in the manner attempted.

Counsel for appellants earnestly contend for the rule announced in Marvin v. Bowlby, 142 Mich. 245, 4 L.R.A.(N.S.) 189, 113 Am. St. Rep. 574, 105 N. W. 751, 7 Ann. Cas. 559, and cases cited.

We have examined these authorities, and have carefully noted the reasoning in the opinions. Most of them, as in the Marvin-Bowlby Case, recognize the general doctrine that the distributive share due an heir from personal estate may be applied by the administrator in pay-

ment of a debt due the estate by such heir, but they draw a distinction between personal and real estate in applying such doctrine. The Michigan court, among other things, says: "It is a recognized doctrine that the distributive share derived from personal property of an heir indebted to an estate may be retained by the administrator in payment of such debt. This same doctrine has also been applied to a debtor legatee by an unbroken line of authorities from the earliest English decisions to the present time. The doctrine is founded upon principle as well as upon authority. It is, in fact, the collection of a debt due the estate. Personal estate is assets in the hands of the administrator. He is required by law to convert personal property into money, to collect all debts due the estate from all debtors, including heirs. The heir has no title or claim to personal estate, except a distributive share in the surplus after payment of debts and expenses of administration.

"No such doctrine has prevailed as to real estate. The title to the real estate vests in the heir at the date of the death of the ancestor. Real estate is not assets in the hands of a personal representative, and, unless otherwise charged by the terms of a will, is subject only to the contingency of a sale of so much thereof as may be necessary to pay the debts of the estate in case there is not sufficient personal estate for that purpose. This statutory contingency is a modification of the common law, and no sale of real estate to pay debts of the estate could be made before this modification."

The court reviews and criticizes numerous authorities holding to the contrary, including Oxsheer v. Nave, 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7; Streety v. McCurdy, 104 Ala. 493, 16 So. 686; Fiscus v. Moore, 121 Ind. 547, 7 L.R.A. 235, 23 N. E. 362; Koons v. Mellett, 121 Ind. 585, 7 L.R.A. 231, 23 N. E. 95; Donaldson's Estate, 158 Pa. 292, 27 Atl. 959; Gosnell v. Flack, 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411; New v. New, 127 Ind. 576, 27 N. E. 154, and concludes that the great weight of authorities hold the contrary doctrine, to the effect that the distributive share of the real estate of an heir, debtor to the estate of his ancestor, is not chargeable with such indebtedness, either as against the land or the proceeds of the sale thereof in the hands of the administrator.

The distinction thus drawn by the Michigan court between real and personal estates is not applicable in North Dakota, for, as above stated

by § 5186, Rev. Codes, the property, both real and personal, of one who dies intestate, passes to the heirs of such intestate, subject to the control of the county court, and to the possession of the administrator for the purposes of administration. In other words, no distinction whatever is made between the two classes of estates in this regard.

With due deference to the opinion of the Michigan court, we think the great weight of authority, as well as the better reasoning, is opposed to its holding in Marvin v. Bowlby, 142 Mich. 245, 4 L.R.A. (N.S.) 189, 113 Am. St. Rep. 574, 105 N. W. 751, 7 Ann. Cas. 559.

As stated by Judge Woerner in 2 Am. Law of Administration, 2d ed. § 564, "the tendency seems to be in favor of the right of set-off" as to real as well as personal property, and in 1 Ross on Probate Law & Practice, p. 845, it is unqualifiedly stated that "the indebtedness of a distributee to the estate may be deducted from his share," citing the recent cases of Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119; Ayres v. King, 168 Mo. 244, 90 Am. St. Rep. 452, 67 S. W. 558; Re Lietman, 149 Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307; Irvine v. Palmer, 91 Tenn. 463, 30 Am. St. Rep. 893, 19 S. W. 326; Re Angle, 148 Cal. 102, 82 Pac. 668. To these may be added the following: Keever v. Hunter, 62 Ohio St. 616, 57 N. E. 454; Head v. Spier, 66 Kan. 386, 71 Pac. 833; Gosnell v. Flack, 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411; Dickinson's Estate, 148 Pa. 142, 23 Atl. 1053, and other authorities too numerous to mention.

The reasoning of appellants' counsel that because the legislature singled out advancements and made them subject to equitable set-off, and did not do so as to indebtedness owing by heirs or distributees, that the legislative intent was not to allow such set-off as to such indebtedness is, we think, unsound. The legislation thus enacted was, no doubt, for the purpose of distinguishing advancements from gifts, and not for the purpose of affecting, in the least, the rights of heirs or distributees who might be indebted to the estate. Indebtedness due the estate is a part of its assets for distribution after payment of the debts and expenses of administration; but neither gifts nor advancements can be thus considered. Legislation was thus necessary in the one case, but not in the other. As said by the Ohio court in Keever v. Hunter, 62 Ohio St. 616, 57 N. E. 454, "A proposition necessarily involved in the decision of the circuit court is that in a case of this

character a son who owes a debt which is payable at all events occupies a better position than one who has received an advancement which is not payable otherwise than as it may serve to diminish his inheritance. The conclusion does not contribute to the equality of inheritance which is made so prominent in the legislation and the decisions of this state. The statute upon the subject of advancements distinguishes gifts by way of advancement from other gifts. It does not make a gift by way of advancement more onerous to the child who receives it than is a debt to the child who owes it. It is not important whether, to secure equality in cases of this character, we adopt the doctrine of equitable set-off, as has been done by some courts, or, for that purpose, regard the debt as an advancement, as has been done by others. The ground of decision is that it is inequitable and at variance with the policy defined in our statutes to permit one to share in an estate which is diminished by his default and to the prejudice of those whose rights are equal to his." The court then quotes from Judge Woerner in his American Law of Administration, vol. 1, § 71, as follows: "The distinction between debts owing by an heir and advancements made to him by the intestate is sharply drawn; in some states debts so owing cannot be deducted from the share of the heir in the real estate, and from the personal estate only by way of set-off, but the true principle seems to be that a debt owing by an heir constitutes part of the assets of the estate, as much as that of any other debtor, for which he should account before he can be allowed to receive anything out of the other assets; and it is so held in the United States." It should be noted that Ohio, as well as several other states, have statutes similar to North Dakota relative to advancements and the duty of offsetting the same in the distribution of estates.

In Dickinson's Estate, 148 Pa. 142, 23 Atl. 1053, it was squarely held that when one of the heirs of decedent was indebted to decedent, and the latter died intestate, an equal distribution of decedent's estate can only be effected by charging the heir with the advancement, or requiring him to pay his indebtedness by applying his share of the estate to that object, and the rights of creditors of the heir are dependent upon his rights. They claim through him. If the heir's share is insufficient to discharge his indebtedness to the decedent's estate, his creditors take nothing in the distribution.

The Washington court in the recent case of Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119, in a case on all fours with the case at bar, unqualifiedly approve the decision in Oxsheer v. Nave, 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7, and state that the rule there announced has the support of the weight of authority. Among other things, it is there said: "It seems apparent that before the devisee can have a distributive interest in the estate his debt due the estate must be settled. The interest of the devisees cannot be distributed until the assets of the estate are determined. The averments of the complaint show that Franklin D. Boyer has in fact no interest in the estate. The claim of lien, then, is an unsubstantial cloud upheld by appellant."

In the case of Ayres v. King, 168 Mo. 244, 90 Am. St. Rep. 452, 67 S. W. 558, the Missouri court in a very terse and clear statement fully upholds the views above expressed. The syllabus is as follows: "An heir who owes the estate far more than his distributive share therein has no such interest therein as will enable him to maintain a partition suit. Nor has his creditor who has reduced his claim against him to judgment, and had his interest in the estate sold under execution, and obtained a sheriff's deed therefor." See also Gosnell v. Flack, 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411.

These, and kindred cases too numerous to mention, announce a salutary, equitable, and just rule, and we adopt the same as the rule in this jurisdiction. For authorities in addition to the above, see note to Marvin v. Bowlby, 7 Ann. Cas. pages 564 and 565.

As seen by appellants' statement of facts, they concede that the sole question upon this appeal is whether the indebtedness owing from Martin G. Flaagan to the estate of his father is a prior lien upon the distributive share of Martin in the real property as against appellants' judgments. But later in their brief they question the correctness of the finding as to the amount of such indebtedness, and assert that there is a difference in favor of Martin between his indebtedness and his distributive share in approximately $700. Counsel do not seriously urge the correctness of their suggestion in this respect, but content themselves with a naked statement of such discrepancy between the finding on this point and the evidence, citing pages 14 and 15 of statement of case. Suffice it to say that, after an examination of the evidence, we deem the finding thus challenged fully sustained.

But one other question need be considered, which is the power and authority of the county court to direct such equitable set-off. Its exercise of such power and authority involves its jurisdiction to determine judicially the fact and the extent of Martin's indebtedness to the estate. We think there can be no question as to such jurisdiction. It clearly has undoubted authority to determine who the proper distributees of the estate are and the portion to which each is entitled. We think the correct rule is announced in the case of Holden v. Spier, 65 Kan. 412, 70 Pac. 348, from which we quote: "The probate court, having jurisdiction to make settlement and distribution of a decedent's estate, may determine the share of each distributee, and to that end can inquire into and determine the indebtedness of the distributee to the estate, and order a deduction of the same from his share."

In this connection see also Head v. Spier, 66 Kan. 386, 71 Pac. 833, wherein the rule in the Holden Case is stated to be the general rule, citing Dutoit v. Doyle, 16 Ohio St. 400, 4 Am. & Eng. Enc. Law, 379; Earnest v. Earnest, 5 Rawle, 213; Batton v. Allen, 5 N. J. Eq. 99, 43 Am. Dec. 630; Martin v. Martin, 170 Ill. 18, 48 N. E. 694; Cheyney's Appeal, 148 Pa. 142, 23 Atl. 1053.

If the county court has jurisdiction, as it no doubt has, as incident to its authority to make settlement and distribution of a decedent's estate, to inquire into and determine the indebtedness of the distributee to the estate, and order a deduction of the same from his share, then it would seem to logically follow as a necessary conclusion that the decree of distribution would be final and conclusive as against a collateral attack. Upon this question see 1 Ross on Probate Law & Practice, §§ 542–544 inclusive; also § 7898, Rev. Codes 1905, which provides: "The proceedings of a county court in the exercise of its jurisdiction are construed in the same manner and with like intendments as the proceedings of courts of general jurisdiction, and to its records, orders, and decrees there is accorded like force, effect, and legal presumptions as to the records, orders, judgments, and decrees of courts of general jurisdiction." See also Rev. Codes §§ 8211 and 8212, and Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008, and cases cited. Also Re Angle, 148 Cal. 102, 82 Pac. 668; Re Crooks, 125 Cal. 459, 58 Pac. 89; Hopkins v. White, 20 Cal. App. 234, 128 Pac. 780.

It follows that the judgment appealed from was correct, and the same is accordingly in all things affirmed.

W. O. BAIRD v. CHARLES D. MATTESON.

(147 N. W. 722.)

Defendant perfected an appeal from a judgment of the district court of Eddy county to this court September 18, 1911, and on March 9, 1914, the record had not been transmitted to this court, and no abstract or briefs filed. *Held:*

Appeal — dismissal — motion for — delay — excusing.

1. In the absence of a showing of extraordinary reasons excusing appellant for his delay, the appeal should be dismissed on motion of respondent.

Appeal — diligence in perfecting — record on appeal — transmission — rules — not exclusive.

2. The only act done by the appellant between the perfecting of his appeal, September 18, 1911, and March, 1914, toward securing a determination of such appeal, was to settle a statement of the case in October, 1911, on September 20, 1911, to write the clerk of the district court inclosing his check for $5, stating that it represented the clerk's fees in the matter of the appeal, and requesting that it be credited, and in transmitting to the clerk of the district court on November 7, 1911, a statement of the case, etc., and requesting that the clerk tell counsel immediately when the record was sent to the supreme court. *Held*, that under these and other facts stated in the opinion it devolved upon counsel for appellant to see that his record was duly transmitted to this court, and that the rule permitting the respondent to notify the appellant to cause the record to be transmitted within twenty days, and providing for the record being transmitted by the respondent, is not exclusive, but that respondent may move for dismissal of the appeal for want of prosecution.

Appeal — dismissal — motion for — hearing — record remanded — purpose — reopen judgment — delay.

3. On the return day of an order to show cause why the appeal in this case should not be dismissed, defendant submitted a counter motion to have the record remanded to the trial court to enable him to move that court to open the judgment, and permit the introduction of evidence discovered since the trial and judgment from which the appeal was taken. *Held*, that, inasmuch as such evidence is shown to have been discovered May 8, 1912, and no application was made to this court to have the record remanded until after the notice in March, 1914, of a motion to dismiss the appeal for want of prosecution, and the absence of the record on appeal in this court, such delay is

unwarranted, and the facts stated furnish no ground for remanding the record over the objection and in the presence of the motion of respondent to dismiss the appeal.

Opinion filed June 11, 1914.

Statement.

Judgment was entered in the district court in this action, and notice of the entry thereof served upon defendant's counsel on the 21st day of July, 1911. Time for settling statement of the case was extended, over plaintiff's objections, until October 31, 1911, when it was settled by the judge. An appeal to this court from such judgment was perfected on the 18th day of September, 1911. No motion was ever made in the trial court to open or modify the judgment. Nothing further was done in the way of printing and serving abstract or statement or briefs by appellants until the 7th day of March, 1914, when respondent's counsel procured from this court an order to show cause why such appeal should not be dismissed for failure to prosecute.

March 20, 1914, appellants filed in this court notice of motion for an order remanding the record and proceedings on appeal to the district court of Eddy county to enable the appellants to make such motion, or take such proceedings therein as they might be advised. Affidavits supporting this motion state that the action is in effect one to determine adverse claims to real estate; that the trial court found certain tax deeds valid, and that the appellant Matteson had no right, title, or interest in the premises described; that prior to the trial in the district court a careful search was made of the records and files of the county auditor of Eddy county to ascertain if notices of expiration of redemption had been given or published in connection with the tax deeds referred to; that such notice was required by law, but that nothing was found tending to show such notice had ever been given, and that the county auditor was unable to furnish any information pertaining to the same; that, not finding anything tending to show that notice of expiration of redemption had been given or published, the case was tried upon the theory that they were not given or published; that therefore the deeds were void; that, subsequent to the trial of said action and the perfection of the appeal from such judgment,

and on or about the 8th day of May, 1912, a search of the old files of a newspaper published at New Rockford, in Eddy county, was made, and notices of expiration of redemption on the sale on which said deeds were based were found, and that they had been printed therein; and the object of the motion to remand is stated to be so the appellant may move the trial court to reopen the case and permit the introduction of record evidence of publication of such notices of expiration of redemption. The affidavit of the party who made the examination of such files and discovered the publication of the notices referred to was made the 29th of August, 1913.

It is shown that on September 20, 1911, counsel for appellant wrote the clerk of the district court of Eddy county, inclosing his check for $5, stating that it represented the clerk's fees in the matter of the appeal to the supreme court in this case, and requesting him to credit it; that said check was cashed, and on November 7, 1911, another letter was written said clerk, advising him of the forwarding to him by express of the statement of the case and certificate, together with affidavit of service and notice of settlement, with a request that he get it from the express office, and file it in his office, and acknowledge receipt of the same. The letter closed with this request: "Be sure and tell us immediately when you send this record to the supreme court." Appellant's counsel did not know until March 9, 1914, that the record had not been transmitted to this court. Other statements set forth what was done by appellant's counsel after March 9, 1914, but they need not be set forth here.

Thorp & Chase, of Jamestown, N. D., for appellant.
Maddux & Rinker, of New Rockford, N. D., for respondent.

SPALDING, Ch. J. It is apparent that, standing alone, the motion to dismiss the appeal should be granted. Delay in doing anything toward prosecuting an appeal from September 18, 1911, to March, 1914, or at least from the writing of the letter to the clerk, November 7, 1911, until the submission of a motion to dismiss the appeal in March, 1914, is such delay as to require a dismissal of the appeal, in the absence of some extraordinary reasons excusing appellants for their delay.

We do not construe the letter of November 7th to the clerk as a

request to transmit the record to the supreme court, but even if it be construed as a direction to him to so transmit it, it also contained the request that counsel be notified when it was sent. Not receiving such notice, counsel was thereby apprised of the fact that it had not been transmitted, and whatever the primary duty of the clerk may have been in the premises, it became the duty of appellant to follow the matter up, and cause the record to be transmitted. Furthermore, under rule 13 of this court, which went into effect September 1, 1913 [23 N. D. xxxix, 141 N. W. viii], it was the duty of the clerk of this court to notify counsel of the failure of an appellant to file his brief, and appellant knew that he had filed no brief, and because the clerk did not call his attention to his failure to file a brief he was thereby charged with knowledge that the record was not on file in this court. See also rules 12 and 15. Notwithstanding all these facts, counsel concededly gave the appeal no further attention until March, 1914. It is further suggested that appellant is excused because respondent did not notify him to send up the record, as he was permitted to do by the rules of this court. This rule, however, does not provide the only method for securing the dismissal of an appeal. Unwarranted delay, or the abandonment of the appeal, furnishes ground for its dismissal, notwithstanding respondent may not have pursued the alternative course of requiring the record transmitted, or of transmitting it himself.

The only other question which need be considered is whether the facts to which we have referred, relating to the discovery of the publication of the notices of the expiration of redemption, furnish a valid reason for not dismissing the appeal. We need not enter into the merits of the case further than to say that the claim of appellants, that the submission of such notices of expiration of redemption in evidence would have falsified the record and resulted in a judgment for appellants in the trial court, is controverted. It is evident that the purpose for which the appellants desire the record remanded to the trial court is in effect to enable them to make a motion for a new trial on the ground of newly discovered evidence, though they term it a motion to open the judgment and permit the submission of further evidence. Its appellation does not change the legal effect of the proceeding proposed. It is elementary that for newly discovered evidence to furnish a ground for a new trial, due diligence must be shown in the attempt to

discover it in time to make use of it on the trial. We have grave doubts of the sufficiency of the showing in this respect to have warranted the trial court in granting a new trial, had the application been made before appeal and without delay after trial. It is alleged that search was made in the auditor's office, and that the present auditor and his predecessors had been examined on the subject, and were unable to furnish any information showing publication of the notices. It nowhere appears that the files of newspapers in the county had been searched. The Transcript, the paper in which it is now alleged they were published, is published at the county seat of Eddy county, where the case was tried, and the duty may have devolved upon counsel to search among the files of that paper, notwithstanding the failure to obtain any evidence through the medium of the auditors or their office. However this may be, there was further delay. This evidence was discovered May 8, 1912, one year and ten months before it was brought to the attention of this court, and long after the case should have been, under the usual methods of procedure, disposed of.

We cannot say what effect such delay in presenting it might have upon the ability of respondent to furnish further evidence in support of his action. The evidence of such publication, if of any avail, should have been presented at the earliest possible moment after its discovery, and it is now too late to make it available on motion for a new trial. Hence it would be useless for this court to remand the record as requested. We may say on behalf of the attorneys who presented the matter to this court, that there appear to have been counsel employed in Minneapolis and in New Rockford, as well as in Jamestown, and that counsel of record in this court appear not to be wholly responsible for the failure to present the matter seasonably. We are of the opinion that the facts narrated furnish no valid reason why the motion to dismiss the appeal should not be granted. It is granted. See rule 15 (23 N. D. xxxix, 141 N. W. viii).

MAIE B. RINDLAUB v. JOHN H. RINDLAUB.

(147 N. W. 725.)

Application by plaintiff to this court for a change in the custody of children, and for an increased allowance to the mother for their support and maintenance while in her custody. *Held*:—

The custody of the youngest child, until further order, is awarded to plaintiff, with conditions; the custody of the two oldest is awarded from June 1st to December 1st each year to the mother, and from December 1st to June 1st each yearly period to the father, with conditions.

Opinion filed June 16, 1914.

Application under prior decision of this court.
Barnett & Richardson, of Fargo, N. D., for plaintiff.
Watson & Young and *E. T. Conmy,* of Fargo, N. D., for defendant.

Goss, J. The plaintiff, Maie B. Rindlaub, petitions this court for a modification of the previous orders that she may have awarded her the custody of Bruce and John Rindlaub, two of her three children, and for an increase in the allowance to her for the maintenance and her care of the three children of this marriage, for which she has heretofore received $50 per month per child, while in her custody, or a total of $1,200 per year. The previous order of this court, dated October 30, 1911, granted plaintiff the custody of the youngest child, Newhall, throughout the year, and the custody of the other two children, Bruce and John, for six months each year, from November 1st to April 1st, with the custody of the older children with defendant, John H. Rindlaub, from April 1st to November 1st each year. Each parent was given certain rights of visitation while the custody was with the other. This order concerning the custody of the children was entered pursuant to a reservation of that power, contained in the opinion of this court in Rindlaub v. Rindlaub, 19 N. D. 352, 125 N. W. 479, wherein the merits of the divorce action and rights of alimony and property distribution were finally determined adversely to plaintiff, Maie B. Rindlaub, and the defendant, John H. Rindlaub, granted a divorce on the ground of desertion, with alimony and division of property denied, the court at that time being powerless,

under § 4073, Rev. Codes 1905 (it being before the passage of chap. 184, Session Laws of 1911, amending § 4073, Rev. Codes 1905, granting the court in any event the right to make an equitable distribution of property upon the granting of a divorce, regardless of which party was at fault), to do otherwise under its findings of fact.

The ground presented upon which petitioner asks the custody of said children is that their education is being seriously hampered by reason of the fact that Bruce and John are twice each year switched from one school to another in the middle of a school term, which is not conducive to best educational results. This is made necessary by reason of the petitioner and respondent residing more than a mile apart in the city of Fargo, rendering it impossible for the children on a change of custody from one parent to the other to remain in one school. Thus, on September 1st the school year opens with the children in the custody of the father; they are enrolled in the Central School, where they remain two months, or until November 1st, when they return to the mother's custody, and are withdrawn from the Central School and placed in the Longfellow School until May 1st, when, in returning to the father's custody, they must again re-enter the Central School. The school year in the Fargo schools is divided into three equal terms, to wit, from September 1st to December 1st, from December 1st to March 1st, and from March 1st to June 1st approximately.

Plaintiff also applies for an increase in the allowance for support of said children. Defendant asks that she account for what she has received for such purposes in the past, and particularly for $4,750, paid her during the last four years. The affidavits make no showing of the needs of the children and mother, or her present financial condition, except that it appears to her necessary to supplement the $100 per month now paid her for such purposes by teaching in the Agricultural College, for which she receives a salary. And the ability of the defendant to pay any increase is not sufficiently shown. True, from the early files of this case, presumptions of his ability to pay almost any allowance that might be ordered might be indulged in. It is, however, unnecessary now to deal with the matter on the presumption that his financial condition then shown is presumed to still continue. Such application is denied without prejudice to its renewal at any time on a full showing of necessities and financial conditions of the parties.

It is necessary that the custody of the two older children be changed, so as to conform to the school terms and yet permit each parent to have the custody of Bruce and John for equal periods of each year, and avoid changing them from one school to the other more than once per year. It was intimated on the argument that, should the court find it necessary to make a change, the mother preferred the custody of the children during the summer, more of her time proportionately being occupied during the winter at teaching.

It is therefore ordered that the custody of the youngest child, Newhall Rindlaub, remain, as always heretofore awarded, with the mother during the entire yearly period, subject, however, to such rights of visitation as the father has heretofore enjoyed, and as defined in the order of this court of October 30, 1911, except as hereinafter modified. It is further ordered that the custody of Bruce and John Rindlaub be awarded to each parent for an equal period of each year, and as follows: The mother shall have the custody of both of said children from the close of the school year, approximately June 1st each year, until the commencement of the December term of school each year, or approximately December 1st; that the father be awarded the custody of Bruce and John during the remainder of the year, or approximately from December 1st until June 1st of each yearly period. The right of each parent in and to the children then in the custody of such parent is subject, however, to the right of visitation of such children by the other parent the same as has heretofore been enjoyed under the order of this court of October 30, 1911,—it being the intent of this order that at least twice each week the parent not then possessing the six months' period of custody of said children, Bruce and John, may obtain the equivalent of one half day or evening of association with them after school hours, and at the residence of such parent visited by said two children. The rights of custody and visitation, however, are subject to the further conditions, that the father may have the custody of all three of said children, Bruce, John, and Newhall, for one week continuously during each of the months of July and August of each year, and this in addition to his right of custody of the two older from December 1st to June 1st each yearly period; he may also have Newhall brought to his home every Wednesday P. M. at 4 o'clock and every Saturday P. M. at 1 o'clock, returning him to the mother not later than 8 P. M. of the

same day; and that the mother may also have the custody of John and Bruce from noon of December 26th to noon of the following January 3d yearly, or during that part of said time that said children are not attending school; and provided further that, during any spring school vacation at or near Easter time, the mother may have the custody of said children for a similar period of one week. The defendant will continue to pay plaintiff $100 per month on the first of each and every month until further order of this court, which moneys are to be used primarily for the support of said children, but, inasmuch as considerable of plaintiff's time must be consumed in their care, such portions of said allowance as are not needed to defray the actual expense of food and clothing for said children may be retained by her as a reasonable wage for services rendered in caring for them. In view of defendant's application for an accounting, it is ordered that plaintiff be relieved from any liability to ever account for any balance of moneys that have been heretofore, or that may be hereafter, paid her by defendant under court order and for such purposes. Neither parent shall in any way attempt to alienate the affection of any of said children from the other parent. In case of sickness of said children both parents shall act as the child's best welfare may require, and rights of visitation of said children will be considered subordinated thereto. It is also understood that the terms of this decree recognize the right of plaintiff to continue teaching, if she so desires. In view of the change of the period of custody, defendant will retain custody of John and Bruce until August 15th of this year.

Defendant will, on or before the first of the month next succeeding the entry of the modification of this decree, pay to plaintiff's attorney $85 as fees and disbursements in the presentation of this application. The District Court of Cass County will enter its order accordingly, modifying the former decree touching the custody of these children to conform to the foregoing. This court reserves its right on application to modify this order.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, v. RICHLAND COUNTY, a Municipal Corporation.

(L.R.A.1915A, 129, 148 N. W. 545.)

Railroad right of way — may be assessed for local drain, if benefited — fee in same immaterial.

1. A railroad right of way, if actually benefited, may be assessed for a local drain which is constructed under the provisions of Chapter 23, Rev. Codes 1905, and this irrespective of the fact whether the fee is in the railroad company or not.

Public policy — supreme court cannot make — commonwealth creates, and court announces.

2. A supreme court can announce no public policy of its own, but merely what it believes to be the public policy of the people of the commonwealth by which it is created. It has no power to create or command, but merely to construe; and where the people have spoken, either in the form of a constitutional enactment or a valid and constitutional statute, it must be controlled by their decisions and conclusions.

Assessment of rights of way — local drains — benefits conferred — constitutional statute.

3. Chapter 23, Rev. Codes 1905, which provides for the assessment of railroad rights of way for the benefits conferred by the construction of local drains, does not violate the provisions of the 14th Amendment to the Federal Constitution, nor the so-called Commerce Clause (§ 8, art. 1) of that instrument, even though it is sought to be applied to interstate lines.

(Opinion filed June 29, 1914.)

Appeal from the District Court of Richland County, *Allen*, J.

Action to determine adverse claims in and to a railroad right of way. Judgment for defendant. Plaintiff appeals.

Affirmed.

Note.—While there is a considerable conflict among the authorities on the question of the liability of a railroad right of way to assessments for local improvements, the majority of the cases, as shown by a note in 40 L.R.A.(N.S.) 935, in which all the cases are collated and discussed, seem to support the rule that a railroad right of way may be so assessed, if it is benefited by the improvement. If the property is not benefited, the assessment against it will not hold. A distinction has sometimes been made between the right of way and other railroad property necessarily used in the operation of the road.

Statement by BRUCE, J.

This action was brought by the Northern Pacific Railway Company against Richland county, for the purpose of determining adverse interests in and to an easement or right of way of the plaintiff company, the claim of the plaintiff being for a franchise or right of way as opposed to an ownership in fee. The answer admits the ownership of the franchise or easement, but asserts a lien arising from a levy for benefits assessed against the property for and on account of the construction of a drain under chapter 23, Rev. Codes 1905.

Judgment was rendered in the district court, decreeing a lien in favor of the defendant to the amount of $3,180.70, and an appeal has been taken to this court upon the judgment roll merely and for the sole purpose of testing the legality of the proceedings.

Watson & Young, Purcell & Divet, for plaintiff-appellant.

The pretended lien is void in that no legal assessment was ever made. Such proceedings are purely statutory, and the statute must be strictly followed in all material respects. Hamilton, Special Assessments, p. 540; Norwood v. Baker, 172 U. S. 269, 291, 43 L. ed. 443, 452, 19 Sup. St. Rep. 187; Bidwell v. Huff, 103 Fed. 362; Lee v. Ruggles, 62 Ill. 427.

An assessment for a street improvement where the amount is in figures only, without the dollar mark or other mark to indicate value, is void. McClellan v. District of Columbia, 7 Mackey, 94; Brown v. Joliet, 22 Ill. 123; Balfe v. Johnson, 40 Ind. 235; Payne v. South Springfield, 161 Ill. 285, 44 N. E. 105.

Special assessments for local improvements cannot be made against property unless specifically provided by statute. Chicago, R. I. & P. R. Co. v. Ottumwa, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074; Detroit, G. H. & M. R. Co. v. Grand Rapids, 106 Mich. 13, 28 L.R.A. 793, 58 Am. St. Rep. 466, 63 N. W. 1008; Southern California R. Co. v. Workman, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79, 2 Ann. Cas. 583; Dean v. Paterson, 67 N. J. L. 199, 50 Atl. 620; Allegheny City v. Western Pennsylvania R. Co. 138 Pa. 375, 21 Atl. 763; New York & N. H. R. Co. v. New Haven, 42 Conn. 279, 19 Am. Rep. 534; State ex rel. Milwaukee Street R. Co. v. Anderson, 90 Wis. 550, 63 N. W. 747; Erie v. A Piece of Land, 175 Pa. 523, 34 Atl. 808.

There is no authority for making an assessment upon a right of way,

or for selling the same. Southern California R. Co. v. Workman, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79, 2 Ann. Cas. 583; Boehme v. Monroe, 106 Mich. 401, 64 N. W. 206; McCutcheon v. Pacific R. Co. 72 Mo. App. 271; Philadelphia v. Philadelphia, W. & B. R. Co. 33 Pa. 41; Bridgeport v. New York & N. H. R. Co. 36 Conn. 255, 4 Am. Rep. 63; Mt. Pleasant v. Baltimore & O. R. Co. 138 Pa. 365, 11 L.R.A. 520, 20 Atl. 1052.

The basis of the right to make such a special assessment is the enhancement in the value of the property. Hamilton, Special Assessments, pp. 240, 449, 450; Chicago Union Traction Co. v. Chicago, 204 Ill. 363, 68 N. E. 519; Jones v. Chicago, 206 Ill. 374, 69 N. E. 64; Chicago Union Traction Co. v. Chicago, 207 Ill. 607, 69 N. E. 803; Chicago Union Traction Co. v. Chicago, 207 Ill. 544, 69 N. E. 849; Chicago Union Traction Co. v. Chicago, 215 Ill. 410, 74 N. E. 449; Kankakee Stone & Lime Co. v. Kankakee, 128 Ill. 173, 20 N. E. 670; Chicago Union Traction Co. v. Chicago, 204 Ill. 363, 68 N. E. 519; Chicago, R. I. & P. R. Co. v. Ottumwa, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074; Boston v. Boston & A. R. Co. 170 Mass. 95, 49 N. E. 95; Lake Shore & M. S. R. Co. v. Grand Rapids, 102 Mich. 374, 29 L.R.A. 195, 60 N. W. 767; Allegheny City v. Western Pennsylvania R. Co. 138 Pa. 375, 21 Atl. 763; Farmers' Loan & T. Co. v. Ansonia, 61 Conn. 76, 23 Atl. 706; Chicago & N. W. R. Co. v. People, 120 Ill. 107, 11 N. E. 418; Philadelphia v. Philadelphia, W. & B. R. Co. 33 Pa. 41; Bridgeport v. New York & N. H. R. Co. 36 Conn. 255, 4 Am. Rep. 63; Re Public Park Comrs. 47 Hun, 302; Detroit, G. H. & M. R. Co. v. Grand Rapids, 106 Mich. 13, 28 L.R.A. 793, 58 Am. St. Rep. 466, 63 N. W. 1007; Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; Mt. Pleasant v. Baltimore & O. R. Co. 138 Pa. 365, 11 L.R.A. 520, 20 Atl. 1052; 2 Elliott, Railroads, pp. 198, 199, notes 26, 28, 63 N. W. 1007; South Park. Comrs. v. Chicago, B. & Q. R. Co. 107 Ill. 105.

Railroad property cannot be sold for street improvements. A railroad right of way cannot be benefited by the opening of a street across it so as to subject it to an assessment for such improvements. Detroit, G. H. & M. R. Co. v. Grand Rapids, 106 Mich. 13, 28 L.R.A. 793, 58 Am. St. Rep. 466, 63 N. W. 1008; Chicago, R. I. & P. R. Co. v. Ottumwa, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074; Mt. Pleasant v. Baltimore & O. R. Co. 138 Pa. 365, 11 L.R.A. 520, 20 Atl.

1052; Hammett v. Philadelphia, 65 Pa. 150, 3 Am. Rep. 615; Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; Seattle v. Seattle Electric Co. 15 L.R.A.(N.S.) 487, note; South Park Comrs. v. Chicago, B. & Q. R. Co. 107 Ill. 105; O'Reilley v. Kingston, 114 N. Y. 439, 21 N. E. 1004; Indianapolis & V. R. Co. v. Capital Paving & Constr. Co. 24 Ind. App. 114, 54 N. E. 1076; Heman Constr. Co. v. Wabash R. Co. 12 L.R.A.(N.S.) 114 note; Abbott, Mun. Corp. pp. 811, 812; McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Schmidt v. Market Street & W. G. R. Co. 90 Cal. 37, 27 Pac. 61; New York & N. H. R. Co. v. New Haven, 42 Conn. 279, 19 Am. Rep. 534; Boston v. Boston & A. R. Co. 170 Mass. 95, 49 N. E. 95; Auditor General v. Duluth, S. S. & A. R. Co. 116 Mich. 122, 74 N. W. 505; First Div. St. Paul & P. R. Co. v. St. Paul, 21 Minn. 526; St. Paul v. St. Paul & S. C. R. Co. 23 Minn. 469; State ex rel. Minnesota Transfer R. Co. v. District Ct. 68 Minn. 242, 71 N. W. 27; State, Morris & E. R. Co. Prosecutors, v. Jersey City, 36 N. J. L. 56; Winona & St. P. R. Co. v. Watertown, 1 S. D. 46, 44 N. W. 1072; Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; Junction R. Co. v. Philadelphia, 88 Pa. 424; Erie v. A. Piece of Land, 175 Pa. 523, 34 Atl. 808; Columbia & P. S. R. Co. v. Chilberg, 6 Wash. 612, 34 Pac. 163; Oshkosh City R. Co. v. Winnebago County, 89 Wis. 435, 61 N. W. 1107; Cooley, Taxn. pp. 456, 457; Southern California R. Co. v. Workman, 146 Cal. 80, 79 Pac. 588, 82 Pac. 79, 2 Ann. Cas. 583; Louisville, N. A. & C. R. Co. v. State, 122 Ind. 443, 24 N. E. 350; Philadelphia v. Philadelphia, W. & B. R. Co. 33 Pa. 41; Philadelphia v. Philadelphia & R. R. Co. 177 Pa. 292, 34 L.R.A. 564, 35 Atl. 610; Junction R. Co. v. Philadelphia, 88 Pa. 428.

Freight house, right of way, and tracks of a railroad company cannot be sold as a mode of collecting an assessment for local improvements. Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; Lake Shore & M. S. R. Co. v. Grand Rapids, 102 Mich. 374, 29 L.R.A. 195, 60 N. W. 767; Junction R. Co. v. Philadelphia, 88 Pa. 424; State, New Jersey R. & Transp. Co. Prosecutor, v. Elizabeth, 37 N. J. L. 331; New York & H. R. Co. v. Morrisania, 7 Hun, 652; Bloomington v. Chicago & A. R. Co. 134 Ill. 451, 26 N. E. 366; Bridgeport v. New York & N. H. R. Co. 36 Conn. 255, 4 Am. Rep. 63; South Park Comrs. v. Chicago, B. & Q. R. Co. 107 Ill. 105;

New York & N. H. R. Co. v. New Haven, 42 Conn. 279, 19 Am. Rep. 534; Detroit, G. H. & M. R. Co. v. Grand Rapids, 106 Mich. 13, 28 L.R.A. 793, 58 Am. St. Rep. 466, 63 N. W. 1008; East Alabama R. Co. v. Doe, 114 U. S. 350, 351, 29 L. ed. 139, 140, 5 Sup. Ct. Rep. 869; Gue v. Tide Water Canal Co. 24 How. 257, 16 L. ed. 635; People ex rel. Davidson v. Gilon, 126 N. Y. 147, 27 N. E. 282; Ludlow v. Cincinnati Southern R. Co. 78 Ky. 357; Chicago, R. I. & P. R. Co. v. Ottumwa, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074; Minneapolis & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 104; Yellow River Improv. Co. v. Wood County, 81 Wis. 554, 17 L.R.A. 92, 51 N. W. 1006.

A railroad is an entirety, and cannot be cut up and sold for taxes, in parcels. 2 Rorer, Railways, 1499, § 14; Detroit v. Detroit City R. Co. 76 Mich. 421, 43 N. W. 447; Hackley v. Mack, 60 Mich. 591, 27 N. W. 871; Applegate v. Ernst, 3 Bush, 648, 96 Am. Dec. 272; Georgia v. Atlantic & G. R. Co. 3 Woods, 434, Fed. Cas. No. 5,351; Porter v. Rockford, R. I. & St. L. R. Co. 76 Ill. 561; Big Rapids v. Mecosta County, 99 Mich. 351, 58 N. W. 358; Worcester County v. Worcester, 116 Mass. 193, 17 Am. Rep. 159; Polk County Sav. Bank v. State, 69 Iowa, 29, 28 N. W. 416; New York & H. R. Co. v. Morrisania, 7 Hun, 652; Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; Dunn v. North Missouri R. Co. 24 Mo. 493; McPheeters v. Merimac Bridge Co. 28 Mo. 467; Schulenburg v. Memphis, C. & N. W. R. Co. 67 Mo. 442; St. Louis Bridge & Constr. Co. v. Memphis, C. & N. W. R. Co. 72 Mo. 664; Knapp v. St. Louis, K. C. & N. R. Co. 74 Mo. 378; Indianapolis & C. Gravel Road Co. v. State, 105 Ind. 37, 4 N. E. 319; East Alabama R. Co. v. Doe, 114 U. S. 341, 29 L. ed. 137, 5 Sup. Ct. Rep. 869; Dobbins v. Colorado & S. R. Co. 19 Colo. App. 257, 75 Pac. 157; Minneapolis & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 104; Heman Constr. Co. v. Wabash R. Co. 12 L.R.A.(N.S.) p. 116, note.

The landowner is never estopped to show jurisdictional defects. Hamilton, Special Assessments, pp. 727, 728.

C. J. Kachelhoffer, for respondent. (*Gustav Schuler, W. S. Lauder, John L. Koeppler,* of counsel.)

This suit is not brought for the purpose of impeaching the assessment. The attack upon the assessment is collateral. Hackney v. Elliott, 23

N. D. 373, 137 N. W. 433; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; State ex rel. Dorgan v. Fisk, 15 N. D. 219, 107 N. W. 191; McNamee v. Tacoma, 24 Wash. 591, 64 Pac. 791; Jackson v. Smith, 120 Ind. 520, 22 N. E. 431.

The assessment is valid in all respects. Hackney v. Elliott, 23 N. D. 390, 137 N. W. 433; First Nat. Bank v. St. Joseph, 46 Mich. 526, 9 N. W. 839; Ensign v. Barse, 107 N. Y. 338, 14 N. E. 400, 15 N. E. 401; 37 Cyc. 1067.

This is a collateral attack, and, if the drain commissioners had jurisdiction to make the assessment, then their determination that appellant's right of way was benefited, cannot be questioned here. Erickson v. Cass County, 11 N. D. 507, 92 N. W. 841; Illinois C. R. Co. v. East Lake Fork Special Drainage Dist. 129 Ill. 417, 21 N. E. 925; Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743; State, Paterson & H. River R. Co., Prosecutor, v. Passaic, 54 N. J. L. 340, 23 Atl. 945; Northern P. R. Co. v. Pierce County, 51 Wash. 12, 23 L.R.A.(N.S.) 286, 97 Pac. 1099; Chicago, M. & St. P. R. Co. v. Milwaukee, 148 Wis. 39, 133 N. W. 1120; Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; Heman Constr. Co. v. Wabash R. Co. 206 Mo. 172, 12 L.R.A.(N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 Ann. Cas. 630; Chicago & N. W. R. Co. v. Elmhurst, 165 Ill. 148, 46 N. E. 437; Chicago, M. & St. P. R. Co. v. Janesville, 137 Wis. 7, 28 L.R.A.(N.S) 1124, 118 N. W. 182; Griswold v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 435, 102 Am. St. Rep. 572, 97 N. W. 538; Illinois C. R. Co. v. Decatur, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293.

The right of way is liable to this tax or assessment. Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; Illinois C. R. Co. v. Decatur, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; Baltimore & O. & C. R. Co. v. Ketring, 122 Ind. 5, 23 N. E. 527; Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743; Rich v. Chicago, 152 Ill. 18, 38 N. E. 255; Illinois C. R. Co. v. East Lake Fork Special Drainage Dist. 129 Ill. 417, 21 N. E. 925; Drainage Com'rs v. Illinois C. R. Co. 158 Ill. 353, 41 N. E. 1073; State, Paterson & H. River R. Co., Prosecutor, v. Passaic, 54 N. J. L. 340, 23 Atl. 945; Northern P. R. Co. v. Pierce County, 51 Wash. 12, 23 L.R.A.(N.S.) 286, 97 Pac. 1099; Louisville

& N. R. Co. v. Barber Asphalt Paving Co. 116 Ky. 856, 76 S. W. 1097, affirmed in 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; Chatham County v. Seaboard Air Line R. Co. 133 N. C. 216, 45 S. E. 566; Northern P. R. Co. v. Seattle, 46 Wash. 674, 12 L.R.A.(N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 244; Rev. Codes 1905, § 4702.

A railroad right of way is *property,* and the statute provides that "railroad" property shall be assessable. Heman Constr. Co. v. Wabash R. Co. 206 Mo. 172, 12 L.R.A.(N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 Ann. Cas. 630; Northern P. R. Co. v. Seattle, 46 Wash. 674, 12 L.R.A.(N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 244; Brookings v. Natwick, 22 S. D. 322, 18 L.R.A.(N.S.) 1259, 117 N. W. 376, 17 Ann. Cas. 1254; Lake Erie & W. R. Co. v. Walters, 9 Ind. App. 684, 37 N. E. 295; Schaghticoke Powder Co. v. Greenwich & J. R. Co. 183 N. Y. 306, 2 L.R.A.(N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 153, 5 Ann. Cas. 443; Adams v. Grand Island & W. C. R. Co. 12 S. D. 424, 81 N. W. 960; McLean County v. Bloomington, 106 Ill. 209; Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421.

If the assessment is valid, then no question of estoppel can be involved. Hackney v. Elliott, 23 N. D. 373, 137 N. W. 433; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Turnquist v. Cass County, Drain Comrs. 11 N. D. 514, 92 N. W. 852; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66; Farr v. Detroit, 136 Mich. 200, 99 N. W. 19.

Bruce, J. (after stating the facts as above). The objection of the appellant goes directly to the jurisdiction of the drainage board to make any assessment, or at any rate to create any lien, against the right of way of the defendant company. It is that the alleged lien is void for the reason that special assessments for a local improvement of the kind in question cannot be made against a right of way or easement of a railroad company, and especially of one which is interstate in its character. It is argued that any sale which must necessarily be had to enforce such a lien would be the sale of a fragmentary portion of the roadbed, which would not only disrupt the road and prevent the public service which the company was created to furnish, but would and could furnish to the purchaser no right or interest, as the land could only be used as a railway right of way, and without legislative sanction and permission no such right of user exists. It is claimed that such a proceeding would

violate both the Federal Constitution and the 14th Amendment thereto, and is not contemplated by chapter 23, Rev. Codes 1905. It is claimed that chapter 23 only contemplates the taxation of property in which the fee exists in the person sought to be charged.

The portions of the statute which appear to be pertinent are as follows: Section 1818: "Water courses, ditches and drains for the drainage of sloughs and other lowlands may be established, constructed and maintained in the several counties of this state whenever the same shall be conducive to the public health, convenience or welfare under the provisions of this chapter. The word 'drain' when used in this chapter shall be deemed to include any natural water course opened, or proposed to be opened, and improved for the purpose of drainage and any artificial drains constructed for such purpose." Section 1821: "A petition for the construction of a drain may be made in writing to the board of drain commissioners. If among the leading purposes of the proposed drain are benefits to the health, convenience or welfare of the people of any city or other municipality, the petition shall be signed by a sufficient number of the citizens of such municipality or municipalities, to satisfy the board of drain commissioners that there is a public demand for such drain. If the chief purpose of such drain is the drainage of agricultural, meadow, grazing or other lands, the petition shall be signed by at least six or more freeholders whose property shall be affected by the proposed drain." Section 1826: "Upon acquiring the right of way, if the assessment of benefits has not already been made under the provisions of § 1824, the board of drain commissioners shall assess the per cent of the cost of constructing and maintaining such drain, and of providing the right of way therefor, which any county, township, city, village or town shall be liable to pay by reason of the benefits of such drain to the public health, convenience, or welfare, *and which any railroad company shall be liable to pay by reason of benefits to accrue to its property, and which any lot, piece or parcel of land shall be liable to pay by reason of benefits to accrue thereto, either directly or indirectly, by reason of the construction of such drain, whether such lands are immediately drained thereby, or can be drained only by the construction of other and connecting drains,* but such assessment shall be subject to review by the commissioners as hereinafter provided." Section 1831: "The board of drain commissioners shall make a list showing the amount

which each municipality and lot or tract of land benefited by the drain for which the tax is levied is liable to pay on account of procuring the right of way or the construction of any drain, or both according to the per cent which by § 1826 it is required to fix and determine, a copy of which shall be served on the clerk or auditor of each municipality against which taxes are to be assessed. Such list shall thereupon be filed in the office of the county auditor of the county in which the municipalities and lands benefited by the drain are situated, and the auditor shall thereupon extend upon the tax lists as a special tax as provided by law the several amounts shown by the drain commissioners' list, specifying in such tax lists the particular drain for the construction or procurement of the right of way of which the special tax is assessed, which special tax shall be collected and enforced in the same manner as other taxes. When such special tax is for the right of way the same shall when collected be paid by the county treasurer into court for the benefit of the owners of the right of way. And the common council, or other proper taxing authorities of each city, or other municipality, against which such assessment is made as aforesaid, shall include in the first general tax levy thereafter made in said city or municipality, the amount so assessed against it, by the board of drain commissioners, and the same shall be extended upon the tax lists of the county for the current year by the county auditor against all the taxable property in such city or municipality in the same manner and with the same effect as other taxes are extended." Section 1832: "The drain taxes shall be collected by the county treasurer and all moneys so collected shall be credited to the drain fund to which they belong and the county treasurer shall be the treasurer of such drain funds. Payment of all expenses and costs of locating and constructing any drain shall be made by the board of drain commissioners issuing warrants in such amounts and to such persons as by such board may be found due. All warrants drawn by such board in payment for the right of way or construction of any drain shall be payable from the proper drain fund and shall be receivable for the taxes levied for the right of way or construction of such drain by the treasurer. All such warrants after presentation to the county treasurer for payment, if not paid for want of funds, shall be registered by the county treasurer and thereafter shall bear interest at the rate of 7 per cent per annum." Section 1837: "Drains may be laid along, within the

limits of or across any public road, and when so laid out and constructed or when any road shall thereafter be constructed along or across any drain it shall be the duty of the board of county commissioners, or township supervisors, as the case may be, to keep the same open and free from all obstructions. A drain may be laid along any railroad when necessary, but not to the injury of such road, and when it shall be necessary to run a drain across a railroad it shall be the duty of such railroad company, when notified by the board of drain commissioners to do so, to make the necessary opening through said road and to build and keep in repair suitable culverts or bridges."

There is much to be said in support of the contention of appellants. Railroads are quasi public institutions. They have the right to make a reasonable profit on the investment which they represent. The state, on the other hand, has the power to regulate rates when that profit becomes excessive. It is clear that no profit can be made until the operating and fixed charges are met, and the higher the operating and fixed charges, the higher the rates will be that must be charged in order to make a fair return upon the investment. Special assessments, in fact all taxes, must indirectly increase the cost of operation and raise the point from which the profit begins, as well as the point at which the state is entitled to regulate the charges. They must, in fact, mean higher rates to the public. The first question is, Can local improvements which are for the immediate benefit of the locality merely, and the cost of which can be assessed upon adjacent property merely upon the theory of actual benefit, be imposed, when the cost thereof must ultimately be borne by the people as a whole? The second is, Can such taxes be made a lien upon a right of way, the sale of which may seriously interrupt the operation of the road?

The answer to the first question, to our mind, revolves entirely around the question of benefits. Local and general taxes may be imposed upon railway property because they both help to develop and to assure governmental and police protection to the territory through which the link of the road runs, and because the link is a part of a continuous whole and its police protection is necessary to that whole. Such taxes are valid even when levied upon the property of railroads which are interstate in their nature. A distinction, in fact, is drawn between a tax upon property which is used in interstate commerce or the instrumen-

tality of commerce, which is valid, and a tax upon the act of interstate commerce which is not. 7 Cyc. 478, 480; Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122, 133 Ind. 513, 18 L.R.A. 729, 33 N. E. 421; Philadelphia & R. R. Co. v. Pennsylvania, 15 Wall. 232, 21 L. ed. 146; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305. The same rule applies to local drainage assessments. If they are in fact of any benefit to the railroad, and this is conceded by the record in the case at bar, in other words, if they tend to make the track and roadbed more secure, or, in extreme cases, to prevent the loss of health to passengers and employees incident to miasmal swamps, they benefit the railroad as a whole and the state as a whole. We are not inclined to hold with the appellants that the only measure of benefits is an increased selling price, and as a purchaser can hardly be had for a link in a railroad right of way, and that as such sale should, if possible, be avoided, that no benefits can accrue. The railroad in fact, though not always holding a fee, has a beneficial use extending at its almost unlimited option over a long period of years, and an increase in the value of the use or a decrease in the cost of operation and maintenance are certainly benefits.

Even without a legislative expression upon the subject, there is much authority in support of the validity of an assessment such as that before us. See Louisville & N. R. Co. v. Barber Asphalt Paving Co. 116 Ky. 856, 76 S. W. 1097, 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; Northern P. R. Co. v. Seattle, 46 Wash. 674, 12 L.R.A. (N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 244; Rich v. Chicago, 152 Ill. 18, 38 N. E. 255; Illinois C. R. Co. v. East Lake Fork Special Drainage Dist. 129 Ill. 417, 21 N. E. 925; Drainage Com'rs v. Illinois C. R. Co. 158 Ill. 353, 41 N. E. 1073; State, Paterson & H. River R. Co., Prosecutor, v. Passaic, 54 N. J. L. 340, 23 Atl. 945; Northern P. R. Co. v. Pierce County, 51 Wash. 12, 23 L.R.A.(N.S.) 286, 97 Pac. 1099.

The law in fact is summed up by Judge Elliott in his work on Railroads in § 7866, as follows: "There is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessments. The question has been discussed in a great number of instances, and different conclusions reached in ap-

parently similar cases. The latest authorities, . . . however, recognize what we believe to be the true rule, and that is, . . . where the right of way *receives a benefit* from the improvement for which the assessment is levied, and *there is no statute exempting* the railroad company from local assessments in clear and unequivocal terms, it is subject to assessment."

It is not indeed for us to establish the public policy in this matter. It has been announced by the legislature, and the action of that body, in the absence of some constitutional prohibition, must be conclusive upon us. This is not a case where the court is called upon to construe or to enforce some private contract, concerning which no public policy has been announced. It is a case in which it is asked to set aside a statute which itself expresses the public policy of the state, merely because its conception of what a sound public policy may be differs from that of the legislative body. This it cannot do. In the announcing of the rules of public policy, indeed, the courts are the third and weakest link in the governmental triumvirate. Public policy, in short, is *public* policy. Its highest expression is to be found in a constitutional provision which expresses the will of the sovereign people, and which, being voted upon by the whole public, announces a policy which is truly public, both in its origin and in its expression. Where there is no constitutional provision upon the subject, the next highest expression is that offered by a statute which expresses the public will or policy as construed by the legislative representatives of the people, whose determination, in the absence of a constitutional prohibition, must of necessity be controlling. The third factor in the chain is the supreme court. It, however, has no power to command or to create, but merely to construe. It, in short, announces and can announce no public policy of its own, but merely what it believes to be the policy of the people as a whole, and where the people have spoken it must be controlled by their decisions.

That the public has spoken in the case before us admits of no questioning. Section 1826, of the Code of 1905, is indeed capable of but one construction. It expressly provides that "upon acquiring the right of way, if the assessment of benefits has not already been made under the provisions of § 1824, the board of drain commissioners shall assess the per cent of the cost of constructing and maintaining such drain,

and of providing the right of way therefor, which any county, township, city, village or town shall be liable to pay by reason of the benefits of such drain to the public health, convenience, or welfare, and *which any railroad company shall be liable to pay by reason of benefits to accrue to its property, and which any lot, piece or parcel of land shall be liable to pay by reason of benefits to accrue thereto, either directly or indirectly, by reason of the construction of such drain,* whether such lands are immediately drained thereby, or can be drained only by the construction of other and connecting drains, but such assessment shall be subject to review by the commissioners as hereinafter provided."

It is idle for counsel to argue that the legislature could only have intended depot or similar lands, the sale of which would not interfere with the operation of trains, for the act is not only clearly a rural as opposed to an urban or city and village act (see Stoltze v. Sheridan, post, 194, 148 N. W. 1), but nine depots out of every ten are constructed within the limits of the original right of way, and must often be moved if additional tracks are to be laid.

Nor does the fact that a sale of the right of way would perhaps be necessary as a last resort, nullify the statute. The uninterrupted performance by the railroad company of the public functions for which it was created may indeed be of great importance to the state and to the community; but the legislature may nevertheless deem that the collection of its taxes and a universal obedience to the supremacy of the law may be of more importance still. 37 Cyc. 842; St. Louis, I. M. & S. R. Co. v. Miller County, 67 Ark. 498, 55 S. W. 926.

There can, indeed, also be little difference between levying upon a right of way and levying upon a locomotive engine, which latter act is often done and generally held to be permissible. Both acts might equally interfere with and cripple the operation of the road.

In the case of Heman Constr. Co. v. Wabash R. Co. 206 Mo. 172, 12 L.R.A.(N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 Ann. Cas. 630, the matter and contention was disposed of in the following language: "What we do hold is that, under the charter and ordinance, the tax bill sued on in this case is a lien against that part of the right of way of the defendant company described in the tax bill. We do not feel called upon to determine how such judgment can be enforced. . . . As a general rule, 'where there is a right there is

a remedy,' . . . and this case we think forms no exception to the rule." See also Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421; McLean County v. Bloomington, 106 Ill. 209. The situation, indeed, is not as serious as counsel for appellant would have us believe. If the assessment is a valid one and benefits are in fact conferred (and the company has all of the remedies and means of contesting invalid and illegal assessments that has any other property owner), it is its duty to pay the same without putting the county to the necessity of selling the land. Its paramount duty is to operate its line. The state's paramount duty is to enforce its laws and its judgments.

We have next to determine whether the act violates the provisions of either the 14th Amendment to the Federal Constitution or the 3d, or so-called Commerce Clause, of § 8 of article 1 of that instrument, when it is sought to be applied to interstate lines.

The first point was suggested but not argued by counsel for appellant, and needs no consideration here. It is sufficient to say that the state, in the main, can establish its own due process of law, and that if the state has the right to levy the assessment at all, and the legislature intended that it should be levied, there is in the act no violation of property rights nor of the day in court and equal protection of the laws which the 14th Amendment guarantees. The argument of counsel indeed is based not upon any theory of private property, but of public rights only. He insists that the railroad company has no fee in the land, but merely a right to pass thereover in the performance of a public service; and it is on the premise that a levy upon and sale of a section of the right of way would interfere with this public service that his whole argument is based.

We are not unmindful of the cases as cited by counsel for appellant. In none of them, however, was there a statute similar to our own and in which the legislative intention was clearly expressed that railroads should be subject to their operation. They were cases, indeed, in which the courts were left to infer what the legislative policy in relation to railway property might be, and this by a construction of general words merely. So, too, most of them were cases of assessments for pavements, sidewalks, or sanitary sewers which could not possibly benefit the right of way or render the operation of the road any safer or easier. See Mt. Pleasant v. Baltimore & O. R. Co. 138 Pa. 365, 11 L.R.A.

520, 20 Atl. 1052; Chicago, R. I. & P. R. Co. v. Ottumwa, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074; Boston v. Boston & A. R. Co. 170 Mass. 5, 49 N. E. 95; Detroit, G. H. & M. R. Co. v. Grand Rapids, 106 Mich. 13, 28 L.R.A. 793, 58 Am. St. Rep. 466, 63 N. W. 1007; South Park Comrs. v. Chicago, B. & Q. R. Co. 107 Ill. 105; Chicago, M. & St. P. R. Co. v. Milwaukee, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; State ex rel. St. Paul City R. Co. v. District Ct. 31 Minn. 354, 17 N. W. 954; Seattle v. Seattle Electric Co. 48 Wash. 599, 15 L.R.A.(N.S.) 486, 94 Pac. 194; Koons v. Lucas, 52 Iowa, 177, 3 N. W. 84; O'Reilley v. Kingston, 114 N. Y. 439, 21 N. E. 1004.

A surface-water drain, indeed, which like the one in the case at bar, drains swamp lands along a right of way, is materially different from a sidewalk or pavement or a sanitary house sewer. The first may benefit the right of way by preventing its erosion. The others cannot possibly be of any advantage to it, except as they add to the general health and prosperity of the localities through which the road passes. In the case at bar the trial court found that the right of way was "in fact materially and substantially benefited" by the drain, and no appeal was taken from this determination but on questions of law and of law alone. The question of benefits, therefore, is answered in the affirmative, and is established.

We fully agree with the supreme court of Massachusetts that a tax for local improvements upon a public-service corporation will usually be ultimately borne by the people of the whole state in the form of increased tariffs and charges, and that in the absence of a clear intimation in the statutes to the contrary, no such burden should be deemed to have been intended to be imposed. Boston v. Boston & A. R. Co. 170 Mass. 95, 49 N. E. 95. Where, however, the legislature has clearly spoken upon the subject, as it seems to have in the statute here under consideration, we cannot hold that the legislature did not assume the risk, and did not have the right to do so. The words of the statute, "by reason of the benefits of such drain to the public health, convenience, or welfare, *and which any railroad company shall be liable to pay by reason of benefits to accrue to its property, and which any lot, piece or parcel of land shall be liable to pay by reason of benefits to accrue thereto, either directly or indirectly, by reason of the construction of such drain, whether such lands are immediately drained*

thereby, or can be drained only by the construction of other and connecting drains," are so sweeping and comprehensive that we cannot ignore them. Even without a legislative expression upon the subject, there is much authority in support of the validity of an assessment such as that before us. See Louisville & N. R. Co. v. Barber Asphalt Paving Co. 116 Ky. 856, 76 S. W. 1097, 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; Northern P. R. Co. v. Seattle, 46 Wash. 674, 12 L.R.A.(N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 244; Baltimore & O. & C. R. Co. v. Ketring, 122 Ind. 5, 23 N. E. 527; Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743; Rich v. Chicago, 152 Ill. 18, 38 N. E. 255; Illinois C. R. Co. v. East Lake Fork Special Drainage Dist. 129 Ill. 417, 21 N. E. 925; Drainage Comrs. v. Illinois C. R. Co. 158 Ill. 353, 41 N. E. 1073; State, Paterson & H. River R. Co., Prosecutor, v. Passaic, 54 N. J. L. 340, 23 Atl. 945; Northern P. R. Co. v. Pierce County, 51 Wash. 12, 23 L.R.A.(N.S.) 286, 97 Pac. 1099; Griswold v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 435, 102 Am. St. Rep. 572, 97 N. W. 538; Illinois C. R. Co. v. Decatur, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist. 134 Ill. 384, 10 L.R.A. 285, 25 N. E. 781.

The judgment of the District Court is affirmed.

GEORGE H. YANCEY, by H. P. Long, Guardian ad Litem, v. HERMAN BOYCE.

(148 N. W. 539.)

Pleadings — motion for judgment on — all facts properly pleaded admitted.

1. A motion for judgment upon the pleadings admits the truth of all well-pleaded facts in the pleading of the opposite party.

Note.—While the right of an infant to repudiate a contract for services and sue on *quantum meruit* is not involved in YANCEY v. BOYCE, since the point there decided is his right to sue for the value of his services on the contract which he has disaffirmed, the court says in passing, that unquestionably an action for the value of his services may be maintained. This is in harmony with the weight of

Recovery — express contract alleged as basis — cannot recover on implied contract — allegations of value — quantum meruit.

2. When the plaintiff alleges an express contract as the basis for recovery, he cannot recover on an implied contract or *quantum meruit*, especially in the absence of any allegations of value. Lowe v. Jensen, 22 N. D. 148.

Minor — contracts of — disaffirmance — part performance before — cannot recover on contract — disaffirmance relates back to inception of contract.

3. Sections 4014 and 4015, Rev. Codes 1905, permit a minor to make contracts with certain exceptions, in the same manner as an adult, subject to his power of disaffirmance, and permit him to disaffirm contracts, except for necessaries, and statutory contracts, either before his majority or within one year thereafter, when the contract is made while he is under the age of eighteen; if made when over the age of eighteen, disaffirmance may be had by his restoring the consideration or paying its equivalent, with interest. *Held*, that a minor cannot disaffirm his express contract when partially performed and recover in an action based on the contract. *Held*, further, that an infant having elected to disaffirm his contract when partially performed, the disaffirmance relates back to the inception of the contract, and the contract is totally destroyed and the parties left to their legal rights and remedies the same as though there had never been any contract.

Minor — contract for services — disaffirmance — suit to recover wages under contract — action not maintainable.

4. Plaintiff, a minor, made a contract to work for defendant, a farmer, during the season of 1912, and at the end of the season he was to be paid $30 per month for his services. He disaffirmed this contract and left defendant's employ in August, and subsequently sued upon the contract to recover wages for the time he worked. It is *held* that the action cannot be maintained, and that the question of defendant's rights to recoup or offset damages sustained by the breach of the contract is therefore eliminated from the case.

Opinion filed July 6, 1914.

APPEAL from an order and judgment of the District Court of Cass County, *C. A. Pollock*, J.

Judgment modified.

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authority, as shown by a review of the cases in 15 L.R.A. 211, in which the question of the employer's right to offsets and counterclaims is also considered.

As to necessity of returning consideration in order to disaffirm infants' contracts, see note in 26 L.R.A. 177.

Statement.

This is an action by George H. Yancey, a minor, by his guardian *ad litem* against Herman Boyce. The complaint alleges the minority of the plaintiff, and that about the 1st day of April, 1912, they entered into a contract, under the terms of which plaintiff was to work for defendant as a farm hand in Cass county, and was to receive therefor the sum of $30 per month if he stayed through the entire season, and $26 per month if he quit before the 1st of November, 1912; that pursuant to such contract plaintiff worked for defendant from the 1st day of April, 1912, until the 6th day of August, 1912, and judgment is demanded for $96.25, the amount claimed to be due on the contract. The answer alleges that the plaintiff began work on the 2d day of April, 1912, under a contract by which the plaintiff agreed to work for defendant during the season of 1912, at the agreed wage of $30 per month, and that the defendant agreed to pay plaintiff at the close of the season of 1912 the sum of $30 per month for such services properly rendered. It is then alleged that the plaintiff, without reason or cause and without the consent and against the will of the defendant, and in violation of the terms of the contract referred to, on the 6th day of August, 1912, quit his employ; that by reason of such facts he was compelled to employ other help to do the work, which the plaintiff would have done had he lived up to the terms of his contract, and to pay an advance wage in the amount of $74 more than would have been due the plaintiff under his contract, had he completed it. The answer admits that, after deducting from the wages earned by plaintiff said sum of $74, there is a balance of $39 due plaintiff, and tenders judgment for that sum, with costs.

The case was regularly called for trial, whereupon counsel for plaintiff submitted a motion to the court for judgment upon the pleadings. The grounds upon which the motion was based were, that it appeared upon the face of the pleadings that the action was to recover wages by a minor by his guardian *ad litem,* and that the defense interposed admitted the minority of plaintiff, and set up a contract more favorable to the plaintiff than set forth in the complaint, and sought to recoup damages, by reason of the fact that the minor had left defendant's employ before the contract expired. It was stipulated that counsel

for both parties stood upon such motion; that, if plaintiff's motion was sustained, judgment should be entered in his favor for the amount demanded in the complaint, and, conversely, that judgment should be entered according to the offer of the defendant. The learned trial court rendered judgment in favor of the plaintiff in accordance with the prayer of his complaint. From such judgment the case is here on appeal.

J. F. Callahan, for appellant.

Action by minor to recover for services rendered when he has disaffirmed his contract and quit before the full term of employment has expired can only be maintained on *quantum meruit.* Widrig v. Taggart, 51 Mich. 103, 16 N. W. 251; Craig v. Van Bebber, 18 Am. St. Rep. 621, note; 22 Cyc. 617; Robinson v. Van Vleet, 91 Ark. 262, 121 S. W. 288; Judkins v. Walker, 17 Me. 38, 35 Am. Dec. 229; Davies v. Turton, 13 Wis. 185; Vent v. Osgood, 19 Pick. 572.

W. J. Courtney, for respondent.

The laws of this state permit a minor to abandon his contract for services and recovery, and the employer cannot offset or recoup for damages he may have sustained. Widrig v. Taggart, 51 Mich. 103, 16 N. W. 251; Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286; Davies v. Turton, 13 Wis. 206.

SPALDING, Ch. J. The question for determination seems to be, may an infant sue on an express contract, which he has disaffirmed after partial performance, and, if so, may the defendant recoup or offset damages for its breach by the infant? The statutory provisions pertinent to the question are found in § 4014, Rev. Codes 1905, providing that a minor may make any contract other than as above specified in the same manner as an adult, subject only to his power of disaffirmance under the provisions of this chapter, and subject to the provisions of the chapters on marriage and on master and servant. The exceptions referred to have no application to this case. Section 4023 empowers a minor to enforce his rights by civil action or other legal proceedings in the same manner as a person of full age, except that a guardian must be appointed to conduct the same. Section 4015 permits the infant to disaffirm his contracts, except those for necessaries and any expressly

authorized by statute; and if the contract is made when he is under the age of eighteen years, he may disaffirm it either before his majority or within one year's time afterwards, while if the contract is made while he is over the age of eighteen, it may be disaffirmed by him upon restoring the consideration or paying its equivalent, with interest.

In an application for judgment upon the pleadings, the motion admits the truth of all well-pleaded facts in the pleading of the opposite party (31 Cyc. 606; Walling v. Bown, 9 Idaho, 184, 72 Pac. 960); hence, for the purpose of this action the contract is as set forth in the answer of the defendant (Willis v. Holmes, 28 Or. 265, 42 Pac. 989). This eliminates all consideration of the allegation contained in the complaint, that the plaintiff was to receive $26 per month, if he quit the services of the defendant before the close of the season.

When the plaintiff alleges an express contract as a basis for recovery, he cannot recover on an implied contract or *quantum meruit.* Lowe v. Jensen, 22 N. D. 148, 132 N. W. 661, and authorities cited; Tharp v. Blew, 23 N. D. 3, 135 N. W. 659. This question has been so recently passed upon by this court that no discussion is necessary. It is apparent in the case at bar that, if the plaintiff might recover upon *quantum meruit,* the complaint contains no allegations of the value of the services. Hence, no foundation is laid for such a recovery.

We need not consider what the rights of the parties would be, had this action been brought upon *quantum meruit,* as that question is not involved under the pleadings, nor under the motion for judgment on the pleadings and the stipulation made by the parties in open court, to which reference has been made.

Legislatures and courts have sought to protect the rights of minors by rendering their contracts void in some cases and voidable in others. The contract pleaded was voidable only at the instance of the plaintiff. The theory of the legislatures and courts seems to have been that minors are, by reason of mental immaturity and lack of experience, unable to deal with adults on an equality, or to protect their own rights and interests. There is a great conflict of authority on every phase of contracts of infants, and particularly upon those which have been partially performed and disaffirmed by the infant before reaching majority. Some courts have carried the doctrine of their incapacity to such a limit that its application seems to work greater injustice than

would be caused by its abrogation; but we are dealing, in a measure, with legislative provisions and inhibitions, which are not altogether clear or comprehensive. In fact, the distinguished legal authority, the late Mr. A. C. Freeman, analyzes and comments upon the provisions of the California statute, which are in all material respects identical with our own, including the sections quoted, as follows: "The Civil Code of California contains several sections on this subject, which, as amended, exhibit a minimum acquaintance with the general law and a maximum obscurity of thought. The sections certainly have not the 'pride of ancestry,' and we will venture to predict that in an intelligent community they have not the 'hope of posterity.' " After further analyzing and commenting upon them, he says: "These distinctions made by the codifiers are perfectly senseless." 18 Am. St. Rep. 580, note.

The minor cannot disaffirm his express contract when partially performed, and in a suit on the contract recover his wages for the time he worked. The reason for this is that he cannot both disaffirm and affirm his contract at the same time. He cannot disaffirm it for the purpose of escaping the burdens it imposes upon him, and affirm it for the purpose of obtaining all or any part of the benefits which accrue to him. It is either a contract or it is not a contract. If he elects to disaffirm it, and having elected to disaffirm it, the disaffirmance relates back to the inception of the contract and from the beginning it is no longer a contract. 22 Cyc. 616. He cannot affirm in part and disaffirm the rest. Biederman v. O'Conner, 117 Ill. 493, 57 Am. Rep. 876, 7 N. E. 463; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589.

Mr. Labatt, in his recent Commentaries on the Law of Master and Servant, vol. 2, § 700, says: "Several decisions embody the doctrine that in an action brought by a minor servant, who has exercised his privilege of abandoning a contract, which is not obligatory by reason of his minority, the master is entitled to set off any damages which he may have sustained by reason of the withdrawal." See authorities cited under note 2. He continues: "The rationale of this doctrine is that, 'as the plaintiff had not performed the special contract, he cannot recover upon that, and being driven to his *quantum meruit*, he can only recover so much as he reasonably deserves to have under all the circumstances.' " See authorities under notes 2 and 3. However, this

learned author continues: "Some courts, on the other hand, refuse to make any allowance on this score, being of opinion that the logical consequence of the avoidance of the contract is that the rights of the parties should be determined in every respect on the same footing as if the contract had never been made. This doctrine, it is submitted, is the correct one. . . . If, under the supposed circumstances, the abandonment does not constitute a breach of any obligation, its effects as regards the master's business cannot properly be taken into account." The effect of the election of the minor to disaffirm a voidable contract is a total, and not a partial, destruction; and the parties are left to their legal rights and remedies, the same as though there had never been any contract. 1 Labatt, Mast. & S. § 107; Vent v. Osgood, 19 Pick. 572; Campbell v. Cooper, 34 N. H. 49; Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286; authorities cited in note in 18 Am. St. Rep. 681.

If these conclusions are correct, it must be clear that this plaintiff cannot maintain his action in the form in which it was brought (22 Cyc. 628), and that the authorities, relating to the abstract question of the right of the defendant to maintain an action for damages for the breach of a contract, and to recoup or offset such damages in an action for the value of the services rendered, are not applicable to the case before us. Unquestionably an action may be maintained for the value of the services rendered (22 Cyc. 617); but the authorities are greatly divided on the question of recoupment, some holding that it may be had, others that it may be in effect taken into consideration by the jury or court, in connection with all the circumstances surrounding the services rendered, while still others hold that, inasmuch as there never was a contract, there is no breach of duty in quitting the services of the employer, and hence no such offset or recoupment can be had.

The parties having stood upon the motion for judgment on the pleadings, that motion having been for judgment for the amount claimed by the plaintiff, and it having been stipulated that, if the motion should be granted the judgment should be for the full amount, while if not granted, the judgment should be for $39, our conclusion is that the court was in error in fixing the amount of recovery, and that it should have been for $39 only. The same result would be

attained, we think, if we were to hold that the minor could maintain an action on the contract after disaffirmance, because in such case it would be most unjust and inequitable to permit him to stand upon his contract, in so far as it was beneficial to him, and repudiate it as to other provisions, especially without any showing that the contract was unreasonable or that advantage had been taken of his minority. If he is allowed to institute an action upon the contract, he must suffer all the consequences which properly inhere in the contract. He could not reject it in part. Sec. 4023, supra, does not apply to a voidable contract which has been disaffirmed. It protects the infant in his rights as fixed by the statute, and enables him to bring and maintain appropriate actions. The District Court is directed to modify its judgment in accordance with this opinion. The appellant will recover his costs in this court.

F. H. STOLTZE, on Behalf and for the Benefit of Himself and All Other Persons Mentioned in Paragraph 1 of the Complaint herein, v. P. SHERIDAN, S. H. Sleeper, and Gilbert Johnson, as Drain Commissioners of Renville County, North Dakota.

(148 N. W. 1.)

Drain — house sewage — storm waters — incorporated city — petition — benefits — health of city — number of signers — public demand — sufficiency of petition.

1. Even if a drain, the purpose of which is to take care of the house sewage as well as the storm waters of an incorporated city, may be constructed under the provisions of chapter 23, Rev. Codes 1905, as amended by chapter 93 of the Laws of 1907 and chapter 124 of the Laws of 1911, a petition which states that the said drain is "for the best interests of the city of M—— and a benefit to the health, convenience, and welfare of the people of said city," discloses a drain the principal benefits of which will accrue to such city, and in such a case the petition should be signed "by a sufficient number of the citizens of such municipality to satisfy the board of drain commissioners that there is a public demand" therefor, and where the petition is signed by at the most twenty persons, and the record discloses that there are 223 property owners in the municipality, no such public demand is shown.

Purposes of drain in city — signatures of sufficient number of citizens — board of drain commissioners — public demand — authority of board — injunction after petition has been presented and survey ordered — not premature.

2. Where among the leading purposes of a proposed drain are benefits to the health, convenience, and welfare of the people of any city or municipality, the signature of a sufficient number of the citizens of such municipality to satisfy the board of drain commissioners that there is a public demand for such drain is a jurisdictional prerequisite, and without such petition the board of drain commissioners has no authority to order a survey or to take any further steps in the matter, and an action for an injunction restraining any further proceedings is not premature which is brought after the petition has been presented and a survey had or ordered but before any other proceedings have been had under § 1821, Rev. Codes 1905.

Opinion filed June 5, 1914. On petition for rehearing July 7, 1914.

Appeal from the District Court of Renville County, *Leighton,* J.

Action to enjoin the construction of a drain. Judgment for defendants quashing a temporary injunction. Plaintiff appeals.

Reversed.

Noble, Blood, & Adamson, for appellant.

The petition in conformity with the statute, signed by the requisite number of citizens, is the foundation of the jurisdiction of the drain board to act. Alstad v. Sim, 15 N. D. 629, 109 N. W. 66.

Unless the petition conforms strictly to the requirements of the statute, the board is without jurisdiction. State ex rel. Bale v. Morrison, 24 N. D. 568, 140 N. W. 707.

And there is no presumption of jurisdiction. Bishop v. People, 200 Ill. 33, 65 N. E. 421; Seibert v. Lovell, 92 Iowa, 507, 61 N. W. 197; Morrow v. Weed, 4 Iowa, 77, 66 Am. Dec. 122; State ex rel. Utick v. Polk County, 87 Minn. 325, 60 L.R.A. 161, 92 N. W. 216; Richman v. Muscatine County, 77 Iowa, 513, 4 L.R.A. 445, 14 Am. St. Rep. 308, 42 N. W. 422; Laws 1911, chap. 125; Rev. Code 1905, §§ 1818, 1821, as amended by chap. 125, Laws 1911, 2771, 2781–2784, 2786; Laws 1907, chap. 93, §§ 1832, 1837.

The city council of an incorporated city is the only body that has power to construct a sewer within the city limits. Anderson v. Endi-

cutt, 101 Ind. 539; State ex rel. Utick v. Polk County, 87 Minn. 325, 60 L.R.A. 175, 92 N. W. 216.

After a petition is filed and the board has acted thereon, and has ordered a survey made, an action lies and an injunction may issue, and such proceedings are not premature. State ex rel. Dorgan v. Fisk, 15 N. D. 219, 107 N. W. 191.

Geo. R. Robbins and *Geo. A. Bangs,* for respondents.

It is wholly within the province of the inferior tribunals and their officers to decide questions as to the practicability of a proposed route for a drain and the question of the necessity for the drain, and, in the absence of fraud, such questions are not subject to review on appeal. 14 Cyc. 1045; State ex rel. Sullivan v. Ross, 82 Neb. 414, 118 N. W. 89; Tyson v. Washington County, 78 Neb. 214, 12 L.R.A.(N.S.) 354, 110 N. W. 634; Dodge County v. Arom, 61 Neb. 376, 85 N. W. 297; Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333; Hoyt v. Brown, 153 Iowa, 324, 133 N. W. 905; Chandler v. Beal, 132 Ind. 596, 32 N. E. 597; Oathout v. Seabrooke, 159 Ind. 529, 65 N. E. 521; Boxersox v. Seneca County, 20 Ohio St. 496; Clark v. Teller, 50 Mich. 618, 16 N. W. 167; Brown v. Henderson, 66 Ark. 302, 50 S. W. 501.

An action in equity to obtain an injunction does not partake of an appeal; it is not a proceeding to correct errors. Hoyt v. Brown, 153 Iowa, 324, 133 N. W. 907.

The appellant can be granted relief only upon the theory that the board is without jurisdiction. Ibid.

If the petition is sufficient, the board acquired full jurisdiction. Edwards v. Cass County, 23 N. D. 555, 137 N. W. 580.

The petition states all the facts required by the statute. Sess. Laws 1911, chap. 125, p. 203; Hackney v. Elliott, 23 N. D. 386, 137 N. W. 433.

There cannot be at the same time, and in the same territory, two distinct municipal corporations, exercising the same powers, jurisdiction, and privileges. Edwards v. Cass County, supra; 1 Dill. Mun. Corp. 5th ed. § 354; 20 Am. & Eng. Enc. Law, 2d ed. 1150; Vallelly v. Park Comrs. 16 N. D. 30, 15 L.R.A.(N.S.) 61, 111 N. W. 615.

The drainage board is not a corporation; it is a mere department of the county created to perform a public function in the exercise of the police power. Reed v. Heglie, 19 N. D. 801, 124 N. W. 1127;

Soliah v. Cormack, 17 N. D. 396, 117 N. W. 125, affirmed in 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103.

The powers of a city with reference to the construction of sewers is but cumulative. It still possesses the general power to construct sewers and to contract therefor and pay for same by general taxation. Pine Tree Lumber Co. v. Fargo, 12 N. D. 368, 96 N. W. 357; 4 Dill. Mun. Corp. 5th ed. 1465; Soule v. Seattle, 6 Wash. 315, 324, 33 Pac. 384, 1080; Stephens v. Spokane, 11 Wash. 41, 39 Pac. 266; Clark v. Des Moines, 19 Iowa, 221, 89 Am. Dec. 423.

The power to construct drains is in no sense a part of the usual power of town and county government, but is a special power for a given purpose, and may be conferred upon any person or body by the legislature. Martin v. Tyler, 4 N. D. 290, 25 L.R.A. 838, 60 N. W. 392; Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545.

The law provides a method of constructing drains, whenever the same shall be conducive to the public health, convenience, or welfare. Aldrich v. Paine, 106 Iowa, 461, 76 N. W. 812.

Where the drain is for the benefit of a municipality, the petition must be signed by the citizens thereof. Soliah v. Cormack, 17 N. D. 401, 117 N. W. 125; Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545; Muskego v. Drainage Comrs. 78 Wis. 40, 47 N. W. 11.

The questions here are as to the interpretation of the statutes, and the court will be governed by the legislative intent as evidenced by the language employed. Anderson v. Endicutt, 101 Ind. 539; Mason v. Detroit, G. H. & M. R. Co. 104 Mich. 631, 62 N. W. 989.

Bruce, J. This is an appeal from an order vacating and setting aside a temporary injunction restraining proceedings for the creation of a sewer under the provisions of chapter 23, Rev. Codes 1905, as amended by chapter 93 of the Laws of 1907 and chapter 124 of the Laws of 1911.

The first and main question which is to be decided in this case is whether a drainage or sewerage system may be created under §§ 1818 and 1821, Rev. Codes 1905, which system the petition alleges "is for the best interests of the city (of Mohall) and a benefit to the health, convenience, and welfare of the people of said city," and which the record discloses is for the purpose of providing a drain which shall

take care of the sewage and house drainage of the city as well as its surface waters, without a compliance with the provisions of § 1821, which provides that "if among the leading purposes of the proposed drain are benefits to the health, convenience, or welfare of the people of any city or other municipality, the petition shall be signed by a sufficient number of the citizens of such municipality or municipalities to satisfy the board of drain commissioners that there is a public demand for such drain."

This, we believe, is a correct statement of the main issue, for although it is contended that the drain is a general agricultural health drain, and passes through agricultural lands as well as city property, it is quite clear from the record that its source is in the city as well as its real field of utility, and that its extension into the agricultural lands is for the purpose of an outlet merely. Even, however, if it were partly agricultural and partly urban, we do not think that the issues would be changed, and we are of the opinion that "a petition signed by a sufficient number of the citizens of the municipality to satisfy the board of drain commissioners that there is a demand for the drain" would still have been necessary, and that such petition was not obtained in the case before us. Section 1818, Rev. Codes 1905, provides that "water courses, ditches and drains for the drainage of sloughs and other low lands may be established, constructed and maintained in the several counties of this state whenever the same shall be conducive to the public health, convenience or welfare under the provisions of this chapter. The word 'drain' when used in this chapter shall be deemed to include any natural watercourse opened, or proposed to be opened, and improved for the purpose of drainage and any artificial drains constructed for such purpose."

Section 1821 provides that "a petition for the construction of a drain may be made in writing to the board of drain commissioners. If among the leading purposes of the proposed drain are benefits to the health, convenience or welfare of the people of any city or other municipality, the petition shall be signed by a sufficient number of the citizens of such municipality or municipalities, to satisfy the board of drain commissioners that there is a public demand for such drain. If the chief purpose of such drain is the drainage of agricultural, meadow, grazing or other lands, the petition shall be signed by at least

six or more freeholders whose property shall be affected by the proposed drain."

Section 2771, Rev. Codes 1905, provides among other things that "the city council shall have power to establish and maintain at any time a general system of sewerage for the city, in such manner and under such regulations as the city council shall deem expedient, and to alter or change the same from time to time as the council shall deem proper; provided, that no action shall be taken for the establishment of such system of sewerage except upon the affirmative vote of two-thirds of the members of the city council," etc. Section 2772 provides that "any city shall have power to create sewer, paving or water-main districts within the limits of such city, which shall be consecutively numbered." Section 2773 provides that "such sewer districts shall be of such size and form as the city council, after consultation with the city engineer, shall decide most practicable for the purpose of the drainage of such portion of such city as may be included in the respective districts as established by the city council."

It is quite clear to us that §§ 1818 and 1821 were enacted for the drainage of sloughs and other lowlands, and under the general police power of the state, and that §§ 2771, 2772, and 2773 were enacted to meet the express problems of cities and the added problem of house sewage, which is not to be found in the country. It is well established that where general words follow a specific enumeration, that these general words must be construed to apply to a class similar to that enumerated. Lewis's Sutherland, Stat. Constr. 2d ed. §§ 422–441. The "other lowlands," therefore, which are spoken of in § 1818, must mean lands which, even though found within the limits of incorporated cities, are in the nature of sloughs and as such injurious to the general health of the community. Sections 1818 and 1821, Rev. Codes 1905, in fact the whole of chapter 23, Rev. Codes 1905, relate merely to what may be termed water or surface-water drains, and have no relation whatever to a sewage and to a sewerage system, such as is generally maintained in cities and is evidently contemplated in the case at bar. There are cases where sloughs and swamps are found within the limits of incorporated cities, and § 1821 was enacted to cover such cases, but the act is limited by § 1818 to "the drainage of sloughs and other lowlands" and of sloughs and other lowlands alone.

However this may be, it is quite clear that the drainage project in the case at bar was primarily, if not solely, for the benefit of the people of the city, and that in no sense could it be held that its *chief* and only purpose was for the "drainage of agricultural, meadow, grazing, or other lands."

Being for the benefit, health, convenience, and welfare of the city, the petition was, in any view of the case and of the statutes, required to be signed by a sufficient number of the citizens of such municipality to satisfy the board of drain commissioners that there was a public demand for the drain. See § 1821. In the case at bar the petition was signed by only ten, or at the most twenty, persons, while the number of property owners of the city amounted to two hundred and twenty-three persons. This was not a sufficient showing of a public demand. The most limited definition of the term "public" that we can find is in the case of State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1076, 1077; 6 Words & Phrases, 5771. In this case the court says: "The term 'public' does not mean all the people, nor most of the people, nor very many of the people, of a place, but so many of them as contradistinguishes them from a few." See 6 Words & Phrases, 5771. Even if we take the most limited construction, we think that no one would contend that ten or twenty is not a "few" as compared with two hundred and twenty-three.

There can be no question that the drain or sewer was intended to provide for the house sewage as well as for the surface or storm waters of the city. This is conclusively shown by the surveyor's report, which, among the estimated items of cost, includes one septic tank, fifteen catch-basin, twelve manholes, one outfall abutment, and several thousand feet of drainpipe, and which throughout speaks of the system as a sewer, rather than a drainage, system.

It is also clear that whether primarily and principally a house sewer or not, its use is mainly confined to the limits of the city. It is true that it extends outside of the limits, but, to use the language of the engineer himself, "the benefits will be to the entire city of Mohall, North Dakota, and *may* include the southwest quarter and the south half of the southeast quarter of section 13, and the north half of the northwest quarter and the north half of the northeast quarter of section 24, twp. 161, range 84. The benefits will be *particularly to the*

health, convenience, and welfare of the residents of Mohall, North Dakota." There is in fact in the petition no suggestion or claim that the system is for the benefit of any but the residents of the city, nor any request that it shall be made to benefit any others. So, too, the petition is signed by residents of the city only. See State ex rel. Bale v. Morrison, 24 N. D. 568, 140 N. W. 707. It is clear that in any event and in any view of the case the requirements of § 1821 should have been met and complied with, and it is equally clear that this was not done.

But it is contended that the action was premature. It is claimed that it was begun before the hearing under § 1821 could be had, and before the board could determine whether or not a public demand existed for the drain. It is claimed that under the statute the drain board determines whether or not a public demand exists, and that such determination, in the absence of an appeal, should be final.

We do not think that this is the case. It appears to be quite clear, indeed, that before any steps are taken whatsoever, the board of drain commissioners must be satisfied that there is the "public demand" which is mentioned in and which is made a prerequisite by § 1821. Before this matter has been determined, the board, under the statute, has no right to cause the survey to be made, nor to take any steps in the matter. This determination, and a petition on which the determination may be legally had, is, we believe, jurisdictional. It is true that the concluding portion of § 1821 provides that "all persons whose land may be affected by any such drain may appear before the board of drain commissioners and fully express their opinions upon the matter pertaining thereto." We believe, however, that this hearing is contemplated after the filing of the proper petition, and the determining of the public demand, and the making of the survey, and not before, and relates to the benefits and the necessity, and not to the preliminary and jurisdictional "public demand." We are also cognizant of § 1822, which provides that "if upon such examination and survey, or upon the trial in the district court it shall appear that there was not sufficient cause for making such petition, or that the proposed drain would cost more than the amount of benefit to be derived therefrom, the board of drain commissioners shall deny the petition, and the petitioners shall be jointly and severally liable to such board for all costs and expenses

incurred in the proceedings to be recovered by such board by action." We believe, however, that this clause refers to the value and necessity of the drain, and not to the jurisdictional element of a public demand therefor.

We are of the opinion that the trial court erred in dissolving the temporary injunction, and that all further proceedings under the invalid petition should be enjoined and the injunction reinstated. It is so ordered. The costs of the appeal will be borne by the defendant and respondent.

On Petition for Rehearing.

A petition for a rehearing has been filed in which the claim is made that the finding of the commissioners as to the fact of a public demand is final and conclusive, and cannot be attacked in the injunction proceedings. The contention of counsel in short is that in such a case if the commissioners choose to hold that two and two make six, or that ten out of two hundred and twenty-three is a *number* in itself sufficient to indicate a popular demand, or to make some other equally grotesque holding, the public and the courts must sit idly by and see an expensive election or proceeding carried on. Such, we believe, never has been and never will be the law. A holding such as that above on the part of a commission, though perhaps innocently made, is, in the eyes of the law, equivalent to fraud, and in such cases no court will hold that the exercise of discretion or of quasi judicial determination is binding.

We have carefully examined the cases cited by counsel for petitioner. In none of them, however, are the facts similar to those in the case at bar. In the case of State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958, for instance, the court merely held that "after a county-seat election has been ordered and *held,* and a sufficient vote is cast in favor of some one place to work a relocation of the county seat, the question whether the petition presented to the board of county commissioners praying that such an election be held was signed by a sufficient number of voters is not open to judicial investigation when the board has found that it was so signed." It will be noticed that in this case the election had been held and the popular opinion and de-

sires expressed. In truth the very fact was shown by the election which the petition was intended to state, and that was that there was a desire for a change of the county seat. This is the reason why the court held as it did. This is plain from the language of the opinion itself. It said: "We do not think that, *after an election has been held, and a sufficient vote has been cast in favor of a place to work a change of the county seat to such place,* the question whether the petition had upon it the requisite number of names is open to judicial investigation. While a sufficient petition is undoubtedly necessary, yet the question lies deeper than that. What body is to settle this matter finally? This is the pregnant inquiry. When we consider the nature of the question to be passed upon, the peculiar facilities that county commissioners living in close contact with the people have for reaching a correct result, and the enormous expense involved in a trial of that question in court, we are impelled to the conclusion that the decision of the board is final; *at least, after an election is had which demonstrates that the requisite number of voters were in favor of a change.* In the case before us it appears that the voters of Traill county were almost unanimous in their desire for a change, Caledonia receiving only 218 votes out of 1,882 votes cast on that issue. The board is to receive the petition, is to pass upon its sufficiency, and is to order the election if satisfied that it is sufficient. Here is a clear submission of this question of fact to the board for adjudication. The statute contemplates that the board is to settle it one way or the other. No other body is given jurisdiction over the matter. It is left to the judgment of the board, to the end that the taxpayers shall not be burdened with the expense of an election unless there is a strong sentiment in favor of a change, and also to the end that, when there is a sufficiently widespread desire for a relocation to justify the expectation that the vote on the subject will accomplish something, and not prove futile, the citizens of the county may enjoy the right to vote on this issue. We think such a question may be safely left to the final decision of the county commissioners of a county. They are elected for a short term. They stand close to the people, and under such circumstances an abuse of the power is not to be expected. If the power is abused, the attempt of the board will prove abortive, if the voters do not desire a change. The only consequence of their wrongful action will be the expense of

the election, so far as it relates to the special matter, which will be trifling, in view of the fact that the question is to be voted on at the general election, and in addition the increased excitement of the election owing to the additional issue before the voters for settlement. *These consequences are trivial as compared with the evils flowing from the doctrine that the question whether two thirds of the voters signed the petition is open to investigation after two thirds of the voters have declared in favor of a change of the county seat to another place, and so open to investigation for all time.*"

In the case of State ex rel. Plain v. Falley, 8 N. D. 90, 76 N. W. 996, all that was held was that the duties of the secretary of state, in certifying the names of the legislative nominees to the auditors of the proper counties, were ministerial, and not judicial. It is plain that this case has no application to the one at bar. In State ex rel. Laird v. Gang, 10 N. D. 331, 87 N. W. 5, we merely have a case where the board of county commissioners refused to call an election for the organization of a civil township on the ground that the petition was not signed by a sufficient number of legal voters. In it they passed upon a question of fact as to whether the signers were electors or not. There was no evidence of abuse of discretion, and no suggestion of such an abuse of quasi judicial judgment as to in law amount to fraud. So, too, no real harm was done by, nor any infringement upon personal or property rights perpetrated, or money wasted, by the refusal to call the election. In the case of State ex rel. Cooper v. Blaisdell, 17 N. D. 575, 118 N. W. 225, is to be found a holding similar to that in State ex rel. Plain v. Falley, supra, and is merely that the secretary of state, in certifying the names of candidates for state offices to the auditors of the different counties, merely acts in a ministerial capacity. In the case of Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 393, 127 N. W. 499, an attempt was made to attack the organization of a school district several years after its organization, on account of an alleged defect in the petition, after taxes had been levied for three years and a schoolhouse built, and bonds issued for $9,000. It was a case not only in which there was no showing of fraud or of that which was equivalent thereto, or of a gross abuse of discretion or of judgment, but one in which the doctrine of estoppel was and could be asserted. The case of School Dist. v. King, 20 N. D. 614, 127 N. W. 515, pre-

sents facts somewhat similar to those in the case at bar in that an injunction was sought to restrain the annexation of certain territory to a school district. In it, however, the court said nothing about the ultimate discretion of the board of education. It, on the other hand, expressly said that "the allegation of the complaint that the petition was 'falsely and fraudulently' presented to the board of education is not followed by any proof to substantiate that general allegation. This allegation, even if deemed sufficient, must fail as not substantiated by proof. The same is true of the allegation in the complaint that the petition is not signed by a requisite number of the legal voters of the territory attached to the village of Tower City for school purposes. As stated before, the defendants have shown *by undisputed testimony that every requirement of the statute was literally complied with.*" These are all of the cases cited from North Dakota. We have, in addition, carefully examined those cited from other states, and we make upon them exactly the same criticism that we do upon those cited from North Dakota. The cases referred to are Currie v. Paulson, 43 Minn. 411, 45 N. W. 854; Slingerland v. Norton, 59 Minn. 351, 61 N. W. 322; Tucker v. Lincoln County, 90 Minn. 406, 97 N. W. 103; State ex rel. Buck v. Ravalli County, 21 Mont. 469, 54 Pac. 939; Scarbrough v. Eubank, 93 Tex. 106, 53 S. W. 573.

The petition for a rehearing is denied.

LYDA AKIN v. NETTIE JOHNSON AND AUGUST JOHNSON.

(148 N. W. 535.)

Question of fact — conclusions — credibility of witnesses — for the jury — verdict of jury — supported by competent evidence — will not be disturbed.

Questions of fact, as well as conclusions regarding the credibility of the witnesses, are primarily and fundamentally for the jury, and not for the court, to pass upon and to determine. Where no error of law has been committed by the trial court, a verdict of the jury will not be disturbed which is supported by at least some competent testimony.

Opinion filed July 7, 1914.

Appeal from the District Court of Cass County, *Pollock*, J.

Action to recover wages for services rendered. Counterclaim for board and clothing furnished. Judgment for plaintiff. Defendants appeal.

Affirmed.

Statement by BRUCE, J.

This is an action to recover $2.80 claimed to have been misappropriated by the defendant, and the sum of $206 for services rendered as a domestic, less an allowance of $15 for clothing and necessaries furnished by the defendants to the plaintiff. An answer which practically amounted to a general denial was interposed, and in addition thereto a counterclaim which alleged that the plaintiff had lived in the family of the defendants, and was furnished with board and lodging and clothing, and which placed the value of the clothing at $64.49, and the board and lodging at the amount of $12 a month, and in all prayed for a judgment in the sum of $124.49.

The jury returned a verdict in favor of the plaintiff for the sum of $169.80, with interest at 7 per cent from June 1, 1911. A motion for a new trial was made and denied, and an appeal was taken, the defendants claiming that the damages were excessive and given under the influences of passion and prejudice, and that the evidence was insufficient to support the verdict.

Chas. G. Bangert, of Enderlin, North Dakota, for plaintiff and respondent.

Pollock & Pollock, of Fargo, North Dakota, for defendants and appellants.

BRUCE, J. (after stating the facts as above). We do not very well see how this court can interfere with the judgment and verdict in question without absolutely encroaching upon the province of the jury. We must, indeed, either take the position that the jury is the judge of the credibility of the witnesses and of the basic facts in a lawsuit, or that it is not, and that the jury is the judge of such facts seems to be the universal understanding. If, indeed, there is any evidence in the record which would justify the verdict, we are, in the absence of error

in the instructions and rulings of the court, precluded from interfering therewith.

The first question is whether there is any evidence of an implied agreement that the plaintiff should be paid for her services. The defendants contend that, though a stranger, she was merely a visitor or guest of the family, and that there was no agreement that she should be paid anything for the services which she rendered. Mrs. Johnson, one of the defendants, however, admits that the plaintiff was required to do some work, and as she herself states, "I paid Miss Akin for the services she rendered by getting her clothes and shoes."

The defendants' claim, also, that she was a member of the family, and that, being such, the presumption would be that the services rendered by her would be gratuitous, is absolutely negatived by the counterclaim which treats her as a stranger, and asks for judgment against her for board and clothing furnished to her. It is also disputed by the statement of the defendant Mrs. Johnson, who says, "When this girl was *boarding with me,* I didn't see how I was going to keep her and clothe her for nothing, and not charge her anything for her board; therefore I did intend to charge her for the board for the time she stayed at our house."

Although, too, there is testimony on the part of the defendants in support of their contention, the plaintiff's testimony, if true, discloses an implied agreement at least that she should be paid for her services, and the testimony of both the plaintiff and at least one other witness is that they were reasonably worth the sum recovered by her.

The plaintiff, among other things, testifies that she commenced working for the defendants on or about the 1st of June, 1910, and worked for them for about a year; that she went to work for the defendants *at their request;* that, among other things, she was required to work in the field; that she did chores, such as taking care of horses and milking cows; and that "I asked them for wages, and she said she would pay me some, and she told me once she would give me $4 a week. . . . The reasonable value of my services while I was working for these people at Johnson's was about $3 to $4 a week. Yes, sir, about $4 a week. I don't think that would be any too much. No, sir, not a bit for the work I did."

In addition to this, we find the testimony of one, Chris Peterson,

for whom the plaintiff worked for a short time, that she could do her work the same as any other girl, and that the reasonable pay for like services was from $3 to $4 and up to $5 per week.

This witness was merely speaking of housework, and said nothing as to field work. The defendant Nettie Johnson admits that plaintiff did at least some field work, for some of which they would have had to pay a man $1.75 per day. She adds, "Yes, at the time she was plowing she helped take care of the horses. She was a pretty good girl to be able to do that. She was worth as much as any girl would be around the place. I have paid her for a part of her services in clothing."

There is, in fact, more than a scintilla of evidence to the effect that there was an implied agreement that plaintiff should be paid for her services, and also that her services were worth the amount recovered by her, and such being the case the verdict of the jury must be conclusive.

We realize, of course, that the defendants claim that the clothing furnished the girl was worth $69.49. The plaintiff's testimony, however, is that such clothing was worth less than $15, and it is quite clear from the evidence that a considerable portion of the $69.49 claimed by the defendants was for services in making up the garments, which, if due to anyone at all, is due to the defendants' daughter, who is a dressmaker, and not to them.

It is also claimed that the plaintiff worked for other persons while in the household of the defendants, and was paid by such other persons therefor. It is claimed that this time spent away from the house was approximately three months. It is claimed that the total compensation for a year at $4 per week would be $208, which, with the $2.80 claimed to have been misappropriated, would have been $210.80, and less the $15 for clothing would have been $195.80; that if from this was deducted twelve weeks, for the time spent away from defendants' farm, at $4 per week, namely $48, a balance of $147.80 would be left, while the verdict of the jury was for $169.80, and that the verdict therefore was in any event excessive to the amount of $22. The evidence, however, as to the time that the plaintiff was away from the home of the Johnsons is in conflict. Though the defendants testified that she was away some three months in all, they are not definite in

their testimony, and the plaintiff herself testifies that she was only away some five weeks. The testimony, too, as to $4 per week as a value of the services, would not be conclusive. The witness Chris Peterson, for instance, testifies that the girl *as a household domestic merely* was worth from $3 to $5 per week, but says nothing as to the value of a girl who both helped in the fields and barn and in the house. It, indeed, may very well have been that the jury, in assessing damages, considered the services testified to as having been rendered outside, in the fields and in the barn, and which if performed by a man, (and the defendant Nettie Johnson herself testifies that some of it at least was the same as could and would have been performed by a man at $1.75 a day) would have been worth much more than 58 cents or 67 cents per day, that is to say, more than $4 per week.

The case in short was one for the jury. There was at least some evidence in support of the plaintiff's contention and in support of the verdict, though there is much evidence in support of the defendants' position. The questions involved are questions of fact, and not of law, and are not therefore such as we can pass upon or determine.

The judgment of the District Court is affirmed.

DIOCESE OF FARGO, a Corporation, v. COUNTY OF CASS, a Corporation.

(148 N. W. 541.)

County courts — fees of paid — statute unconstitutional — may be recovered as an involuntary payment — mandamus — formal protest not necessary.

1. Fees wrongfully exacted under an unconstitutional statute, by the county judge by virtue of his official position, for the filing of the inventory and

Note.—The decision in FARGO v. CASS, sustaining the right to recover back money illegally exacted by a public officer for the performance of his official duty, is in harmony with the other authorities, as shown by a note in 15 L.R.A.(N.S.) 183, the courts acting on the principle that a payment made to a public officer who has the power of compulsion behind him, or a payment exacted by an officer *colore officii*, is never to be deemed a voluntary act, it being considered that the parties do not stand on terms of equality.

for whom the plaintiff worked for a short time, that she could do her work the same as any other girl, and that the reasonable pay for like services was from $3 to $4 and up to $5 per week.

This witness was merely speaking of housework, and said nothing as to field work. The defendant Nettie Johnson admits that plaintiff did at least some field work, for some of which they would have had to pay a man $1.75 per day. She adds, "Yes, at the time she was plowing she helped take care of the horses. She was a pretty good girl to be able to do that. She was worth as much as any girl would be around the place. I have paid her for a part of her services in clothing."

There is, in fact, more than a scintilla of evidence to the effect that there was an implied agreement that plaintiff should be paid for her services, and also that her services were worth the amount recovered by her, and such being the case the verdict of the jury must be conclusive.

We realize, of course, that the defendants claim that the clothing furnished the girl was worth $69.49. The plaintiff's testimony, however, is that such clothing was worth less than $15, and it is quite clear from the evidence that a considerable portion of the $69.49 claimed by the defendants was for services in making up the garments, which, if due to anyone at all, is due to the defendants' daughter, who is a dressmaker, and not to them.

It is also claimed that the plaintiff worked for other persons while in the household of the defendants, and was paid by such other persons therefor. It is claimed that this time spent away from the house was approximately three months. It is claimed that the total compensation for a year at $4 per week would be $208, which, with the $2.80 claimed to have been misappropriated, would have been $210.80, and less the $15 for clothing would have been $195.80; that if from this was deducted twelve weeks, for the time spent away from defendants' farm, at $4 per week, namely $48, a balance of $147.80 would be left, while the verdict of the jury was for $169.80, and that the verdict therefore was in any event excessive to the amount of $22. The evidence, however, as to the time that the plaintiff was away from the home of the Johnsons is in conflict. Though the defendants testified that she was away some three months in all, they are not definite in

their testimony, and the plaintiff herself testifies that she was [illegible] away some five weeks. The testimony, too, as to $4 per week as the value of the services, would not be conclusive. The witness Chris Peterson, for instance, testifies that the girl *as a household domestic merely* was worth from $3 to $5 per week, but says nothing as to the value of a girl who both helped in the fields and barn and in the house. It, indeed, may very well have been that the jury, in assessing the ages, considered the services testified to as having been rendered inside, in the fields and in the barn, and which if performed [illegible] (and the defendant Nettie Johnson herself testifies that such [illegible] least was the same as could and would have been rendered [illegible] at $1.75 a day) would have been worth more than [illegible] 67 cents per day, that is to say, more than [illegible]

The case in short was one for the jury [illegible] evidence in support of the plaintiff's claim [illegible] verdict, though there is much evidence [illegible] position. The questions involved are [illegible] law, and are not therefore such as we can [illegible]

The judgment of the District Court [illegible]

DIOCESE OF FARGO, a [illegible]

[illegible]

County courts — fees of paid — [illegible] as an involuntary [illegible] — [illegible] sary.

1. Fees wrongfully [illegible] judge by virtue of his [illegible]

Note.—The decision [illegible] illegally exacted by a [illegible] harmony with the other authorities [illegible] courts acting on the principle [illegible] the power of compelling [illegible] *officii*, is never to be deemed [illegible] do not stand on terms of [illegible]

28 N. D.—31.

[illegible]. in order [illegible] of the estate [illegible] id executor, Cass, North [illegible] orth Dakota, Ireland, said [illegible] unty of Cass, [illegible] and every one [illegible] ss of the first found, and as [illegible] treasurer's re- [illegible], thereupon filed

appraisement of decedent's estate, required to be filed within a given time in order that the executor might proceed, may be recovered as involuntarily paid, although the filing could have been compelled by mandamus, and although such fees were thus paid without any formal protest.

Public officer — money exacted by — excess of legal fees — compulsory payment.

2. Money exacted by a public officer and paid in excess of his legal fees in order to obtain the performance of his official duty, to which the payer is entitled without such payment, is compulsory, and may be recovered back, and in such a case it is not necessary that the payer should have protested against such payment.

Opinion filed July 24, 1914.

Appeal from District Court, Cass County, *Charles A. Pollock,* J.

From an order overruling a demurrer to the complaint, defendant appeals.

Affirmed.

A. W. Fowler (State's Attorney) Fargo, N. D., for appellant.

Pfeffer & Pfeffer, Fargo, N. D., for respondent.

Fisk, J. This is an appeal from an order of the district court of Cass county overruling a demurrer to the complaint. The complaint embraces two causes of action for the recovery of certain moneys exacted and paid by plaintiff's assignor as an alleged probate tax upon the estate of the late Bishop Shanley by Archbishop Ireland, the executor and sole beneficiary under the will of the late Bishop Shanley. The total amount of fees or so-called probate taxes which were exacted and paid as aforesaid is $1,110, and the same were exacted and paid pursuant to the provisions of chapter 119, Laws 1909, which statute was recently held unconstitutional in the case of Malin v. Lamoure County, 27 N. D. 140, 50 L.R.A.(N.S.) 997, 145 N. W. 582. It is apparent, judging from the large fee or tax thus exacted and paid, that the estate is a large one, amounting approximately to $225,000. The complaint, among other things, alleges the following facts:

VI.

"That on the 2d day of May, 1910, at the time the inventory and

appraisement of the estate of said John Shanley, deceased, was presented to the county court of the county of Cass, North Dakota, for the purpose of filing, and further proceeding with the administration of the estate of said John Shanley, deceased, the judge of said county court in and for said county of Cass, North Dakota, as a condition precedent to the filing of said inventory and appraisement, or allowing the same to be filed in said county court, required, exacted, and demanded of the said John Ireland, said executor, that said John Ireland, said executor, pay or cause to be paid into the treasury of the county of Cass, North Dakota, pursuant to chapter 119, Session Laws, N. D. 1909, the sum of five ($5) dollars for each and every one thousand ($1,000) dollars or fraction thereof in excess of the first $1,000 of value therein found, as shown by said inventory and appraisement; and that the judge of said county court, as a further condition precedent to the filing of said inventory and appraisement, required, exacted, and demanded of said John Ireland, said executor, a receipt signed by the treasurer of the county of Cass, North Dakota, showing that said John Ireland, said executor, had paid into the treasury of the county of Cass, the sum of five ($5) dollars for each and every one thousand ($1,000) dollars or fraction thereof, in excess of the first $1,000 of value therein found, as shown by said inventory and appraisement.

VII.

"That thereupon and on the said 2d day of May, 1910, in order that he as executor might proceed with the administration of the estate of John Shanley, deceased, he, the said John Ireland, said executor, paid or caused to be paid to the treasurer of the county of Cass, North Dakota, and into the treasury of the county of Cass, North Dakota, as required, demanded, and exacted of the said John Ireland, said executor, by the said judge of the county court of the county of Cass, North Dakota, the sum of five ($5) dollars for each and every one thousand ($1,000) dollars or fraction thereof, in excess of the first $1,000 of value in said inventory and appraisement found, and as shown by said inventory and appraisement, taking the treasurer's receipt therefor, which said receipt, he, the said executor, thereupon filed

or caused to be filed in the county court of the said county of Cass, as required, demanded, and exacted by the judge of said county court."

X.

"That the said payment to the treasurer of the county of Cass, North Dakota, and into the treasury of the county of Cass, of the sum of seven hundred and eighty-five and no/100 ($785) dollars mentioned and referred to in paragraphs eight (8) and nine (9) of the first cause of action, was required, demanded, and exacted of the said John Ireland, said executor, by the judge of the county court of the county of Cass, North Dakota, acting under color of law, and for public services which the said John Ireland, as executor of the estate of John Shanley, deceased, was entitled to have performed, and that when the sum of seven hundred and eighty-five and no/100 ($785) dollars, required, demanded, and exacted, as aforesaid, was paid, or caused to be paid by said John Ireland, said executor, to the treasurer of the county of Cass, North Dakota, and into the treasury of the defendant herein, the said county of Cass, the said payment so required, demanded, exacted, and paid was a payment to the county of Cass, said defendant, and was received by said defendant to the use of said John Ireland, said executor as aforesaid."

The complaint also affirmatively discloses upon its face that such payments were made without any written protest being filed, but under the conditions and in the manner set forth in the paragraphs of the complaint above quoted.

The sole ground of the demurrer is that the complaint fails to allege facts sufficient to constitute a cause of action, defendant's contention, in brief, being that the payments were voluntarily made, and therefore the action for the recovery thereof as for money had and received will not lie. The learned trial court, in its order overruling the demurrer, states that it follows the rule laid down in Trower v. San Francisco, 152 Cal. 479, 15 L.R.A.(N.S.) 183, 92 Pac. 1025. We are agreed that the rule there stated by the California court is both sound and in accord with the weight of authority, and that the trial court very properly overruled the demurrer. Upon the plainest principles of justice and equity, moneys thus exacted and received by

the county, in equity and good conscience, belong to the estate, and the county ought not to be heard to urge that the same were voluntarily paid, merely because the same were not paid under a formal written protest. The allegations of the complaint, which are admitted to be true by the demurrer, clearly disclose, we think, that the same were paid under legal duress and compulsion. We cannot improve upon the reasoning contained in the opinion of the California court in Trower v. San Francisco, supra, and we therefore quote therefrom as follows: "The act under which the fees were exacted by the county clerk being unconstitutional, the assignors of plaintiff had a right to have the inventories and appraisements in the various estates which they represented filed without payment of any separate fee therefor. The exaction of the fee provided under the unconstitutional act was illegally made by the clerk by virtue of his official position, and against the right of the assignors of plaintiff to have such documents filed immediately on their presentation. The law required that they be filed within a given time. It was necessary that they be filed in order to proceed with the administration of the respective estates. The executors would be deemed culpable in delaying their filing, and be subject at least to proceedings for removal from office for failure to do so. The only alternative left to the assignors of plaintiff was to commence mandamus proceedings to compel the filing of the documents, or pay the illegally exacted fees. They chose the latter alternative; and we are satisfied that, under the authorities, such payment was none the less involuntary, and that their right to recover it back was not at all affected by their failure to bring such mandamus proceedings."

The court then quotes with approval from the case of Lewis v. San Francisco, 2 Cal. App. 113, 82 Pac. 1106, as follows: "When an illegal demand is made against the person or property of an individual which can be enforced only by a judgment therefor in an action at law wherein he can contest its legality; or, if made under a threatened sale of his property, and he can contest the validity of the proceedings whenever an attempt is made to disturb his possession, and he pays the claim or demand rather than be subjected to such action or to have his property sold,—such payment is voluntary, to the extent that it cannot be recovered in an action therefor. If, however, an illegal demand is made by any person holding an official position,

with the color of authority to enforce the same, and such demand operates as a restraint upon the exercise of an undoubted right or privilege, and in its enforcement there is no opportunity of contesting its validity, a payment of the demand in order to remove such restraint is compulsory, and not voluntary. The distinction to be observed is between a payment made for the purpose of protecting or securing the present enjoyment of a right to which the person is immediately entitled, and a payment made to prevent a threatened disturbance of such right where there is no authority to interfere with its enjoyment until the right of the threatening party shall be established in a judicial proceeding in which the rights of the respective parties may be presented and determined. In the latter case, a payment to avoid such threatened contest is regarded as voluntary, while in the former case it is compulsory."

In 22 American & English Encyclopedia of Law, 2d ed. 619, the rule is stated thus: "The rule is well settled that a payment exacted by and paid to a public officer in excess of his legal fees in order to obtain the performance of his official duty, to which the payer is entitled without such payment, is compulsory, and may be recovered back; and in such a case it is not necessary that the payer should have protested against the payment; and it has been held that the fact that the failure of the payer to protest against the exaction of the illegal fees was due to his ignorance of the law would not prevent his recovery." Numerous authorities are cited in the note in support of the text above quoted, but we deem it unnecessary to cite them in this opinion. We call attention, however, to the following:

Clinton v. Strong, 9 Johns. 370; Townshend v. Dyckman, 2 E. D. Smith, 224; American S. S. Co. v. Young, 89 Pa. 186, 33 Am. Rep. 748; Robinson v. Ezzell, 72 N. C. 231; United States v. Lawson, 101 U. S. 164–169, 25 L. ed. 860–862; United States v. Ellsworth, 101 U. S. 170, 25 L. ed. 862; Swift & C. & B. Co. v. United States, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; American Exch. F. Ins. Co. v. Britton, 8 Bosw. 148; Buckley v. New York, 30 App. Div. 463, 52 N. Y. Supp. 452. See also 30 Cyc. 1306 and cases cited.

In Townshend v. Dyckman, 2 E. D. Smith, 224, moneys were illegally exacted by the register of the city of New York, as a condition upon

which he would permit an inspection of certain public records. The court said:

"But it is urged that this is a voluntary payment. The plaintiff had a clear legal right to inspect this index, and if the defendant, having possession and control thereof, made use of his official authority, and under cover thereof exacted fees to which he had no legal claim, the payment was not a voluntary payment, but a payment by compulsion. If there was no authority to make the charge, its exaction was coercion as truly as if the register were to refuse to record a deed or render a service, upon the prompt rendering of which the security not only of millions of property, but oftentimes very important rights of persons, depends, and which it is his plain duty to render. Such an abuse of official power, and of his control over public records, which he alone has in virtue of his public office, is, to my mind, coercion of a very efficient character."

In American S. S. Co. v. Young, the Pennsylvania court, among other things, said:

"We think that sound public policy requires us to hold that a public officer who, *virtute officii,* demands and takes as fees for his services, what is not authorized, or more than is allowed by law, should be compelled to make restitution. He and the public who have business to transact with him do not stand upon an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much he is authorized to demand for his services; but with them it is different. They have neither the time nor the opportunity of acquiring the information necessary to enable them to know whether he is claiming too much or not." "A public officer who by virtue of his office demands and takes unauthorized or illegal fees may be compelled to make restitution, and where such fees are paid to such officer, without protest or notice of intention to reclaim, it is not a voluntary payment, where a United States shipping commissioner charges a seaman, who has paid the shipping fee, an additional fee every time he reships on the same vessel for successive subsequent voyages, such charge is unauthorized by the acts of Congress, and the fees thus named may be recovered back in an action of assumpsit."

In Swift & C. & B. Co. v. United States, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244, it is said:

"A payment made to a public officer in discharge of a fee or tax illegally exacted is not such a voluntary payment as will preclude the party from recovering it back." "The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *Volenti non fit injuria.*"

In Meek v. McClure, 49 Cal. 623, the court had under consideration the question of the necessity of alleging and proving a formal protest in an action to recover back money illegally exacted, and, among other things, the court said:

"It was held in Hays v. Hogan, 5 Cal. 243; McMillan v. Richards, 9 Cal. 417, 70 Am. Dec. 655; Falkner v. Hunt, 16 Cal. 170, and other cases in this court, that if money which is not legally due is exacted by means of duress or coercion, it may, if paid under protest, be recovered back. The purpose and effect of the protest is not satisfactorily defined in any of those cases. In one of them it is said that one purpose of the protest is to take from the payment its voluntary character; but it is manifest that it is involuntary only, because of the coercion, the duress, or the undue advantage exercised or possessed by the party to whom the payment is made. If money is paid under those circumstances, to a party for his own use, no protest is necessary in order to lay the foundation for an action."

The facts surrounding the payments of this probate tax in the case at bar are in all essential particulars the same as those in the case of Malin v. Lamoure County, recently decided by this court, except in the latter case such payment was made subject to a formal written protest. Does this in legal effect serve to distinguish the cases? We think not. To so hold would, it seems to us, be giving undue weight to a fact which ought not, in justice and equity, to be of controlling importance. Why should the one be permitted to recover back such payments and the other denied such redress? Should the right to thus recover depend upon a formal protest having been made, or should it not rather depend upon the *fact* that such payment was coerced through

compulsion and duress, and was therefore involuntary? We are clear, both on principle and authority, that the latter is correct, and that in the absence of an express statute to the contrary, and none exists in this state, the only purpose accomplished by the making of a formal protest is the weight such protest may have in determining the crucial question as to whether the payment was involuntary, and in legal effect made under compulsion and duress. And where this fact is clearly established, plaintiff may recover without proof of protest having been made. Such fact effectually establishes nonconsent in making the payment, and this is all that proof of a formal protest amounts to. The most formal protest would not authorize a recovery back of such money if the proof should disclose that, notwithstanding such protest, the payment was made under such conditions as to show that it was voluntary, and not made through legal duress.

In Malin v. Lamoure County, as above stated, a formal written protest was filed in connection with the payment of such tax; but we decided that case without any special reference to such fact, other than a mere recital of the allegation in the complaint, and in no sense can it be considered an authority in appellant's favor in the case at bar.

In 30 Cyc. 1310, the correct rule is stated as follows: "A payment is not rendered involuntary merely because the payer at the time of payment makes a protest against the payment. If money is paid under compulsion, no protest is necessary to lay the foundation of an action to recover the payment, except perhaps where the payment is to a public officer and he has no notice of the facts which render the demand illegal. But if there is doubt, under the circumstances, whether the payment was voluntary, the protest may be taken into account in determining the question."

Chief Justice Bartholomew, speaking for the court in Wessel v. D. S. B. Johnston Land & Mortg. Co. 3 N. D. 160, 44 Am. St. Rep. 529, 54 N. W. 922, said: "A protest is of no avail unless there be duress or coercion of some character, *and then its only office is to show that the payment is the consequence of such duress or coercion.*"

See also Chicago v. Sperbeck, 69 Ill. App. 562, and cases cited. Also note to the case of Atchison, T. & S. F. R. Co. v. O'Connor, Ann. Cas. 1913C, 1052.

We are not unmindful of the holding of the Minnesota court in De-

Graff v. Ramsey County, 46 Minn. 319, 48 N. W. 1135, in a case similar to the case at bar, in which that court sustained the lower court's finding to the effect that the payment was voluntary, and could not be recovered. But we note the following language in the opinion: "The appellant assigns as error that the finding of fact that the payment was voluntary is not sustained by the evidence. We have examined the evidence, and find that if in such a case the payment may be voluntary, it justifies the finding. . . . There is a class of cases where, although there be a legal remedy, his situation or the situation of his property is such that the legal remedy would not be adequate to protect him from irreparable prejudice,—where the circumstances and the necessity to protect himself or his property otherwise than by resort to the legal remedy may operate as a stress or coercion upon him to comply with the illegal demand. In such cases his act will be deemed to have been done under duress, and not of his free will. Such cases were Fargusson v. Winslow, 34 Minn. 384, 25 N. W. 942; State ex rel. McCardy v. Nelson, 41 Minn. 25, 4 L.R.A. 300, 42 N. W. 548; Mearkle v. Hennepin County, 44 Minn. 546, 47 N. W. 165, and the other cases cited by the respondent. In the Mearkle Case, which is more nearly like this than any other cited, the circumstances and condition of the estate were such that the court could see great and irreparable injury would accrue to it while the executor was seeking his legal remedy, and the payment was made under protest, so that not only the payor, but the payee also, understood that the former claimed the payment to be involuntary. We do not mean to say that in a clear case of coercion or duress a protest is necessary, or that it would be sufficient without circumstances of coercion; but if there be doubt, under the circumstances, that the payment is voluntary, it may be taken into account in determining the question that the payor declared as a part of his act that he paid involuntarily. In this case the evidence was not such as to require a finding that the estate would suffer while the executor might be enforcing the remedy afforded by the law against the refusal of a court to proceed when it is its duty to do so."

The court there merely recognized the fact, which no doubt is true, that a case of this kind may possibly arise under facts showing that a voluntary payment was made, and the finding of the trial court was sustained upon the sole ground that the evidence in that case was

susceptible of such construction. We cannot thus construe the allegations of the complaint before us.

We are asked to pass upon the question as to plaintiff's right to recover interest. This question does not properly arise on this appeal, which is not from the judgment, but from an order overruling defendant's demurrer to the complaint, which demurrer merely challenges the sufficiency of the complaint to state a cause of action. Hence, the question of the extent of such cause of action is not before us. Nor does the record disclose the amount of the judgment, if any, entered herein, or whether interest was or was not allowed by the trial court. Manifestly, therefore, such question can arise only on an appeal from the judgment. See, however, the following cases bearing upon this question: Lewis v. San Francisco, 2 Cal. App. 112, 82 Pac. 1106; Savings & L. Soc. v. San Francisco, 131 Cal. 356, 63 Pac. 665; Columbia Sav. Bank v. Los Angeles, 137 Cal. 467, 70 Pac. 308.

The order appealed from is affirmed.

R. S. ENGE v. JOHN L. CASS.

(148 N. W. 607.)

State's attorney — eligibility — must be licensed as attorney in this state — constitution — statute — construction — necessary implication.

1. In order to be eligible to hold the office of state's attorney, the incumbent must be duly licensed to practice as an attorney and counselor at law in the courts of this state. While no express requirement to such effect is contained either in the Constitution or statutes of this state, such is the clear and necessary implication to be deduced from the language employed both in § 173 of the Constitution, and in the provisions of the Code prescribing the duties of a state's attorney.

Note.—The authorities are pretty evenly divided on the question whether eligibility to office is to be determined as of the time of election or appointment, or of induction into office, though the majority perhaps are in accord with the decision in ENGE v. CASS, as shown by a review of the cases in a note in 23 L.R.A.(N.S.) 1228, and the later cases which are collated in a note in 41 L.R.A.(N.S.) 1119, tend to strengthen this position.

Elector — attorney — admission to the bar of this state — admission before qualification for office to which elected.

2. Respondent, who was an elector of Mercer county, but who had not been admitted to practice as an attorney and counselor at law in the courts of North Dakota, but who was entitled to such admission on motion without examination as to his qualifications, was elected to the office of state's attorney at the general election in November, 1912. Thereafter and prior to his induction into office, he was, on motion, duly admitted as an attorney and counselor at law. *Held*, that his election was valid, and that he is entitled to hold such office. The case of Jenness v. Clark, 21 N. D. 150, is differentiated from the case at bar.

Opinion filed July 24, 1914.

Appeal from District Court, Mercer County, *S. L. Nuchols*, J.

Action in the nature of quo warranto to determine respondent's right to hold the office of state's attorney. From a judgment in defendant's favor, plaintiff appeals.

Affirmed.

Newton, Dullam, & Young, for appellant.

To be eligible to the office of state's attorney, a person must have been previously admitted to practise in this state as an attorney at law. 4 Cyc. 899; Rev. Codes 1905, §§ 494, 497; Const. § 211; Rev. Codes 1905, § 2494; State v. Russell, 83 Wis. 330, 53 N. W. 441; Jenness v. Clark, 21 N. D. 150, 129 N. W. 357, Ann. Cas. 1913B, 675.

A person who is ineligible to hold public office cannot be elected thereto, and if elected, his election is a nullity. State ex rel. Reynolds v. Howell, 70 Wash. 465, 41 L.R.A.(N.S.) 1119, 126 Pac. 954; Searcy v. Grow, 15 Cal. 118; People ex rel. Simmons v. Sanderson, 30 Cal. 160; Taylor v. Sullivan, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802; People ex rel. Marshall v. Leonard, 73 Cal. 230, 14 Pac. 853; State ex rel. Richards v. McMillen, 23 Neb. 385, 36 N. W. 587; Re Corliss, 11 R. I. 638, 23 Am. Rep. 538; State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; State ex rel. Nourse v. Clarke, 3 Nev. 566; Brown v. Goben, 122 Ind. 113, 23 N. E. 519; State ex rel. Perine v. Van Beek, 87 Iowa, 569, 19 L.R.A. 622, 43 Am. St. Rep. 397, 54 N. W. 525.

H. L. Berry and *Thorstein Hyland*, for respondent.

Under both the Constitution and statutes, defendant possessed due

qualifications for such office. N. D. Const. ¶ 173; N. D. Rev. Codes 1905, ¶ 17; Session Laws, 1911, chap. 131, amending N. D. Rev. Codes 1905, § 605; State ex rel. Knappen v. Clough, 23 Minn. 17; N. D. Rev. Codes 1905, § 123, subdiv. 3; N. D. Rev. Codes 1905, § 499; Danford v. Egan, 23 S. D. 43, 139 Am. St. Rep. 1030, 119 N. W. 1021; 20 Ann. Cas. 418; Howard v. Burns, 14 S. D. 383, 85 N. W. 920.

It is sufficient that a candidate be qualified at the time of induction into office. State ex rel. Reynolds v. Howell, 41 L.R.A.(N.S.) 1119, note; Bradfield v. Avery, 23 L.R.A.(N.S.) 1228, note.

Fisk, J. Action in the nature of quo warranto. Plaintiff at all times mentioned was a citizen and qualified elector of Mercer county, and duly admitted as an attorney and counselor at law in the courts of this state. On July 1, 1912, he was duly appointed to the office of state's attorney of such county to fill a vacancy then existing therein, which term expired on the 1st Monday in January, 1913. He duly qualified pursuant to such appointment, and entered upon the discharge of his duties, and continued in such office until January 24, 1913.

Defendant at all times mentioned was a citizen and qualified elector of Mercer county, and at the general election held on November 5, 1912, he was a candidate for such office and received a majority of the votes cast for that office. Thereafter, and on November 20, 1912, a certificate of election to such office was issued to him by the county auditor. Within ten days after the 1st Monday in January, 1913, he filed his oath of office and official bond in conformity with the statute.

Plaintiff refuses to surrender the office to him, urging as a reason that defendant, at the time of his election, had not been admitted to practise as an attorney and counselor at law in this state. Defendant had been duly admitted to practise in the courts of Minnesota in 1880, and practised there for a period of about ten years thereafter. He was not admitted to practise in this state, however, until December 14, 1912.

Upon plaintiff's refusal to surrender the office to the defendant, the latter sued out an alternative writ of mandamus, in obedience to which writ plaintiff surrendered possession of the office to defendant on January 24, 1913, ever since which time defendant has been and still

is in possession of the office. This proceeding was brought to oust defendant from such possession, and to restore to plaintiff his alleged right to the exercise of the duties of such office, and to the fees, emoluments, and privileges thereof.

The trial court made findings and conclusions favorable to defendant, upon which judgment was rendered in his favor in June, 1913. From such judgment this appeal is prosecuted.

The facts are not in dispute. The sole question involved is whether the fact that defendant, at the date of his election, had not been admitted to practise as an attorney and counselor in the courts of this state, rendered him ineligible as a candidate. In other words, was his election null and void?

This question has been passed on by many of the courts of this country, and the decisions are much in conflict, but we are convinced that by the weight of modern authority, as well as by the sounder reason, the decision of the learned trial court was correct and should be affirmed.

There appears to be no express provision, either in our Constitution or in our Code, prescribing that a candidate for such office shall be licensed to practise as an attorney and counselor in the courts of this state; nor do we find any express provision prescribing as a necessary qualification for holding the office of state's attorney, that the incumbent be first admited to practise as an attorney and counselor in the courts of this state. It is, however, quite clearly implied, both in the Constitution and statutes, that the incumbent of such office shall possess such qualification. Section 173 of the Constitution enumerates the county officers to be elected at each general election, and among the list designated is "state's attorney," and this section also provides that all such enumerated county officers shall be electors of the county of which they are elected. The expression, "state's attorney," as thus used, clearly implies that such officer shall be an attorney and counselor at law, duly admitted in the courts of this state, and the statutes defining the duties of such official clearly contemplate and imply that such officer shall be a duly licensed attorney and counselor at law. The framers of the Constitution, as well as the legislature, evidently assumed, in accordance with universal custom and usage, that such officer

should possess this qualification, but as above stated, neither expressly so required.

For the purposes of this appeal we shall assume that by necessary implication, both from the Constitution and statutes, no person is competent to qualify and enter upon the discharge of his duties as state's attorney unless he is first duly licensed to practise as an attorney and counselor at law in the courts of this state. It does not follow, however, that he must have possessed such qualification at the date of his election. In other words, if at such time he was an elector of the county, he possessed sufficient qualification to render him eligible as a candidate at the election.

We shall not attempt to review the many authorities pro and con on the question before us, but will refer to the following recent authorities:

In the case of Ward v. Crowell, 142 Cal. 587, 76 Pac. 491, the facts were that one Crowell was elected to the office of county surveyor at the general election held on November 4, 1902, and the only question presented was whether he was legally incapable of holding said office because at the time of his election he was under a certain disability, which was removed before he entered upon the office. At the time of his election he was admittedly qualified to be so elected in every respect except one; to wit, he had not then received a licensed land-surveyor's certificate from the state surveyor, as provided by law, although he had received such certificate before the term of office commenced. It was there contended, as here, that for such reason he was not legally elected, and could not legally hold the office. Among other things, the court said:

"The general rule is that every citizen who is a qualified elector has the right to hold any office for which he has been elected or appointed. The general limitations of the right are these: 'No person is capable of holding a civil office who *at the time of his election or appointment* is not of the age of twenty-one years and a citizen of this state.' . . . 'No person is eligible to a county office who *at the time of his election* is not of the age of twenty-one years, a citizen of the state, and an elector of the county in which the duties of the office are to be exercised.' . . . 'No person is eligible to an elective county, district, or township office who, *at the time of his election,* is not of the age of twenty-

one years, a citizen of the state, and an elector of the county, district, or township in which the duties of the office are to be exercised . . .; and provided, further, that no person shall hereafter be eligible to the office of district attorney who has not been admitted to practise in the supreme court of the state of California.' . . . There are also some provisions of the Constitution and the Code of Civil Procedure to the effect that no person shall be eligible to certain offices unless he shall have been a citizen and resident for a certain period of time 'next preceding his election;' but none of these provisions include the office of county surveyor. However, in § 135 of the county government act it is provided that 'the county surveyor must be a licensed land surveyor of the state, and must make any survey that may be required by order of court,' etc.; and upon this provision the contention is based that appellant could not legally hold the office because at the time of his election he was not a licensed land surveyor. It will be observed that in this provision there is no reference to the time of the election of the county surveyor in office, or to his qualifications at that time, as there is in the provision above quoted relating to a district attorney, and as there is to other officers in other provisions of the law. It refers merely to a county surveyor, and means only that one not having the certificate cannot hold the office. There is a great deal of discussion in the briefs about the meaning of the word 'eligible,' but that word is not used at all in the provision in question. . . . The right of the people to select from citizens and qualified electors whomsoever they please to fill an elective office is not to be circumscribed except by legal provisions clearly limiting the right; and there is certainly no such clear limitation in said § 135. It has no express reference, nor any reference at all, to the time of the election of a county surveyor, or to the object of such election; and the intent that a disability so easily removable as the want of a surveyor's certificate shall not invalidate the people's choice of the county surveyor is made very apparent by the fact that with respect to many other offices there are express constitutional and statutory provisions that no person shall be chosen who had not certain qualifications at or 'before his election.' Of course, there may be cases,—as in People ex rel. Marshall v. Leonard, 73 Cal. 230, 14 Pac. 853,—where, in order to carry out clear constitutional or statutory intent, words may be construed in a broader

or more circumscribed sense when this can be done without violating the legitimate meaning of the language used; but there is no controlling consideration of that kind in the case at bar."

The court then refers to the case of State ex rel. Schuet v. Murray, 28 Wis. 96, 9 Am. Rep. 489, and while not approving the decision *in toto,* it does approve the distinction therein made between the capacity to be elected to an office and the capacity to afterwards hold such office, and remarks that the correct principle upon which a case like the one at bar should be decided was there stated, and it expressly approves the following language of the Wisconsin court: "We give force and effect to another fundamental principle of free government, equally as important as that which we have discussed, which is, that the *will of the majority constitutionally expressed must be obeyed.*"

Another recent case is that of Bradfield v. Avery, 16 Idaho, 769, 23 L.R.A.(N.S.) 1228, 102 Pac. 687. That was an election contest involving the office of county superintendent of public instruction. The statute of Idaho prescribing the qualifications of such office reads as follows: "Provided, that no person shall be eligible to the office of county superintendent of public instruction except a first-grade practical teacher of not less than two years' experience in Idaho, one of which must have been while holding a valid first-grade certificate issued by a county superintendent, and the holder of a first-grade certificate at the time of his election or appointment, nor unless twenty-five years of age." The appellant was elected in November, 1908, but did not at such time hold a first-grade certificate, but such certificate was duly issued to him thereafter and prior to his induction into office. The court, in determining whether the statutory qualifications apply to the person at the time of election or at the time he is inducted into the office, said: "The serious question in this case is to determine whether, by the language used in the above section, the legislature intended to prescribe and fix the capability or fitness of a person to be elected to the office of county superintendent, or intended to fix and determine the capability and qualification of such person to hold such office after election. The word 'eligibility,' as used in connection with an office or the person to be elected to fill an office, has been variously defined by the courts and various constructions given to the use of such word, with reference to whether the same applies to the election to office or the

induction into office. The authorities upon both sides of this question are cited in 29 Cyc. 1376, and 10 Am. & Eng. Enc. Law, pp. 970, 971. We are satisfied that the better reason is with the proposition that, where the word 'eligibility' is used in connection with an office, and there are no explanatory words indicating that such word is used with reference to the time of election, it has reference to the qualification to hold the office, rather than the qualification to be elected to the office. Ibid."

The supreme court of Oklahoma in the very recent case of State ex rel. West v. Breckinridge, 34 Okla. 649, 126 Pac. 806, has cited and reviewed many authorities pro and con, from which we quote the following:

"On the second point made by the state on this phase of the case—*i. e.,* that under § 1597, Comp. Laws 1909, the county attorney was not eligible to appointment—we have examined with care the cases relied upon as authority. The two leading cases supporting the contention are by the supreme court of Nebraska, and are State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602, and State ex rel. Broatch v. Moores, 52 Neb. 786, 73 N. W. 304, wherein the word 'eligible' is defined by the Nebraska supreme court; and it was there held that the word meant 'capable of being chosen' as contradistinguished from 'right to qualify' at a time after election. But the provision under discussion was: 'Any person who is in default as collector or custodian of public money or property shall not be eligible to any office of trust or profit,' etc. The Nebraska court relied on its previous decisions, and also on certain early decisions of California (Searcy v. Grow, 15 Cal. 117; People ex rel. Marshall v. Leonard, 73 Cal. 230, 14 Pac. 853; State ex rel. Nourse v. Clarke, 3 Nev. 566), also on Carson v. McPhetridge, 15 Ind. 327; Jeffries v. Rowe, 63 Ind. 592, and a case from Minnesota (Taylor v. Sullivan, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802). In Ward v. Crowell, 142 Cal. 587, 76 Pac. 491, the California supreme court reviews its earlier decisions, distinguishes them, and holds that a person not qualified to hold an office at the time of his election, but who became qualified before entering upon the office, could hold it.

"In the later case of Hoy v. State, 168 Ind. 506, 81 N. E. 509, 11 Ann. Cas. 944, the Indiana supreme court distinguishes and limits

the effect of its earlier decisions, and holds that, although a candidate is disqualified to hold an office at the time of his election to it, yet, if he can and does remove the disqualification before entering into the office, he can hold. See also Smith v. Moore, 90 Ind. 294; Brown v. Goben, 122 Ind. 113, 23 N. E. 519. The earlier Wisconsin decisions were modified in later ones, and in State v. Trumpf, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512, it was held that an alien at the time of election, having been naturalized before the commencement of the term of office to which he had been elected, became eligible to hold it. The Nevada case has been considered and its reasoning criticized by the supreme court of Indiana (Smith v. Moore, supra), and by the supreme court of Kansas in Demaree v. Scates, 50 Kan. 275, 20 L.R.A. 97, 34 Am. St. Rep. 113, 32 Pac. 1123. The opinion of the Kansas court by Chief Justice Horton also disapproves of the reasoning of the Minnesota case (Taylor v. Sullivan, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802). The syllabus to the Demaree Case, supra, is: 'Gen. Stat. 1889, ¶ 1622, provides that "no person holding any state, county, township, or city office, or any employer, officer, or stockholder in any railroad in which the county owns stock, shall be eligible to the office of county commissioner." Gen. Stat. Oct. 31, 1868, chap. 25, § 12. Held, that the word "eligible," as used in the statute, means "legally qualified;" that is, capable of holding office. The term "eligible," as used, does not mean "eligible to be elected to the office of county commissioner at the date of the election, but eligible or legally qualified" to hold the office after the election; that is, at the commencement of the term of office.' In State ex rel. Perine v. Van Beek, 87 Iowa, 569, 19 L.R.A. 622, 43 Am. St. Rep. 397, 54 N. W. 525, the subject is fully discussed, and the court says: 'Any person who can qualify himself to take and hold the office is eligible to it at the time of the election.' So far as we have been able to investigate, it seems the doctrine contended for by the state finds its main support in the cases from Nebraska and the case from Nevada. The cases relied on by the Nebraska court have, in the main, been overruled, modified, or limited in their effect by later decisions of the court rendering them, and the reasoning of the Nevada case has been criticized by Indiana and Kansas. The undoubted weight of authority is that in statutes or constitutional provisions, where the disqualification to hold office is in lan-

guage of similar import to that of the section of our law under consideration, that the word 'eligible' means 'legally qualified to hold office,' and does not mean 'proper to be chosen for office.'

"The following cases are in point: State ex rel. Schuet v. Murray, 28 Wis. 96, 9 Am. Rep. 489; DeTurk v. Com. 129 Pa. 151, 5 L.R.A. 853, 15 Am. St. Rep. 705, 18 Atl. 757; Bradfield v. Avery, 16 Idaho, 769, 23 L.R.A.(N.S.) 1228, 102 Pac. 687; State ex rel. Thornburg v. Huegle, 135 Iowa, 100, 112 N. W. 234; People v. Hamilton, 24 Ill. App. 609; Kirkpatrick v. Brownfield, 97 Ky. 558, 29 L.R.A. 703, 53 Am. St. Rep. 422, 31 S. W. 137; Vogle v. State, 107 Ind. 374, 8 N. E. 164; Privett v. Bickford, 26 Kan. 52, 40 Am. Rep. 301." For other authorities, see valuable note to State ex rel. Reynolds v. Howell, 41 L.R.A.(N.S.) 1119. Also Jones v. Williams, 153 Ky. 822, 156 S. W. 876.

From the above it is apparent that the modern trend of authority amply supports the conclusion arrived at by the learned trial judge.

But it is contended by appellant's counsel that by the decision of this court in Jenness v. Clark, 21 N. D. 150, 129 N. W. 357, Ann. Cas. 1913B, 675, the question here involved was settled adversely to the respondent. A cursory examination of the opinion therein would tend, in a measure, at least, to justify such conclusion; but that case may be readily differentiated from the case at bar upon the facts. There, we were dealing with a case where, by force of a demurrer to the complaint, it was admitted that the defendant was ineligible to hold the office involved, not only at the date of the election, but at the date of his induction into office and at all times since. It is clear, therefore, that the question here presented could not, and did not, arise in that case. The gist of our holding in the Jenness-Clark Case was that in the light of the admitted fact, Clark was at all times ineligible to hold the office, Jenness was entitled thereto until a qualified successor had been chosen and had duly qualified, and that Clark could not qualify because of ineligibility to hold the office.

The judgment of the District Court is in all things affirmed.

SPALDING, Ch. J. I concur in the result.

E. I. DONOVAN v. W. B. DICKSON and Ezra Block.

(148 N. W. 537.)

Pleading — demurrer — insufficiency to state cause of action.

Complaint examined, and *held* not vulnerable to attack by demurrer upon the ground of alleged insufficiency of the allegations to state a cause of action.

Opinion filed July 24, 1914.

Appeal from District Court, Cavalier County, *Cowan*, J.

From an order sustaining a demurrer to the complaint, plaintiff appeals.

Reversed.

Geo. M. Price, Langdon, N. D., for appellant.

Dickson & Devaney, Langdon, N. D., for respondents.

FISK, J. This is an appeal from an order sustaining a demurrer to the complaint upon the sole ground that it fails to state facts sufficient to constitute a cause of action.

The substance of the complaint as set forth by appellant is as follows:

"First, that on the 19th day of February, 1901, the defendant Block was the owner of the land in question.

"Second, that on February 19, 1901, the defendant Block executed and delivered to the plaintiff a warranty deed conveying the premises to the plaintiff; that as a part of the consideration for this deed the plaintiff assumed and agreed to pay a certain real-estate mortgage on the premises theretofore made by Block and wife as mortgagors to the Canadian and American Mortgage & Trust Company, Limited, and which was a first mortgage upon the land; and also to pay off other indebtedness of said Block, all of which indebtednesses were secured by mortgages or other liens upon the land.

"Third, that on the 28th day of March, Block instituted an action against this plaintiff for the rescission and cancelation of the deed;

Note.—The right of a purchaser to compel a return of advance payments upon resale by the vendor, after the purchaser's default, due to the act of the vendor, is considered in a note in 35 L.R.A.(N.S.) 534.

the basis of such action being set forth in Exhibits 'B' and 'C,' being the complaint and the answer in said action; that on May 24, 1902, judgment was entered in this action in favor of Block and against Donovan, rescinding the contract of sale and canceling the deed therefor and restoring the premises to Block; that upon appeal to this court on the 11th day of April, 1904, this court affirmed the judgment appealed from, but adjudged that the payments made by the plaintiff Donovan under the sale contract should 'stand as obligations against Block of the same character as when the deed was executed by Block to Donovan;' that judgment was thereafter entered in district court in accordance with the judgment of the supreme court, the judgment itself being set forth as an exhibit in the complaint.

"Fourth, that after the delivery of the deed from Block to Donovan, and in pursuance of the plaintiff's agreement to pay the mortgage and other indebtedness of Block, plaintiff did in good faith pay certain indebtedness of Block according to his contract, and which are specifically set forth in the complaint.

"Fifth, that all of these payments were made by the plaintiff for the purpose of paying off the indebtedness of Block upon the premises according to the contract between him and Block.

"Sixth, that while in possession of the premises under the deed from Block, plaintiff Donovan constructed a building upon the premises, which was a permanent improvement and necessary to the proper farming of said premises. That no part of the amount paid by Donovan has been repaid to him.

"Seventh, that in July, 1903, Block, by warranty deed, conveyed these premises to his codefendant, W. B. Dickson, without consideration; that Dickson received the conveyance with full knowledge of Donovan's rights in the premises and of the payments made by him. That Dickson went into possession of the premises about July 15, 1905, under the judgment set forth in the pleadings, and has been in possession ever since and claims the right of possession by reason of Block's rescission of the Donovan deed and Block's deed to him; that plaintiff Donovan has fully complied with the terms of the judgment, and that defendants, Block and Dickson, have accepted all of the benefits of the judgment accruing to them.

"Eighth, that the defendant Block, on the 19th day of February,

1901, was, and ever since has been, insolvent, and that in 1903 he left the state and has not resided here since then.

"The prayer is that the court ascertain the amount due upon the various indebtedness, mortgages, and liens paid by Donovan, and that said amounts be declared valid and subsisting liens against the premises; that the value of the improvements made by Donovan upon the premises, and of the taxes paid by him, be adjudged a valid lien against the premises; that all of said liens be adjudged prior to the interest of Block or Dickson in the premises, and that a decree be entered for a sale of the premises to satisfy the amount due upon the lien, and for such other relief as the court may deem just and equitable."

Before considering the merits of the appeal we will briefly notice the practice pursued by counsel in presenting the appeal to this court. We do so not for the purpose of criticizing counsel or intending to reflect in the least upon their skill in the conduct of the litigation. We merely refer to the matter in the interest of proper and orderly procedure. Appellant, for reasons stated, has deemed it advisable, in preparing his abstract, to print not only the complaint, the sufficiency of which is challenged, but also over thirty pages consisting of the original complaint and answer thereto, and two amended complaints previously interposed, demurred to, and held insufficient. Notwithstanding the explanation offered by appellant's counsel for so doing, we can see no good purpose to be subserved by encumbering the abstract with these matters. The last amended complaint supplants all prior complaints, and its sufficiency, when attacked by demurrer, cannot be determined by any matters not appearing on the face of such complaint. In other words, it must stand or fall by the allegations upon its face alone. Extrinsic matters, therefore, have no proper place in the record. This, of course, also applies to the practice pursued by respondent in submitting his additional abstract. The matters contained therein consisting of the pleadings, findings, orders, judgments, and other papers in the prior litigation in the cases of Block v. Donovan and Donovan v. Block, have, as we view it, no proper place in the record on this appeal, and will therefore not be noticed further.

Coming to the merits, our sole inquiry must be whether the facts alleged in the complaint are sufficient upon their face to constitute a cause of action. This question must be resolved in appellant's favor

if the facts thus alleged entitle plaintiff to any relief. Hence, whether he is entitled to all the relief prayed for is not of vital or controlling importance on this appeal. We are agreed that an affirmative answer must be made to this question for reasons which we will state as briefly as possible.

As we view the facts which, for the purpose of the demurrer, are deemed to be true, plaintiff is clearly entitled to the relief prayed for to the extent, at least, of the claims held by the various persons against Block, and which appellant either paid, or purchased pursuant to his agreement with Block with the purpose and intent of satisfying the same as a part consideration for the deed executed and delivered by Block to him. Whether appellant's acts in taking up these claims constituted in law a payment or merely a purchase of assignments thereof is not very material as we view it. To the extent of the moneys he thus disbursed, either as payer or purchaser of these claims, they manifestly were disbursed because of the purchase of the land by appellant from Block and with the ultimate intention of satisfying the same as to Block. They should therefore be treated in the nature of a payment *pro tanto* of the agreed consideration for the deed from Block to appellant. In so far as plaintiff's right to recover for these items is concerned, it is not material what the nature of the action brought by Block against Donovan was, whether to rescind an executed grant of the real property, or, as intimated by respondent, to declare a forfeiture of an executory contract. In either event, appellant's right to assert a claim against the land for reimbursement for such expenditures was expressly recognized by this court in its decision of the case of Block v. Donovan, and his equitable rights were accordingly therein protected in the following language: "Payments made by defendant under the contract will stand as obligations against the plaintiff of the same character as when the contract was made." [13 N. D. 12, 99 N. W. 72.] This language cannot be ignored or treated as mere *obiter;* for it is included in the judgment entered by the district court after the filing of the remittitur from this court, and was also included in the remittitur which is the judgment of this tribunal. It is clear that it was thereby intended to adjudge that this appellant should, to the extent of moneys thus paid out by him, have the right to assert a lien against the land for his reimbursement. This was doing nothing more

than simple justice to appellant. Upon a cancelation of the deed and a rescission of the transfer, Block was restored to his estate, and manifestly he ought, in equity and justice, to be required to reimburse appellant for the moneys expended by him in taking up and satisfying the liens against such land. In the opinion in Donovan v. Block, 17 N. D. 406, 117 N. W. 527, we expressly recognized the former adjudication establishing Donovan's right to such reimbursement. As to these claims we need go no further than such prior adjudication, and we place our decision expressly thereon. According to the allegations of the complaint, the respondent Dickson occupies no better or more advantageous position than Block, his grantor. We have carefully considered the able argument of respondent upon the question of *res judicata* and subrogation; and while the rules contended for are, no doubt, sound as abstract propositions of law, we do not deem them applicable or controlling in the case at bar, for the obvious reason, as above stated, that this court has finally and conclusively settled the rights of the parties in so far as such payments are concerned. That the court had jurisdiction to thus adjudicate such rights can hardly be successfully questioned. The fact that the exact amount of such payments was not determined is not important. The important and vital question there settled was Donovan's right to assert such claims as against the land. In other words, the court, as a condition to granting relief to Block, recognized Donovan's right to reimbursement for these claims, and in legal effect held that such judgment could not be urged to estop Donovan from asserting such claim to reimbursement in proper proceedings which he might thereafter commence and prosecute for such purpose. The judgment in effect expressly reserved, by its terms, the adjudication of these claims as to the amount thereof. This being true, it is well settled that, even though such reservation was erroneously incorporated in the judgment, it is operative to prevent a bar.

Reynolds v. Hennessy, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639; Wanzer v. Self, 30 Ohio St. 378; Gunn v. Peakes, 36 Minn. 177, 1 Am. St. Rep. 661, 30 N. W. 466. See also 24 Am. & Eng. Enc. Law, 2d ed. 777, and cases cited in note 2.

We think the foregoing sufficiently differentiates the case at bar from the cases of Isensee v. Austin, 15 Wash. 352, 46 Pac. 394; Hansbrough v. Peck, 5 Wall. 497, 18 L. ed. 520, and the other cases cited and

relied on by respondent, and fully answers respondent's contention on this phase of the case, leading to a reversal of the order appealed from.

We might stop here, but in view of further proceedings in the court below we deem it proper to briefly announce our views regarding plaintiff's right to recover for the alleged improvements made by him. As to such claim plaintiff is in no way aided by a reservation in the decree in the prior action of Block v. Donovan. We have carefully considered appellant's contention with reference to his claim for improvements. Such contention would, no doubt, have much merit if it had been urged under proper pleadings in the prior action of Block v. Donovan; but we think the judgment in that case is *res judicata* as to his claim for such improvements. The authorities relied on by appellant are cases where the allowance for improvements was made in the action canceling the deed. 6 Cyc. 342 and 343 and cases therein cited. Our Code expressly provides the rules governing rescissions of contracts (§ 5380, Rev. Codes 1905), and by § 6625 it is prescribed that "on adjudging the rescission of a contract the court may require the party to whom such relief is granted to make any compensation to the other which justice may require." But we think it is thereby clearly contemplated that such compensation shall be adjudged in the action in which such rescission is awarded, and not be left to future litigation unless expressly so reserved by the decree.

For the above reasons the order appealed from is reversed and the cause remanded for further proceedings.

Goss, J., did not participate.

THOMAS BRAATEN, Resident, Citizen, and Taxpayer of Burke County, North Dakota, v. C. P. OLSON, the Duly Elected, Qualified, and Acting Treasurer of Burke County, North Dakota, and John Bryan, Jerry Donovan, and Thomas Ely, the Duly Elected, Qualified, and Acting County Commissioners of Burke County, North Dakota.

(148 N. W. 829.)

Segregation of one county from another — commissioners — duty of — indebtedness — bonds — rents — fiscal affairs — expert accountants — employment of.

1. In the case of the segregation of one county from another, and where under § 2336, Rev. Codes 1905, it is the duty of the boards of commissioners of the two counties to meet together and to ascertain as near as may be the total outstanding indebtedness of the original county, less the amount due from rents, the amount of outstanding bonds given or money paid for public property owned by and within the limits of the original county and the amount of public funds on hand and belonging to the original county, and which computations are the basis for a settlement as to the proportion which the newly organized county shall pay of such indebtedness, and under § 2401, Rev. Codes 1905, which gives to county commissioners the superintendence of the fiscal affairs of their several counties, county commissioners have the implied power to employ expert accountants to assist them in such computation and investigation.

Counties — segregation — expert accountants — work of — not subject for competitive bidding — commissioners may employ.

2. Where one county is segregated from another, and the county commissioners employ expert accountants to assist them in making the computations and settlement provided for by § 2336, Rev. Codes 1905, it is not necessary that the contract for such expert assistance shall be the subject of competitive bidding, as the word "labor," which is used in § 2421, Rev. Codes 1905, does not include semi-professional services.

Counties — contract by competitive bidding.

3. In the absence of charter or statutory requirements, municipal contracts need not be made under competitive bidding.

Opinion filed September 5, 1914.

Note.—The general question of right of lowest bidder on public contract is treated in a note in 26 L.R.A. 707.

Appeal from the District Court of Ward County, *Leighton*, J.

Action to enjoin payment of warrant for services of expert accountants. Judgment for Plaintiff.

Reversed.

Geo. A. Bangs and *Geo. R. Robbins*, for appellants.

County commissioners handle and control the business affairs of their county. They are the legislative body as well as financial agents of the county. Martin v. Tyler, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392; Barrett v. Stutsman County, 4 N. D. 175, 59 N. W. 964; State ex rel. Wiles v. Heinrich, 11 N. D. 31, 88 N. W. 734.

In case of county segregation or the formation of new county, it is the duty of the commissioners to adjust the financial affairs as between the old and the new county, and to make an accounting, and for such purpose, they may employ experts for such work. There is no requirement or presumption in law that the commissioners will personally do such work. Harris v. Gibbins, 114 Cal. 418, 46 Pac. 292; Lewis v. Colgan, 115 Cal. 529, 47 Pac. 357; Prothero v. Twin Falls County, 22 Idaho, 598, 127 Pac. 175; Blades v. Hawkins, 133 Mo. App. 328, 112 S. W. 979, affirmed in 240 Mo. 187, 144 S. W. 1198, Ann. Cas. 1913B, 1082; Duncan v. Lawrence County, 101 Ind. 403; Garrigus v. Howard County, 157 Ind. 103, 60 N. E. 948, 164 Ind. 589, 73 N. E. 82, 74 N. E. 249; Perry County v. Gardner, 155 Ind. 165, 57 N. E. 908; Tasker v. Garrett County, 82 Md. 150, 33 Atl. 407; Nixon v. State, 96 Ind. 111; Hoffman v. Lake County, 96 Ind. 84; Tippecanoe County v. Mitchell, 131 Ind. 370, 15 L.R.A. 520, 30 N. E. 409; Boggs v. Caldwell County, 28 Mo. 586.

They have general authority to appoint such employees and servants to do such service. 11 Cyc. 473; Youmans v. Wyandotte County, 68 Kan. 104, 74 Pac. 617; Manley v. Scott, 108 Minn. 142, 29 L.R.A. (N.S.) 652, 121 N. W. 628; Kornburg v. Deer Lodge County, 10 Mont. 325, 25 Pac. 1041; Tasker v. Garrett County, 82 Md. 150, 33 Atl. 407; Webster County v. Taylor, 19 Iowa, 117; Baker v. Washington County, 26 Iowa, 148; Ringgold v. Allen, 42 Iowa, 697.

The work required to be done was of an exceptional nature, requiring skill, knowledge, and professional training. 2 Dill. Mun. Corp. p. 1203; 28 Cyc. 657; 20 Am. & Eng. Enc. Law, 1166; People ex rel. Smith v. Flagg, 17 N. Y. 584; Smith v. New York, 21 How. Pr. 1;

Detwiller v. New York, 46 How. Pr. 218; Harlem Gaslight Co. v. New York, 33 N. Y. 324; Swift v. New York, 83 N. Y. 537; O'Brien v. Niagara Falls, 65 Misc. 92, 119 N. Y. Supp. 497; Newport News v. Potter, 58 C. C. A. 493, 122 Fed. 321; Moorhead v. Murphy, 94 Minn. 123, 68 L.R.A. 400, 110 Am. St. Rep. 345, 102 N. W. 219, 3 Ann. Cas. 434; Houston v. Glover, 40 Tex. Civ. App. 177, 89 S. W. 425; Houston v. Potter, 41 Tex. Civ. App. 381, 91 S. W. 389; Hurley Water Co. v. Vaughn, 115 Wis. 476, 91 N. W. 971; Gleason v. Dalton, 28 App. Div. 555, 51 N. Y. Supp. 337.

Accepting and retaining the benefits of the contract was a ratification thereof, and the county is bound. Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 312; Bissell v. Michigan S. & N. I. R. Cos. 22 N. Y. 258; Green's Brice, Ultra Vires, 33–35; Bell v. Kirkland, 102 Minn. 213, 13 L.R.A.(N.S.) 793, 120 Am. St. Rep. 621, 113 N. W. 271; 29 Am. & Eng. Enc. Law, 2d ed. 42; 39 Cyc. 664; 4 Dill. Mun. Corp. 5th ed. § 1611, p. 2812.

Even if the contract was *ultra vires* and void, still there was complete ratification, and plaintiff is estopped. 20 Am. & Eng. Enc. Law, 1182; Goose River Bank v. Willow Lake School Twp. 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; Capital Bank v. School Dist. 1 N. D. 497, 48 N. W. 363; Gull River Lumber Co. v. School Dist. 1 N. D. 500, 48 N. W. 427; State ex rel. Diebold Safe & Lock Co. v. Getchell, 3 N. D. 243, 55 N. W. 585; Erskine v. Steele County, 4 N. D. 339, 28 L.R.A. 645, 60 N. W. 1050; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Roberts v. Fargo, 10 N. D. 230, 86 N. W. 726; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; Fox v. Walley, 13 N. D. 610, 102 N. W. 161; McKinnon v. Robinson, 24 N. D. 367, 139 N. W. 580.

The general power to act in the premises being shown, a municipal corporation will be estopped to deny its proper exercise. 20 Am. & Eng. Enc. Law, 2d ed. p. 1182; National Tube Works Co. v. Chamberlain, 5 Dak. 54, 37 N. W. 761; McGuire v. Rapid City, 6 Dak. 346, 5 L.R.A. 752, 43 N. W. 706; Des Moines v. Welsbach Street Lighting Co. 110 C. C. A. 540, 188 Fed. 906; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Hitchcock v. Galveston, 96 U. S. 341, 351, 24 L. ed. 659, 662; Peterson v. Ionia, 152 Mich. 678, 116 N. W. 562; Coit v. Grand Rapids, 115 Mich. 493, 73 N. W. 811; Arbuckle-Ryan Co. v. Grand

Ledge, 122 Mich. 491, 81 N. W. 358; Spier v. Kalamazoo, 138 Mich. 652, 101 N. W. 846; Scovel v. Detroit, 159 Mich. 95, 123 N. W. 569; Bell v. Kirkland, 102 Minn. 213, 13 L.R.A.(N.S.) 793, 120 Am. St. Rep. 621, 113 N. W. 271; Moore v. Ramsey County, 104 Minn. 30, 115 N. W. 750; State Bd. of Agri. v. Citizens Street R. Co. 47 Ind. 407, 17 Am. Rep. 703; Valparaiso v. Valparaiso City Water Co. 30 Ind. App. 316, 65 N. E. 1063; East St. Louis v. East St. Louis Gaslight & Coke Co. 98 Ill. 415, 38 Am. Rep. 97; Moore v. New York, 73 N. Y. 238, 29 Am. Rep. 134; New York v. Sonneborn, 113 N. Y. 423, 21 N. E. 121; Buffalo v. Balcom, 134 N. Y. 532, 32 N. E. 7; Grand Island Gas Co. v. West, 28 Neb. 852, 45 N. W. 242; Rogers v. Omaha, 76 Neb. 187, 107 N. W. 214; Miles v. Holt County, 86 Neb. 238, 27 L.R.A.(N.S.) 1130, 125 N. W. 527; Kansas City v. Wyandotte Gas Co. 9 Kan. App. 325, 61 Pac. 317.

Chas. D. Kelso, for respondent.

There is nothing in the law which gives the commissioners power to employ expert accountants, or to spend Burke county's funds for the benefit of Ward county. It was not necessary. Wheeler v. Wayne County, 132 Ill. 599, 25 N. E. 626; State ex rel Stuewe v. Hindson, 44 Mont. 429, 120 Pac. 490; Frederick v. Douglas County, 96 Wis. 411, 71 N. W. 801; McCloud v. Columbus, 54 Ohio St. 439, 44 N. E. 95; McDonald v. New York, 68 N. Y. 23, 23 Am. Rep. 144; McCurdy v. Shiawassee County, 154 Mich. 550, 118 N. W. 625; Goose River Bank v. Willow Lake School Twp. 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; McBrian v. Grand Rapids, 56 Mich. 95, 22 N. W. 206; 10 Cyc. p. 1148, note 71; Erskine v. Steele County, 4 N. D. 339, 28 L.R.A. 645, 60 N. W. 1050.

A county, through its commissioners, cannot contract for something not provided for by law. Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; State ex rel. Coleman v. Dickinson County (State ex rel. Coleman v. Fry), 77 Kan. 540, 16 L.R.A.(N.S.) 476, 95 Pac. 392; Mather v. King County, 39 Wash. 693, 82 Pac. 121; Grannis v. Blue Earth County, 81 Minn. 55, 83 N. W. 495; Stevens v. Henry County, 218 Ill. 468, 4 L.R.A.(N.S.) 339, 75 N. E. 1024, 4 Ann. Cas. 136; Massie v. Harrison County, 129 Iowa, 277, 105 N. W. 507; Vindicator Printing Co. v. State, 68 Ohio St. 362, 67 N. E. 733; Frandzen v. San Diego County, 101 Cal. 317, 35 Pac. 897; State ex rel. Workman v. Gold-

thait, 172 Ind. 210, 87 N. E. 133, 19 Ann. Cas. 737; Holtzclaw v. Hamilton County, 101 Tenn. 338, 47 S. W. 421.

Commissioners cannot submit matter in dispute to arbitration. Myers v. Gibson, 147 Ind. 452, 46 N. E. 914; State ex rel. Scott v. Hart, 144 Ind. 107, 33 L.R.A. 118, 43 N. E. 7.

Advertisement for competitive bids on work to be done. Hobart v. Detroit, 17 Mich. 246, 97 Am. Dec. 185; Re Dugro, 50 N. Y. 513; Kilvington v. Superior, 83 Wis. 222, 18 L.R.A. 45, 53 N. W. 487; Nicolson Pavement Co. v. Painter, 35 Cal. 699.

A contract, where no publication was had for bids, is void. Publication, in such cases, should be the rule. Green v. Okanogan County, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457; Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535; People ex rel. Coughlin v. Gleason, 121 N. Y. 631, 25 N. E. 4; Chippewa Bridge Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603; City Improv. Co. v. Broderick, 125 Cal. 139, 57 Pac. 776; Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628, 45 Pac. 863; State ex rel. Stuewe v. Hindson, 44 Mont. 429, 120 Pac. 485; McCloud v. Columbus, 54 Ohio St. 439, 44 N. E. 95; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Wickwire v. Elkhart, 144 Ind. 305, 43 N. E. 216; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; McDonald v. New York, 68 N. Y. 23, 23 Am. Rep. 144; McCurdy v. Shiawassee County, 154 Mich. 550, 118 N. W. 625; State ex rel. Workman v. Goldthait, 172 Ind. 210, 87 N. E. 133, 19 Ann. Cas. 737; Stevens v. Henry County, 218 Ill. 468, 4 L.R.A.(N.S.) 339, 75 N. E. 1024, 4 Ann. Cas. 136; Myers v. Gibson, 147 Ind. 452, 46 N. E. 914.

One who deals with a public corporation deals at his peril, and is presumed to know the limit of authority of the officers and that all preliminary steps have been taken. State ex rel. Stuewe v. Hindson, 44 Mont. 429, 120 Pac. 490; Frederick v. Douglas County, 96 Wis. 411, 71 N. W. 801; McCloud v. Columbus, 54 Ohio St. 439, 44 N. E. 95; McDonald v. New York, 68 N. Y. 23, 23 Am. Rep. 144; McCurdy v. Shiawassee County, 154 Mich. 550, 118 N. W. 625; McBrian v. Grand Rapids, 56 Mich. 95, 22 N. W. 206; Wickwire v. Elkhart, 144 Ind. 305, 46 N. E. 216, cited supra.

As against the public, the doctrine of equitable estoppel by laches is very rarely applied. Newbery v. Fox, 37 Minn. 141, 5 Am. St. Rep.

830, 33 N. W. 333; Frederick v. Douglas County, 96 Wis. 411, 71 N. W. 798; State ex rel. Stuewe v. Hindson, 44 Mont. 429, 120 Pac. 490; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; McDonald v. New York, 68 N. Y. 23, 23 Am. Rep. 144; 28 Cyc. p. 674, note 22, and p. 675, note 23; Hope v. Alton, 214 Ill. 102, 73 N. E. 406; McCurdy v. Shiawassee County, 154 Mich. 550, 118 N. W. 625; Fox v. Walley, 13 N. D. 610, 102 N. W. 161; Coit v. Grand Rapids, 115 Mich. 493, 73 N. W. 814.

BRUCE, J. Plaintiff sought to enjoin the payment of a warrant for services rendered as an expert accountant. The appeal is from an order sustaining a demurrer to the answer. The facts set up by the complaint and answer, and conceded by the demurrer, are that at the 1908 election Ward county was divided into the counties of Ward, Mountraill, Renville, and Burke; that of the new counties Mountraill was the first to be organized; that it caused to be prepared a report of the records and accounts of Ward county up to and including July 1, 1909; that Burke county was not organized until July, 1910, the delay being caused by litigation; that upon its organization it became necessary for the commissioners of Burke county to ascertain and verify the same facts and figures, and to examine the same records and accounts, as had the county of Mountraill, and to continue such examination and report down to July 1, 1910, for the purpose of the settlement required by § 2336, Rev. Codes 1905, which provides that "any county organized under this article shall assume . . . a just proportion of the indebtedness of the county from which it is segregated, based upon the last assessed valuation . . . and in the proportion that the valuation within the segregated portion bears to the aggregate . . . and it is the duty of the commissioners of both [counties] . . . to meet together at the county seat . . . they shall ascertain as near as may be the total outstanding indebtedness of the original county on the 1st day of January or July, as the case may require, next preceding the date of the joint session provided for in this section, and from such total they shall make the following deductions: (1) The amount of all dues from rents, (2) the amount of outstanding bonds given or money paid for public property owned by and remaining within the limits of the original county, (3) the amount of public funds on hand and be-

longing to the original county on the day for which its outstanding indebtedness is ascertained by the joint board of county commissioners as provided for in this section, and not belonging to the special funds hereinafter mentioned, etc.;" that the Burke county commissioners were not qualified to make the examination or report; that Ralph Abbott was formerly a commissioner of Ward county and had been the first auditor of Burke county, and that Edith Abbott had been employed as one of the clerks of said county and was familiar with the books and records thereof; that the said Ralph Abbott and Edith Abbott were persons skilled in the work required to be done; that it was necessary and essential that said work be promptly done; that the said Abbotts were employed by the board to do the said work; that the sum agreed to be paid was reasonable; that said services were performed in a good and satisfactory manner; that under the contract there was due the sum of $325; that there was no advertisement for bids and that the contract was not let upon competitive bidding; that a properly verified and itemized bill was presented, audited, and allowed for such work, and that the county commissioners of Burke county made use of the report, and that the final adjustment required by § 2336, Rev. Codes 1905, was made and was based thereon.

The points upon which the demurrer was sustained and the force and validity of which are in issue upon this appeal are (1) that the board of county commissioners was itself charged with the sole and personal duty of making the investigations, calculations, and examinations required by § 2336, Rev. Codes 1905, and had no power to delegate the duty, and therefore no power to contract for the services of the special accountants; (2) that even if such service might be contracted for, the contract should have been the subject of competitive bidding, and came within the provisions of § 2421, Rev. Codes 1905; (3) that such contract was unauthorized and void, and was not and could not be held ratified by the mere fact that the settlement between the two counties was based upon the work of the said accountants.

An examination of §§ 166, 167, 171, 172, of the Constitution of North Dakota, and of §§ 2336, 2348, 2377, 2309, 2400, 2401 (as amended by chapter 118 of the Laws of 1911), 2418, 2419, 2420, and 2421, of the Revised Codes of 1905, will, we believe, make it clear to anyone that not only was the superintendence of the fiscal affairs of the new

county of Burke intrusted to the board of county commissioners, but that in the particular case before us the board was intrusted by the statute with the duty of making a settlement of accounts with the original county, and of agreeing upon and determining in conjunction with the board of the parent county, the amount of the indebtedness which the new county should assume and pay. It is conceded by the demurrer that the commissioners were not expert accountants; that many books and documents and accounts needed to be examined; that it was necessary that this work should be promptly done; that the experts employed were skilled and competent; that the amount agreed to be paid was reasonable, and that the services were performed in a skilful and satisfactory manner. It would seem to us to be too plain to need argument that the power to superintend the fiscal affairs of a county and to make a settlement between two counties carries with it the implied power to employ and pay for experts and assistance which is necessary for the carrying out of that work. Nor do we believe that there is the slightest merit in the contention that since, according to the provisions of § 2336, Rev. Codes 1905, the duty of ascertaining "as near as may be the indebtedness of the original county" was a duty devolving upon the boards of both counties, and was to be performed in a joint meeting, if expert accountants could be employed at all, they could only be employed by the joint action of the boards of both counties. We must remember that the interests of the counties in such a settlement and investigation are hostile, and though the settlement must necessarily be jointly made, and requires the consent and action of the two parties, it is absolutely necessary that the agents of each of these parties or counties shall themselves be fully informed. Much less merit, too, is there in the contention that since the statute merely states that the boards shall *"ascertain as near as may be"* the total outstanding indebtedness, etc., accuracy was not required, and the employment of experts was not necessary, and was therefore not anticipated. One might indeed as well contend that, when in a lawsuit all of the evidence is to be found in the books which are in the possession of one of the parties, his opponent is precluded from testing or questioning the accuracy or authenticity of those books, and of scientifically and intelligently informing himself on the very issues which are in controversy, because forsooth there is to be found in the archives of the law

the ancient and much-respected doctrine of *de minimis non curat lex.* The proposition needs only to be stated to meet with its own refutation.

We realize that there is no express statutory authority for the employment of experts in cases such as that before us. The doctrine of implied powers, however, is one which is of quite general application, and can, we believe, be resorted to here. "The county government act," says the supreme court of California in Harris v. Gibbins, 114 Cal. 418, 46 Pac. 292, "requires many things of the supervisors which they could not wholly accomplish personally or do manually with their own hands. It is difficult to conceive how a board of supervisors, in its capacity as a body corporate and politic, could expert books or be an expert accountant, and yet the experting of books seems to be necessary to that supervision of county officers which the law expressly imposes upon such board. Power to accomplish a certain result, which evidently cannot be accomplished by the person or body to whom the power is granted, without the employment of other agencies, includes the implied power to employ such agencies, and in such case when the law does not prescribe the means by which the result is to be accomplished, any reasonable and suitable means may be adopted." See also Prothero v. Twin Falls County, 22 Idaho, 598, 127 Pac. 175; Blades v. Hawkins, 133 Mo. App. 328, 112 S. W. 979, 240 Mo. 187, 144 S. W. 1198, Ann. Cas. 1913B, 1082; Duncan v. Lawrence County, 101 Ind. 403; Perry County v. Gardner, 155 Ind. 165, 57 N. E. 908; Garrigus v. Howard County, 157 Ind. 103, 60 N. E. 948.

Nor was it necessary that the services which were contracted for in the case at bar should have been the subject of competitive bidding. The only statute which is in any way applicable is § 2421, Rev. Codes 1905, which makes a specific provision for competitive bids in the case of contracts for county buildings, but contains the further provision that "the provisions of this section shall apply to all contracts for fuel, stationery, and all other articles for the use of the county or *labor to be performed therefor,* when the amount to be paid for the same during any year exceeds the sum of $100." It is universally held that, in the absence of a constitutional or statutory mandate, competitive bids are not necessary. Price v. Fargo, 24 N. D. 440, 139 N. W. 1054; 28 Cyc. 657.

The word "labor," when used in a similar context to that furnished

by the statute before us, has, we believe, never been held to cover and include expert or semi-professional services such as those furnished by lawyers, doctors, chemists, consulting engineers, and expert accountants. 2 Dill. Mun. Corp. 1203; 28 Cyc. 657; 20 Am. & Eng. Enc. Law, 1166; People ex rel. Smith v. Flagg, 17 N. Y. 584; Newport News v. Potter, 58 C. C. A. 493, 122 Fed. 321; Moorhead v. Murphy, 94 Minn. 123, 68 L.R.A. 400, 110 Am. St. Rep. 345, 102 N. W. 219, 3 Ann. Cas. 434; Dewell v. Hughes County, 8 S. D. 452, 66 N. W. 1079.

There is no suggestion of fraud to be found in the complaint. The demurrer to the answer admits that the services contracted for were necessary, that they were well and faithfully performed, and that they were reasonably worth the amount which was agreed to be paid therefor. This is all that the law requires. Price v. Fargo, supra.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings according to law.

STATE OF NORTH DAKOTA EX REL. J. J. BRAND v. THORWALD MOSTAD, Oliver Saugstad, and William McDermott, as Directors and the Members Constituting the School Board and Board of Directors within and for Bell School District No. 10, Ward County, North Dakota.

(148 N. W. 831.)

Schools — consolidated — transportation of children.

1. Under § 232, art. 15, chap. 266, of the Laws of 1911, transportation must be furnished to children living more than 2½ miles from the district

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Note.—A case somewhat similar to STATE EX REL. BRAND v. MOSTAD is that of Lyle v. State, 172 Ind. 502, 88 N. E. 850, in which it is held that under a statute providing that when a school has been discontinued, it shall be the duty of a township trustee to provide means of transportation for all pupils living a certain distance from the school to which they are transferred, or under a certain age; a township trustee cannot be compelled to cause such children to be taken from and returned to their several homes, but fulfils his duty by causing a proper convey-

school which they are required to attend, no matter whether such school is a consolidated school or not.

Transportation of children — statute liberally construed.

2. Section 232, art. 15, chap. 266, of the Laws of 1911, which provides for furnishing transportation "to and from school" for children living more than 2½ miles from the schoolhouse, should be construed liberally, and not in accordance with the strict letter of the enactment.

School board — reasonable discretion — discrimination.

3. School boards have the right to exercise all reasonable discretion in furnishing the free transportation which is provided for in § 232, art. 15, chap. 266, of the Laws of 1911, and it is not an abuse of such discretion, nor "an unjust or illegal discrimination," nor "a denial of transportation," to require boys of from ten to nineteen years of age to cross the frozen Mouse river, and to walk a distance of from ¼ to ½ of a mile to meet a team which has been sent for the children of two other families who live about a mile further on, when the river is reasonably passable for pedestrians, when all the three families live beyond the 2½ mile limit, and need to be accommodated, and the only other alternatives would be: (1) That the wagon with its load of children should go 2 miles out of its way to a bridge, returning 2 miles to the home of the plaintiff, subjecting its occupants to the cold and discomfort of 4 miles of unnecessary travel; or (2) that the board should hire two teams, one for each side of the river and at a probable expense of from $35 to $40 a month for each; or (3) that the loaded wagon should itself cross the river and run the risk of upsetting.

Opinion filed September 5, 1914.

Petition for mandamus to compel transportation of certain school children under § 232, article 15, chapter 266, of the Laws of 1911, *Leighton*, J.

Judgment for plaintiff.

Reversed.

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ance to be driven over a route so established and maintained as to bring the conveyance within reasonable distance of the dwelling place of each pupil. This case, and the other cases on the question of duty of the public to furnish free transportation to pupils, appear in a note in 37 L.R.A.(N.S.) 1110.

The right to use school money for transportation of pupils is considered in a note in 38 L.R.A.(N.S.) 710, and the later cases on this question are collated in a note in 50 L.R.A.(N.S.) 428.

Statement by BRUCE, J.

This is an action in mandamus to compel the school board of School District No. 10, Ward county, to furnish transportation for the children of petitioner to and from a certain school located in said district. A demurrer was interposed to the complaint or petition, which demurrer was overruled and an answer interposed. An objection was also made upon the trial to the introduction of any evidence under the complaint, which was also overruled. The trial court made findings of fact and conclusions of law, and entered judgment directing the school board to furnish the transportation required. A motion for a new trial was made and denied, and this appeal was taken from the judgment and also from the order denying a new trial.

E. R. Sinkler, for appellants.

It is elementary that the powers and duties of school directors or trustees are derived wholly from the statute, and they cannot exercise any powers other than those expressly conferred. 25 Am. & Eng. Enc. Law, 2d ed. 56.

Greenleaf, Pradford, & Nash, for respondents.

All distances are to be covered by the conveyance used for transportation, and all pupils are to be given equal facilities for school attendance. Laws of 1911, chap. 266, p. 420, § 84.

BRUCE, J. (after stating the facts as above). The first point urged by counsel for appellant is that "the complaint does not allege, and the evidence does not show, that any election was ever called or had to determine the question of conveying pupils at the expense of said district to and from the school already established, and that there is no allegation in the complaint, and no evidence showing, that such school district was or is a consolidated school district, or that an election was ever had to determine the question of consolidating two or more schools." In other words, it is contended that the writ of mandamus will not lie because the school board has no authority to furnish the transportation ordered by the judgment to be furnished.

The sections of the statute involved are § 84, chap. 266, of the Session Laws of 1911, and § 232, art. 15, of chap. 266, of the Session Laws of 1911. Section 84, chap. 266, of the Laws of 1911 provides: "Con-

solidation. Conveying Pupils. The district board may call and if petitioned by one third of the voters in the district, shall call an election to determine the question of 'conveying pupils at the expense of said district to and from schools already established,' or 'of consolidating two or more schools, and of selecting a site and erecting a suitable building, or of making suitable additions to buildings already erected to accommodate the pupils of schools to be vacated.' Said elections shall be conducted, both as to notices and as to manner of canvassing the votes, in the same manner as the annual school election. If a majority of the votes cast at such election are in favor of conveying the pupils at the expense of the district to and from schools already established, or of consolidating two or more schools and of providing a suitable building for the accommodation of the pupils of vacated schools, then the board shall make all necessary arrangements to carry out the decision of the district. The board shall arrange for the transportation of pupils to and from such schools. It shall establish routes of travel, adopt rules and regulations for such transportation and shall contract with responsible parties for such transportation." Section 232, art. 15, chap. 266, Laws of 1911, is as follows: "School age. Who exempt from compulsory attendance. Every parent, guardian or other person who resides in any school district or city and who has control over any child of or between the ages of eight and fifteen shall send every such child to a public school in each year during the entire time the public schools of such district or city are in session. . . . If no school is taught the requisite length of time within two and one half miles of the residence of such child by the nearest route, such attendance shall not be enforced except in cases of consolidated schools where transportation may be arranged by the school board; provided, *that in districts where children live beyond the two and one-half mile limit and school facilities are not otherwise provided, the district board shall provide transportation for such children to and from school.* In districts having consolidated schools where transportation is arranged for by the school board, or in other districts providing transportation, attendance shall be required of pupils residing within five miles of such school or schools; but this provision shall not apply to deaf, blind or feeble-minded children in this state; provided further, that this section shall not be construed to apply to parents, guardians or other persons

having control of any child or children between the ages of eight and fifteen who desire to send such child or children for a total period of not exceeding six months which may be taken in one or more years, to any parochial school, for the purpose of preparing such child or children for certain religious duties."

As we understand § 232 of art. 15, chap. 266, of the Laws of 1911, which relates to compulsory school attendance, and in a large measure stands by itself, free transportation must be furnished to children living more than 2½ miles from the school, and compulsory attendance is required of such persons no matter whether the district is consolidated or not. Such being the case, there was no necessity for proof of an election, as the evidence is clear that the school was the only one to which the children could go. This disposes of the first point of appellant.

When we come to the merits of the case, however, we are not so well satisfied with the decision of the learned trial judge, nor with his finding that the respondents "unjustly and illegally discriminated against the children of said J. J. Brand, called the relator, and wholly failed to furnish transportation for said relator's children." There is, in our opinion, no material conflict in the evidence on the real issues in the case, and the only questions to be determined are whether the language of § 232, chap, 266 of the Laws of 1911, which provides for transportation "to and from school," is to be strictly construed so that in all cases children must be actually conveyed from their house doors to the doors of the schoolhouse, or whether a reasonable discretion in such matters has been left with the school board. Also, whether, if such discretion exists, there was an abuse thereof in the case at bar.

We are firmly of the opinion that the legislative intention was that actual transportation from the door of the home to the door of the schoolhouse should only be furnished as far as the same was reasonably practicable. In other words, that, though the statute is mandatory and cannot be avoided, it should be construed as if passed by reasonable men, and should be interpreted according to its spirit rather than according to its letter.

We must, indeed, in the construction of such statutes, exercise the common sense of the ordinary man, and be willing to concede that possession and the presumption of its exercise in others. The purpose of the act is plain, and that is the promotion of the cause of education and

the making it possible for children to comply with the compulsory educational laws without being subjected unnecessarily to the storms of winter. We can never believe that the good results of education were intended to be minimized by breeding a selfish, exacting, and effeminate race of boys. It is certainly within the province of the board to take into consideration the sex and age of the children to be carried. It must have been the intention of the legislature that some reasonable discretion should be exercised in the matter, and that, though conveyance from the house to the schoolhouse should be furnished as nearly as is reasonably possible, the letter of the statute should not be made the pretext for absurd and unreasonable exactions. The evidence in the case at bar shows that the board had the choice of the following methods: (1) To drive directly to their door, and to convey the children of petitioner directly to the schoolhouse, and at the expense of conveying the other children 4 miles out of their way, and exposing them to the risks and exposures of this unnecessary ride; (2) to hire an extra team and drive at the probable cost of $35 or $40 a month for the accommodation of the children of the petitioner alone; (3) to cross the river with the team at the risk of accident or of upsetting on account of the irregular banks, and the risk of breaking through the ice with the loaded wagon; (4) to do what was done in the case at bar, which was to stop the wagon within a short distance of the banks of the river, and to require the children of the plaintiff, who were boys between the ages of ten and nineteen years, to cross the frozen river and to meet the team. We must presume that the legislature intended that the board should exercise a sound discretion in such exigencies, and that the statute was passed under the presumption that the people for whom our various educational institutions are and have been maintained and endowed by both the state and the national government are worthy of the privileges conferred upon them, and possess that spirit of neighborly helpfulness and accommodation without which there can be no social progress and no true civilization.

We cannot hold that the board abused its discretion in the premises, nor hold with the learned trial judge that the children of the petitioner are "unjustly and illegally discriminated against," or that "transportation is wholly denied to them." We must remember that petitioner's children are not delicate girls, but boys of between ten and nineteen

years of age. The plaintiff lives some 3 miles from the Logan school district and on the west side of the Mouse river. On the same side of the river, but only a mile or so from the school, and therefore not entitled, as a strict statutory right, to the transportation provided in the section of the statute under consideration, is another man by the name of Stredvick. On the east side of the river, and about a mile further from the plaintiff himself, live two families of the names of Francis and Pennewell respectively. These families are both outside of the 2½ mile limit, and are entitled to the transportation provided. In order to accommodate these two families and at the same time to accommodate that of the plaintiff and respondent, and if only one team is used, it will be necessary for the team to go some 4 miles out of its way after picking up the children of Francis and Pennewell, unless it can cross the river at a point east of the home of the plaintiff, or unless the children of the plaintiff themselves cross the river and meet the team at such a point, the place of meeting being from ¼ to ⅓ of a mile from the home of the plaintiff, and the testimony showing, as we understand it, that the river is safe and reasonably passable for pedestrians in the winter months, and it is only in the winter months that the transportation under consideration is provided for. If neither of these methods can be adopted or routes traveled, it will be necessary to send two teams, one on each side of the river, that is to say, one on the east side for the accommodation of the children of the families of Francis and Pennewell, and one, at the expense of some $35 or $40 a month, on the west side for the accommodation of the family of the plaintiff Brand alone, or to cross the river with the team, which, on account of the steep and irregular banks and the risk of breaking through the ice, might be a dangerous undertaking. When we take into consideration the fact that the children of the plaintiff are boys, as well as all the other facts of the case, we are not prepared to say, and we believe that the trial court was not justified in saying, that the board abused its sound discretion in the premises or in any way violated the spirit of the statute.

The judgment of the District Court is reversed, and the case is remanded with directions to enter judgment dismissing the complaint.

EDWARD S. MOTT v. WALLACE M. HOLBROOK.

(148 N. W. 1061.)

An attachment was regularly issued in Ramsey county and levied on real estate in Pierce county in an action of Holbrook v. Dahl, who as defendant, after such levy, confessed judgment by a written instrument entitled as was the pending attachment action, but making no reference thereto. Return on attachment was made by the sheriff of Pierce county within the statutory period therefor, but after judgment had been entered on an order based on the confession of judgment. After levy, but before sheriff's return on attachment and before transcription of Ramsey county judgment to Pierce county, Dahl deeded the land to Rother, who filed his deed for record. Mott by mesne conveyances from Rother became owner of the land, and brought this action in Pierce county to quiet his title as against Holbrook's lien by attachment and judgment transcripted, claiming the judgment was taken as one entered upon confession without action *ipso facto* working an abandonment by Holbrook of his pending action and lien of attachment procured therein, and further that as a confession of judgment in such alleged independent summary proceeding the purported written confession was insufficient and void. Trial court sustained Mott's contentions, and Holbrook appeals. *Held:*—

Record of judgment — confession — presumptions.

1. The presumptions from the record are that the judgment was entered as one taken by confession in the pending attachment action.

Record ambiguous — testimony — facts — judicial notice.

2. If the record is ambiguous on the issue of fact, testimony and matters of which the court may take judicial notice may be considered, from which it also must appear that the judgment was taken as in that pending action.

Lien by attachment — judgment in county other than where attached land situated — does not discharge lien — transcription.

3. The lien by attachment remained extant independent of the judgment entered in a county other than where the land was situated, said lien not merging until filing of sheriff's return in Ramsey county and transcription of judgment to Pierce county; and the entry of judgment in Ramsey county before filing of the sheriff's return did not discharge the lien in Pierce county.

Reference to attachment lien — judgment need not make — need not direct sale — duty of attaching officer.

4. It was not necessary that the judgment as entered refer to the attachment lien nor direct a sale of the property attached in satisfaction thereof as the law imposes that duty upon the attaching officer.

Lien by attachment — prior to recorded transfer of land attached — attaching creditor prima facie in position of "purchaser in good faith, etc." — rights of.

5. Under § 5038, Rev. Codes 1905, the lien acquired by attachment in advance of the recorded transfer of the attached real estate places the attaching creditor prima facie in the position of a "purchaser in good faith and for a valuable consideration" of the property attached, with rights as purchaser accruing on levy made under § 6948, Rev. Codes 1905.

Debtor's interest in land — records — shown by — subject to lien of attachment — not actual interest — rule — statute.

6. It is not the debtor's actual interest in the real estate that is thus liened by attachment, but instead it is his interest as shown by the records of the register of deed's office affecting the real property attached, our statute, § 5038, changing the rule otherwise applicable.

Lien not waived by lapse of time — continually attacked by action.

7. The attachment lien held valid and not waived by lapse of time, it having been continually under attack by action since six weeks after it was obtained.

Opinion filed September 8, 1914.

Appeal from the District Court of Pierce county, *Burr*, J.

Reversed.

Frederic T. Cuthbert, Henry G. Middaugh, Rollo F. Hunt, Arthur R. Smythe, for appellant.

The auditor's tax deed was void upon its face. Tax sale deed must show upon its face that sale was made to person offering to accept lowest rate of interest. Youker v. Hobart, 17 N. D. 296, 115 N. W. 839.

The attachment lien of Holbrook, filed and recorded against the land, took precedence of the deed filed and recorded subsequently. Civil Code 1905, chap. 39; Rev. Codes 1905, § 5038.

Holbrook's attachment was valid, and nothing was done by him to injure or prejudice the rights of other or subsequent creditors. Wade, Attachm. & Garnishment, § 220; Drake, Attachm. 250.

An attachment is valid though there was no service on defendant, provided he appears voluntarily. Pomeroy v. Ricketts, 27 Hun, 242; Catlin v. Ricketts, 91 N. Y. 668; Shinn, Attachm. §§ 216, 217; Rev. Codes 1905, § 6850.

"The law does not require idle acts." Rev. Codes, 1905, § 6679.

"An interpretation which gives effect is preferred to one which makes void." Rev. Codes 1905, § 6688.

"The law respects form less than substance." Rev. Codes 1905, § 6675.

A confession of judgment is a voluntary submission to the jurisdiction of the court. 8 Cyc. 563; 4 Enc. Pl. & Pr. 560; Hall v. Jones, 32 Ill. 38.

The Holbrook judgment being valid in all respects, it cannot be attacked collaterally. Cordier v. Schloss, 12 Cal. 143; Richards v. McMillan, 6 Cal. 419, 65 Am. Dec. 521; Atwater v. Manchester Sav. Bank, 45 Minn. 341, 12 L.R.A. 741, 48 N. W. 187; McDowell v. Daniels, 38 Barb. 143; Harrison v. Gibbons, 71 N. Y. 59; Kern v. Chalfant, 7 Minn. 487, Gil. 393; Cleveland Co-Op. Stove Co. v. Douglas, 27 Minn. 177, 6 N. W. 628; Lee v. Figg, 37 Cal. 328, 99 Am. Dec. 271.

Kehoe & Moseley, for respondent.

The element of champerty does not exist in this case. Rev. Codes 1905, § 8733; State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357.

A junior attaching creditor may show that the first attaching creditor has lost his lien by attachment for failure to follow it up as by law provided. Gilbert v. Gilbert, 33 Mo. App. 259; 4 Cyc. 647; 11 Enc. Pl. & Pr. 1052; Kendall v. Hodgins, 1 Bosw. 659; Daly v. Matthews, 12 Abb. Pr. 403, note; Rev. Codes 1905, § 5325; Hackney v. Wollaston, 73 Minn. 114, 75 N. W. 1037.

There must first be an action properly pending, and summons must have been personally served, or issued before attachment is allowed. Gans v. Beasley, 4 N. D. 140, 59 N. W. 717.

The court's jurisdiction at such point is conditional. Personal service of the summons, or publication thereof, must be commenced within sixty days after the writ issues, or jurisdiction is lost. Rhode Island Hospital Trust Co. v. Keeney, 1 N. D. 411, 48 N. W. 341; Rev. Codes 1905, § 6940.

The attachment lien by appellant was a temporary lien which expired by reason of his failure to prosecute the attachment action to judgment. Rev. Codes 1905, § 6999; Van Loan v. Kline, 10 Johns.

129; Gilbert v. Gilbert, 33 Mo. App. 259; Murray v. Eldridge, 2 Vt. 388; Hall v. Walbridge, 2 Aik. (Vt.) 215.

The so-called judgment roll in the former action clearly discloses the fact that appellant did not intend at the time he obtained such judgment, to take judgment in the attachment action. His intent, however, would not control in any event. And parol evidence in the present case is wholly incompetent to establish same, or to contradict the record. Lafferty v. Lafferty, 139 Mich. 176, 102 N. W. 626; Gutterman v. Schroeder, 40 Kan. 507, 20 Pac. 230; Weigley v. Matson, 125 Ill. 64, 8 Am. St. Rep. 335, 16 N. E. 881; Roche v. Beldam, 119 Ill. 320, 10 N. E. 191; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Carter v. Frahm, 31 S. D. 379, 141 N. W. 370; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959.

The judgment must be deemed a mere judgment by confession in a separate action from the attachment action. Rev. Codes 1905, §§ 7843, 7844; Pond v. Davenport, 44 Cal. 481.

If the judgment is not one in the attachment action, it must be one by confession. If it is such a judgment, then the attachment lien is lost, because it was not entered in Pierce county until after the recording to the Rother deed. Rev. Codes 1905, §§ 7843, 7844; Gilbert v. Gilbert, 33 Mo. App. 259; McHenry v. Shephard, 2 Mo. App. 378; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107.

The respondent, being in the position of a prior purchaser, is at least on a par with a subsequent attaching creditor, and his rights must be respected, and not destroyed or impaired. Davidson v. Alexander, 84 N. C. 621; Bernard v. Douglas, 10 Iowa, 370; Woods v. Bryan, 41 S. C. 74, 44 Am. St. Rep. 688, 19 S. E. 218; McHenry v. Shephard, 2 Mo. App. 378; Edgar v. Greer, 7 Iowa, 136; Bacon v. Raybould, 4 Utah, 357, 10 Pac. 481, 11 Pac. 510; Wells v. Gieseke, 27 Minn. 478, 8 N. W. 380; Auerback v. Gieseke, 40 Minn. 258, 41 N. W. 946; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107; Chappel v. Chappel, 12 N. Y. 215, 64 Am. Dec. 496; Dunham v. Waterman, 17 N. Y. 9, 72 Am. Dec. 406; Richardson v. Fuller, 2 Or. 179; Utah Nat. Bank v. Sears, 13 Utah, 172, 44 Pac. 832; Puget Sound Nat. Bank v. Levy, 10 Wash. 499, 45 Am. St. Rep. 803, 39 Pac. 142; Wood v. Mitchell, 117 N. Y. 439, 22 N. E. 1125; Gilbert v. Gilbert, 33 Mo. App. 259; Nichols v. Kribs, 10 Wis. 76, 76 Am. Dec. 294; Kennedy v. Howe, 9 Iowa, 580.

In confession of judgment, the statement required must be more specific than a complaint. It must specify as in a bill of particulars. Lawless v. Hackett, 16 Johns. 149; Dunham v. Waterman, 17 N. Y. 9, 72 Am. Dec. 406; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107; Bernard v. Douglas, 10 Iowa, 370; Nichols v. Kribs, 10 Wis. 76, 76 Am. Dec. 294; Wood v. Mitchell, 117 N. Y. 439, 22 N. E. 1125; Bacon v. Raybould, 4 Utah, 357, 10 Pac. 481, 11 Pac. 510.

The rule is that a statement in confession of judgment, which does not attempt to state or show any of the facts out of which the debt arose, is void as to third parties. Puget Sound Nat. Bank v. Levy, 10 Wash. 499, 45 Am. St. Rep. 803, 39 Pac. 142; Chappel v. Chappel, 12 N. Y. 215, 64 Am. Dec. 496; Freligh v. Brink, 22 N. Y. 418; Dunham v. Waterman, 17 N. Y. 9, 72 Am. Dec. 406; Richardson v. Fuller, 2 Or. 179; Bernard v. Douglas, 10 Iowa, 370; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107; Nichols v. Kribs, 10 Wis. 76, 76 Am. Dec. 294; Wells v. Gieseke, 27 Minn. 478, 8 N. W. 380; Davidson v. Alexander, 84 N. C. 621; Richards v. McMillan, 6 Cal. 422, 65 Am. Dec. 521; Cordier v. Schloss, 12 Cal. 147; Auerbach v. Gieseke, 40 Minn. 258, 41 N. W. 946.

Respondent is in position which entitles him to assail the judgment in the former action by the claim that it is not a judgment in the attachment action, but one by confession.

No presumption will be indulged to contradict the recitals in a recorded judgment. The statement of confession of judgment is a part of the judgment roll and record. 23 Cyc. 1089; 17 Am. & Eng. Enc. Law, 1077; 1 Black, Judgm. § 277; Cizek v. Cizek, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Barber v. Morris, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110; Carter v. Frahm, 31 S. D. 379, 141 N. W. 370; Rev. Codes 1905, § 7844; Rasmussen v. Hagler, 15 N. D. 542, 108 N. W. 541.

Goss, J. The complaint is in the statutory form of an action to determine adverse claims. The answer sets up a lien by attachment. On the proof it appears that one Alice J. Dahl, in 1903, owned a quarter section in Pierce county. She resided at Devils Lake. Her husband was employed in the store of defendant Holbrook. On December 11,

1903, she executed and delivered to him her promissory note for $725.75, bearing interest and due six days after date, or December 17, 1903. The note covered an indebtedness for merchandise previously purchased from defendant. On December 21, 1903, the note being past due, this defendant began an action as plaintiff against Alice J. Dahl as defendant by the issuance of a summons, filing of a verified complaint on promissory note, and procured a warrant of attachment out of the district court of Ramsey county, directed to the sheriff of Pierce county as attaching officer, and regularly issued upon an undertaking and affidavit for attachment, which warrant was served the following day, December 22d, by the sheriff of Pierce county, by the recording in the office of the register of deeds of said county a notice of levy upon and describing the land in that county owned by Alice J. Dahl; and in due season, within the twenty-day period allowed, the sheriff of Pierce county made due return thereon to, and filed the same in the office of, the clerk of the district court of Ramsey county. The date of the attachment levy and lien was December 22, 1903. Three days later a deed to the Pierce county land was filed with the register of deeds of that county, conveying the same to F. C. Rother, which deed purports to be dated and acknowledged December 10, 1903, or twelve days before the attachment levy was made. Before the service of summons in the action of Holbrook v. Dahl, in which the attachment had been had and December 23d, the next day after the attachment levy, Alice J. Dahl signed an instrument entitled as was the summons and complaint, and formally confessing judgment in favor of the plaintiff Holbrook for the amount of the note particularly described, and stating that the same was wholly unpaid, verifying personally such confession of judgment. Upon the day following, an order for judgment duly entitled in the action was issued and filed, together with the usual statement of costs and disbursements in such action, which made no mention of sheriff or attachment fees, and upon which judgment was entered by the clerk December 24, 1903. The testimony of the attorney of record for Holbrook in the attachment action, received over objection of incompetency, as well as testimony of Holbrook himself similarly received, is that the confession of judgment bearing the same title identically as the attachment action was taken in that pending action to expedite judgment therein and save costs to defendant Dahl, and "that they were in one and

the same proceeding and the same court." Plaintiff's attorney testified: "The suit was commenced, the attachment started and sent out to this county for seizure and levy on the land, and Mrs. Dahl offered to confess judgment to save further costs in the matter, and my present recollection is I didn't know the amount of the sheriff fees at that time," hence did not tax any or else overlooked the matter, taxing but $8 statutory costs. With the levy thus perfected and the claim in judgment, the matter rested for six weeks until February 8, 1904, when Rother began his action against Holbrook to determine adverse claims, and particularly assailing the lien by attachment, to which a demurrer was interposed within the thirty-day period for answer, and on April 28, 1904, was argued and submitted for determination, but which was not ruled upon, however, for three years, or until August 19, 1907, when an order was entered and served sustaining the demurrer, after which an amended complaint was served upon which answer was joined. Two years later, or on April 21, 1909, on motion of the plaintiff, that action of Rother against Holbrook was dismissed without prejudice. Meanwhile by deed of May 1, 1908, Rother had conveyed the tract to one Lookingbill, who in the same month by deed conveyed the land to Mott, this plaintiff. Lookingbill in the meantime had procured a purported tax deed to the tract, void under both statute and the decisions of this court in Youker v. Hobart, 17 N. D. 296, 115 N. W. 839, and State ex rel. Ebbert v. Fouts, 26 N. D. 599, 50 L.R.A. (N.S.) 316, 145 N. W. 97. Mott, grantee of Dahl, then began this action, as plaintiff and principal party in interest, to quiet title to the land in himself as against the attachment lien unenforced and awaiting the outcome of the litigation in the previous action assailing it. This action was begun in and went to judgment in the district court of Pierce county, wherein the land is situated, and in which county the attachment lien had been obtained by levy, and wherein on December 29, 1903, after said levy and the entry of judgment in the action in Ramsey county, a transcript of that judgment had been docketed in Pierce county.

The court made its findings: "That said judgment is not a judgment rendered in said attachment action (that of Holbrook v. Dahl); . . . that said judgment is a judgment rendered in a proceeding separate and independent of said attachment action, and that the said

Wallace M. Holbrook, by his acceptance of such judgment in a proceeding separate and independent of said attachment action, as well as by his failure and neglect to prosecute said attachment action to judgment, has lost and waived and suffered to become dissolved his said attachment lien upon said premises as against the title of the plaintiff Mott, and that because the said judgment was obtained as aforesaid in a proceeding separate and independent of said attachment action, said attachment lien never became merged in said judgment as against the title of the plaintiff Mott. That said judgment is not a lien upon said premises. That the said judgment is void as against the title of the plaintiff Mott, because said judgment is a judgment upon confession, and the verified statement upon which the same is based does not state concisely nor at all the facts out of which said indebtedness arose." Judgment was entered in favor of Mott and against Holbrook, quieting Mott's title to the land as against any lien by attachment or judgment acquired by Holbrook in the action against Dahl. Defendant appeals.

The merit of the appeal and the regularity of the judgment is determined by whether the judgment in Holbrook's favor against Dahl was entered in the pending action, in which attachment was had and summons had been issued and complaint filed, or was an independent summary confession of judgment taken under §§ 7842, Rev. Codes 1905, et seq. Concededly, if the judgment be considered as one entered as a summary confession of judgment *without action,* notwithstanding the pending action, the action then pending must be taken as having been abandoned, working *ipso facto* a dissolution of any attachment lien obtained. Such is the only theory upon which the plaintiff can recover in this case, and upon which the judgment of the district court can be sustained. It is true that both the order for judgment and the judgment make no particular reference to the pending action, but instead recite "on reading the attached verified statement authorizing judgment . . . it is ordered," and "the above-named defendant having . . . made her confession of judgment and statement in writing verified by her oath, and the court by order having ordered judgment in favor of the plaintiff and against defendant, and on filing of said confession of judgment and said order of court . . . it is adjudged," that plaintiff "do have and recover," etc. The contention of appellant is that the order and judgment entitled in the pending ac-

tion did not need to recite the issuance of the summons and complaint, and that the confession of judgment was understood and taken to be the authorization of the entry of judgment in the pending action, and such being the fact, it must be found that judgment was taken in the pending action; that the record considered alone is ambiguous, and, if so, evidence outside the record was admissible to show the fact of whether the judgment was entered with or without action. But plaintiff asserts that Holbrook is bound by the record made in the action against Dahl, and that the presumption to be drawn from the order for judgment and judgment entered is that the same was taken as a confession without action, and that the action in which the attachment had been levied was abandoned, dissolving the lien on the attachment, and that no evidence *aliunde* the record on the intent of the plaintiff in taking the judgment he did is admissible. The sufficiency of the confession of judgment to authorize the taking of judgment without action is also raised, and on that ground the judgment as entered is contended to be void, and as such subject to collateral attack at the action of this plaintiff.

The proceedings in the action of Holbrook against Dahl, including the levy of the attachment and the sheriff's return thereon, are valid, and were taken in strict conformity to the statute. Thereby plaintiff obtained a quasi jurisdiction *in rem* against the property to be perfected by subsequent substituted or personal service upon the defendant Dahl. No question of good faith or necessity for the attachment is involved, the very transfer of property establishing the grounds upon which the attachment was issued; and the fact is unchallenged that the ancillary proceeding of attachment was necessary in fact to preserve Holbrook's rights of property. The record also discloses that the claim was but shortly past due, and that Holbrook was on the alert to protect his rights, a fact that would of itself negative any disputable presumption of fact, that he would willingly and knowingly abandon any rights procured by his pending attachment proceedings. If there is any presumption to be indulged in from the record it must be in favor of the regularity of proceedings, and the burden is upon him who would vitiate a prima facie valid judgment, regularly obtained, to establish the grounds of invalidity alleged, jurisdiction of person and subject-matter appearing from the record. The plaintiff Mott claims this

affirmatively appears from the failure of the order for judgment and judgment as entered on confession, to mention or identify any other papers than the confession of judgment, and that the judgment roll is limited to the confession order and judgment thereon. The question is one of fact as to what is the record upon which judgment was entered. This is self-evident from the necessity that a finding of fact must be made thereon decisive of the case. To determine this from a bare inspection of the files entitled in the action is impossible, unless it be resolved in Holbrook's favor. When the confession entitled the same as the other files in a pending action was two days later filed with the clerk, it was the equivalent of an appearance and authorization of judgment in that action by the party defendant therein, and upon which statement alone judgment could be ordered and entered as was done, and still constitute but a step taken in a pending action, instead of a basis for a judgment entered without action. It would be at least equally as arbitrary, therefore, to say that the judgment was one entered without action and upon a judgment roll, consisting of confession order and judgment only (§ 7844, Rev. Codes 1905), as, on the contrary, to assume from the record the judgment to be one entered in the pending action. It is certainly permissible under these circumstances to resort to those matters of common knowledge, known to all practitioners of law, as are apparent in this case from the record and as bear upon the issue of fact. The action had been begun, and complaint, affidavit, and undertaking, upon which the warrant of attachment had issued, had been filed two days prior to the date of confession. Plaintiff, having seen fit to use the remedy of attachment, and having the statutory period after the levy in which to serve the same, would naturally make the service of the warrant and make secure his levy upon the property in advance of a service of summons upon the defendant. Should he serve the defendant first, or give notoriety in advance of the levy or the issuance of the warrant, it would jeopardize the interests of his client by affording a dishonest debtor opportunity to at once dispose of her property, and defeat the collection of the debt, and render useless the attachment proceeding. The attorney for Holbrook, in levying under the warrant in advance of the service of the summons upon Dahl, was but fulfilling his duty to his client and following the usual procedure. To do this it was necessary that he send the papers to the

levying officer, the sheriff of a distant county, wherein the land was situated. And no return having been made by the sheriff on the levy until two weeks later, a natural presumption is that the papers were still with the sheriff of Pierce county on December 23d, when the defendant executed the confession of judgment. It does not appear from the papers filed who prepared that confession, but from the fact that it was verified before the attorney of record for Holbrook in the pending action and that such attorney filed the same, it is but a fair inference that he procured it from the defendant in the pending action to expedite judgment therein, as was permissible and legitimate, inasmuch as there would have been no question involved of priority, that having been determined as of the date of the attachment previously made, and as no conflicting claims to this land had yet appeared, the deed not having been filed for record until three days after the confession of judgment had been taken. But we are not limited to the presumption to be drawn from the record. If it be granted that the record is ambiguous, as it certainly must be so taken as to this question of fact unless the presumption be taken in favor of Holbrook on the record, there is no good reason why extrinsic testimony should not be received touching the same, and thus testimony of the plaintiff and his attorney as to how, and the circumstances under which, this confession was taken, remove all doubt in the matter, and establish the fact that they were taken and filed in the pending action, in which they were entitled, to hasten judgment and to save costs to Dahl as well. This is further strengthened by the probabilities arising from the nature of the claim sued on, it being a note on six days' time and given less than two weeks before the confession was executed, so that the confession itself is scarcely more of a recognition of the indebtedness than the note itself, amounting to but little more than the admission that it had not been paid, so that in giving this confession Dahl gave little that Holbrook did not then possess in the light of the fact, which presumably both parties to that action knew, that a lien had been secured by attachment. It is significant that no testimony by Dahl was offered to contradict any natural presumptions applying, or that she did not know of the pendency of the action at the time she gave the confession of judgment, although the testimony of Holbrook on this very subject had been taken on notice six months before for use at the trial at which it was offered, and the testi-

mony offered by Holbrook and his attorney, as recited heretofore in this opinion, is unequivocal and to the effect that "Mrs. Dahl offered to confess judgment to save further costs in the matter." The matter was the pending action. Her offer was accepted, the confession obtained as an appearance and waiver of defense and confession of judgment in the pending action. Holbrook, having agreed to save further costs to Dahl as a consideration for the confession of judgment, observed the stipulation to the letter, and entered but $8 costs, waiving other costs, including that of the attachment which both the record and the testimony show had not yet been returned. Holbrook immediately transcripts the judgment to Pierce county, as would be the usual practice on an execution sale, under § 7102, Rev. Codes 1905, providing that "when the execution is against the property of a judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties. Real property adjudged to be sold must be sold in the county where it lies by the sheriff of such county or by a referee." As the property was held under the lien of attachment, that lien was to be enforced by execution sale. Section 7106. It was not necessary that the judgment refer to the attachment, nor specifically "direct a sale of the property in satisfaction thereof, as the law explicitly imposes that duty upon the attaching officer." Iowa State Sav. Bank v. Jacobson, 8 S. D. 292, 66 N. W. 453, a decision on statutes identical with ours. "The inchoate lien created by the levy of the attachment for the satisfaction of the particular debt becomes perfected when the debt is merged into a judgment for the plaintiff. When a judgment is obtained *which is a lien upon the attached property* the attachment lien becomes merged into the judgment lien, and the latter relates back to the levy of the attachment, and is superior to all liens created or transfers made subsequent to the levy. And when a sale is made upon an execution issued upon the plaintiff's judgment in the attachment suit, such title as the defendant had at the time of the levy passes to the purchaser unaffected by any conveyance or encumbrance made subsequent to the levy. After the judgment is obtained, it is the judgment lien, and not the attachment lien, which must be enforced; for the latter has

become merged into the former, and has no further existence except to preserve the priority by it acquired, which must be enforced under the judgment by virtue of an execution issued thereon." Shinn, Attachm. § 323. Attention may be called to the fact that the return on the attachment was not filed until January 7th, or two weeks after the entry of judgment. This is not important, the levy being unquestionably made before the entry of judgment, the lien itself having been regularly perfected as of the date of the filing of the notice of the lien against the land in the register of deed's office. Every step of the attachment law was fulfilled to the letter, including the provision of § 6947, that "the sheriff shall within twenty days after making such seizure file such inventory and a return of his doings upon such attachment with the clerk of the district court who issued the warrant." The entry of judgment did not merge the lien previously obtained by attachment in the judgment, but the lien remained extant, notice of which was given by the notice of levy, of record in the register of deed's office of Pierce county, and record proof of which was made by the return on the writ filed January 7th. The attachment lien must live irrespective of the judgment, because the judgment entered in Ramsey county could not, even after a return of levy of the attachment filed in that county, of itself amount to a judgment lien when the land is located in a distant county from that in which the judgment is entered. Hence the necessity of transcripting the judgment to Pierce county to enable the lien there held by attachment to merge in the judgment as there transcripted. This is the importance of the italicized portion from the above quotation from Shinn on Attachments § 323, that it is only "when a judgment is obtained *which is a lien upon the attached property,*" that "the attachment lien becomes merged into the judgment lien." On these propositions, see the new and valuable work, Ruling Case Law, vol. 2, p. 842, from which we quote: "Where there is no peculiar statute to the contrary, the failure of the officer to make return on or before the return day will not affect the lien of the plaintiff under the attachment;" citing Hogue v. Corbit, 156 Ill. 540, 47 Am. St. Rep. 232, 41 N. W. 219; Riordan v. Britton, 69 Tex. 198, 5 Am. St. Rep. 37, 7 S. W. 50. And again from the same work, page 856: "The rule is where there is no peculiar statute to the contrary, that the failure of an officer to make a return on or before the return day will not affect the lien of

an attachment that was duly levied, and the validity or continuation of an attachment lien is not dependent upon the entry of the judgment in the judgment lien docket;" citing Katz v. Obenchain, 48 Or. 352, 120 Am. St. Rep. 821, 85 Pac. 617; Hogue v. Corbit, supra; Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775 and note. See also § 6948, Rev. Codes 1905, expressly providing that the "lien of the attachment shall be effectual from the time when a levy is made."

From the date of the levy by force of our recording statute, § 5038, as against this perfected lien by attachment, the subsequently recorded deed by Rother is void. As to such deed Holbrook, holding the lien by attachment, is regarded as a prior "purchaser in good faith and for a valuable consideration." Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 523, 123 N. W. 390, and a same entitled case in 21 N. D. 25, 129 N. W. 1024. Under the statute and the holdings of this court, this attaching creditor is a purchaser in good faith as of the date of the attachment. Hence the equities are with, not against, such attaching creditor under the express terms of the statute. It might be otherwise in the absence of the statute, "An attachment lien on land is subject to every equity which exists against the debtor at the time of the levy, and courts of equity will so limit it. However, where a statute declares a previous transfer of title void as to creditors of the transferrer, there is an exception to this rule. The exception is, of course, founded upon the theory that, as the law makes the transfer void as to the creditor, there is as to him no transfer at all, and the title to the property for his benefit remains in the debtor, notwithstanding a previous legal transfer good as against all others;" 2 R. C. L. 857; citing National Bank v. Western P. R. Co. 157 Cal. 573, 27 L.R.A.(N.S.) 987, 108 Pac. 676, 21 Ann. Cas. 1391; Westervelt v. Hagge, 61 Neb. 647, 54 L.R.A. 333, 85 N. W. 852.

Cases may be found apparently holding contrary to our conclusions until facts and procedure are considered, such as Hall v. Walbridge, 2 Aik. (Vt.) 215; Murray v. Eldridge, 2 Vt. 388; Gilbert v. Gilbert, 33 Mo. App. 259, and similar holdings. The Vermont decisions are based upon an intentional and express discontinuation of the attachment for the purpose of expediting judgment to procure an advantage over another attaching creditor, and the Missouri case likewise is one between attaching creditors. The law applicable to conflicting attachment credi-

tors, or of fraudulent or preferred attachment, is not involved in this decision.

There is no evidence to support the conclusions of the trial court that the attachment action was discontinued and that judgment was taken in a separate proceeding. Both evidence and presumptions are all to the contrary. The many cases cited by respondent are not in point. For reasons above given, the lien by attachment perfected in strict accord with the statutes is valid. It is not lost by failure to earlier enforce it, as either this plaintiff or his grantors have ever since about a month after its perfection assailed the same by some action pending. This defendant was not obliged to sell under the attachment, and in the face of the attack upon it, as he had the right to await final determination of the validity of his attachment lien before taking further steps to enforce such lien.

The judgment appealed from is therefore reversed, and the District Court will enter judgment in conformity herewith to the effect that said lien by attachment is valid, and the rights of the attaching creditor thereunder are superior to any rights of the plaintiff Mott, who holds title subject to the amount of said lien and judgment under which the same is claimed. Defendant will recover costs and disbursements allowable on trial and on this appeal.

REEVES & COMPANY, a Corporation, v. S. R. RUSSELL, A. L. Arbogast, Northern Pacific Railway Company, a Corporation, and J. J. Boyle and J. T. Boyle, Individually and as Copartners, Doing Business under the Firm Name and Style of Boyle Brothers.

(L.R.A. —, 148 N. W. 654.)

Action for foreclosure of chattel mortgage of record. Boyle Brothers answer, asking affirmative relief for foreclosure of their artisan's lien for materials, repairs, and labor, performed upon the mortgaged personal property under a contract with the owner of the mortgaged personalty. The mortgage was taken in 1906, has been renewed, and is a valid mortgage upon the property.

Note.—The question of the priority of a mechanic's lien over earlier mortgages is treated in notes in 14 L.R.A. 305, and 2 L.R.A.(N.S.) 615.

Boyle Brothers performed the work in 1911, immediately filing a claim for artisan's lien under chap. 168, Laws of 1907; and also retained possession of the property under a claim of lien by virtue of such possession under § 6295, Rev. Codes 1905, in case chap. 168, Laws of 1907, be unconstitutional, and claim their lien under § 6295 to have priority over a lien by mortgage of record. *Held:*—

Artisan's lien — common-law lien — dependent upon possession — has priority over existing chattel mortgages.

1. That an artisan's lien is a common-law lien, and where possession was retained, as here, the statute being but declaratory thereof and such a lien at common law having priority over mortgage liens, an artisan's lien under § 6295, Rev. Codes 1905, where possession is retained, has priority over existing mortgage liens, and this independent of the provisions of chap. 168, Laws of 1907, in express terms granting such priority.

Statute — constitutionality — immaterial in such case.

2. It therefore becomes unnecessary to determine whether the 1907 statute is, or is not, unconstitutional, because, though the same may be assumed to be unconstitutional, Boyle Brothers must recover under the prior existing law, § 6295, Rev. Codes 1905, while, if the 1907 statute be constitutional, it in express terms authorizes defendants' recovery.

Points unnecessary to a recovery — supreme court will not decide.

3. This court will decline to pass upon the constitutionality of a statute, where the same is unnecessary to a decision of the right of recovery.

Mortgage rights — no question of waiver — artisan's lien superior in any event.

4. No question of waiver of mortgage rights is involved, because all rights of plaintiff under its mortgage were subordinate to the rights of those claiming under the artisan's lien.

Owner — purchasing from mortgagor without consent of mortgagee — title not affected — artisan's lien may still be created — agency.

5. The fact that the owner, employing Boyle Brothers to repair the engine, had purchased from the mortgagor who sold the mortgaged property without written consent, does not affect the title of such property in the purchaser, who, as owner, could authorize repairs thereto, and subject the same to an artisan's lien for repairs so authorized, such owner being, for such purposes, considered in law as the agent of the mortgagee.

On Petition for Rehearing.

Common law — liens — statutory provision declaratory of common law.

6. Where at common law an artisan's common-law lien had priority over existing contract liens, and the statute granting an artisan's lien is but

declaratory of common-law principles, and is silent on such question of priority, the common law granting priority to the common-law lien must be construed to grant priority to the lien so declared by statute, and but declaratory of the common law.

Common law — basic law as to civil rights not defined by statute.

7. The common law is adopted by statute as the basic law applicable to civil rights and remedies not defined by statute.

Common law — legislative declarations thereof — civil rights and remedies fixed.

8. The common law must as to civil rights and remedies be considered in the construction and application of statutes declaratory thereof, and such statutes construed and applied as continuations of or legislative declarations of the common law so far as covered by such statutes.

Presumption — statutes — common law.

9. The statute will not be presumed to alter the common law "other than what has been specified and besides what has been plainly pronounced."

Statute declaratory of common law — silent as to priority — effect will not be enlarged by construction — continuation of common law.

10. The statute here declaratory of the common law as to the lien, but silent on its priority, will not be enlarged by negative construction to deny priority existing at common law to the lien so defined, but will be limited in application to the definition of the lien; and the common-law priority considered as continuing in force and applicable to the lien, the common law as to priority supplementing the lien as at common law. The statute will be construed as a continuation of the common law, and not as excluding the common law on that part of the subject not covered by the statute.

Repealing of statute — no provision against continuation of common law — common law is revived.

11. Where a statute either declaratory of or changing the common law is repealed without express provision against the revivor of the common law, the common law is *ipso facto* revived by such repeal, which repeal will be regarded, in the absence of a contrary legislative intent appearing, as an affirmance of the common law, reviving the same.

Opinion filed May 8, 1914. On petition for rehearing, September 9, 1914.

Appeal from a judgment of the District Court of Stutsman County, *Coffey*, J.

Affirmed.

Lawrence & Murphy, for appellants.

The statute as applied by the trial court is a retroactive law, impair-

ing the obligations of a contract. Walker, Am. Law, pp. 217–222; Yeatman v. King, 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 728.

Acts creating liens cannot be construed retroactively, because they would defeat vested rights. 8 Cyc. 900; National Bank v. Jones, 18 Okla. 560, 12 L.R.A.(N.S.) 310, 91 Pac. 191, 11 Ann. Cas. 1041; Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; Crowther v. Fidelity Ins. Trust & S. D. Co. 29 C. C. A. 1, 42 U. S. App. 701, 85 Fed. 43; Yeatman v. King, 2 N. D. 428, 33 Am. St. Rep. 797, 51 N. W. 721; Kilpatrick v. Kansas City & B. R. Co. 41 Am. St. Rep. 758, note; Giles v. Stanton, 86 Tex. 620, 26 S. W. 615; 1 Jones, Liens, § 701.

"Nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." State Const. § 20; Yeatman v. King, 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 728; Vermont Loan & T. Co. v. Whithed, 2 N. D. 82; Edmonds v. Herbrandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970; Plummer v. Borsheim, 8 N. D. 565, 80 N. W. 690; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State v. Walsh, 136 Mo. 400, 35 L.R.A. 231, 37 S. W. 1112; State v. Minor, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; People v. Marx, 99 N. Y. 380, 52 Am. Rep. 34, 2 N. E. 29; Cooley, Const. Lim. 6th ed. § 681; Sutherland, Stat. Constr. §§ 121, 137; Luman v. Hitchens Bros. Co. 90 Md. 14, 46 L.R.A. 393, 44 Atl. 1051; Moher v. Rasmusson, 12 N. D. 71, 95 N. W. 152; Jones, Liens, §§ 105, 106; First Nat. Bank v. Scott, 7 N. D. 312, 75 N. W. 254; Wright v. Sherman, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; Miller v. Anderson, 1 S. D. 539, 11 L.R.A. 317, 47 N. W. 959; Owen v. Burlington, C. R. & N. R. Co. 11 S. D. 153, 74 Am. St. Rep. 786, 76 N. W. 302.

Appellant did not waive its mortgage. Intention to waive a lien will not be presumed in the absence of evidence clearly tending to show it. Muench v. Valley Nat. Bank, 11 Mo. App. 144; Stribling v. Splint Coal Co. 31 W. Va. 82, 5 S. E. 321; Wright v. Sherman, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; Kansas City Sav. Asso. v. Mastin, 61 Mo. 435; First Nat. Bank v. Maxwell, 123 Cal. 360, 69 Am. St. Rep. 64, 55 Pac. 980; Ross v. Swan, 7 Lea, 467; Gardner v. New London, 63 Conn. 267, 28 Atl. 42; Smiley v. Barker, 28 C. C. A. 9, 55 U. S.

App. 125, 83 Fed. 684; Armstrong v. Agricultural Ins. Co. 130 N. Y. 560, 29 N. E. 991; Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. 576; Hollings v. Bankers' Union, 63 S. C. 192, 41 S. E. 90; Crandall v. Moston, 24 App. Div. 547, 50 N. Y. Supp. 145; Ripley v. Ætna L. Ins. Co. 30 N. Y. 138, 86 Am. Dec. 362; Bucklen v. Johnson, 19 Ind. App. 406, 49 N. E. 612; Re Auerbach, 23 Utah, 529, 65 Pac. 488; Bennecke v. Connecticut Mut. L. Ins. Co. 105 U. S. 355, 26 L. ed. 990; Freedman v. Fire Asso. of Philadelphia, 168 Pa. 249, 32 Atl. 39; Johnson v. Schar, 9 S. D. 536, 70 N. W. 838; St. Louis Electric Light & P. Co. v. Edison General Electric Co. 64 Fed. 997; Stiepel v. German American Mut. Life Asso. 55 Mo. 224; Maloney v. Northwestern Masonic Aid Asso. 8 App. Div. 575, 40 N. Y. Supp. 918; Fairbanks, M. & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113.

R. G. McFarland, for respondent (*Burt M. King,* of counsel).

Appellant's brief should be stricken out, and not considered by the court, and the judgment should be affirmed because it contains no demand for a review of the entire case, or of any specified part. Supreme Court Rule XXVIII.; Wells, Jurisdiction of Courts, § 141.

There is no evidence that plaintiff had any right or title to or lien upon the plows mentioned.

It is immaterial whether Arbogast was the actual owner of the property, if he was in the legal possession of the same. Lambert v. Davis, 116 Cal. 292, 48 Pac. 123; Chuch v. Garrison, 75 Cal. 199, 16 Pac. 885; Scott v. Delehunt, 5 Lans. 372.

Defendants Boyle Brothers, while retaining possession of the property upon which they had labored and placed repairs, had a lien upon the same at common law, for their reasonable charges. McIntire v. Carver, 37 Am. Dec. 519, and note, 2 Watts & S. 392; Garr v. Clements, 4 N. D. 563, 62 N. W. 640; Hammond v. Danielson, 126 Mass. 294; Williams v. Allsup, 10 C. B. N. S. 417, 30 L. J. C. P. N. S. 353, 8 Jur. N. S. 57, 4 L. T. N. S. 550; Watts v. Sweeney, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680; Scott v. Delahunt, 65 N. Y. 128; Tucker v. Werner, 2 Misc. 193, 21 N. Y. Supp. 264; Meyer v. Berlandi, 40 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; White v. Smith, 44 N. J. L. 105, 43 Am. Rep. 347; Drummond Carriage Co. v. Mills, 54 Neb. 417, 40 L.R.A. 761, 69 Am. St. Rep. 719, 74 N. W. 966; Kirtley v. Morris, 43 Mo. App. 144; Loss v. Fry, 1

1903, she executed and delivered to him her promissory note for $725.75, bearing interest and due six days after date, or December 17, 1903. The note covered an indebtedness for merchandise previously purchased from defendant. On December 21, 1903, the note being past due, this defendant began an action as plaintiff against Alice J. Dahl as defendant by the issuance of a summons, filing of a verified complaint on promissory note, and procured a warrant of attachment out of the district court of Ramsey county, directed to the sheriff of Pierce county as attaching officer, and regularly issued upon an undertaking and affidavit for attachment, which warrant was served the following day, December 22d, by the sheriff of Pierce county, by the recording in the office of the register of deeds of said county a notice of levy upon and describing the land in that county owned by Alice J. Dahl; and in due season, within the twenty-day period allowed, the sheriff of Pierce county made due return thereon to, and filed the same in the office of, the clerk of the district court of Ramsey county. The date of the attachment levy and lien was December 22, 1903. Three days later a deed to the Pierce county land was filed with the register of deeds of that county, conveying the same to F. C. Rother, which deed purports to be dated and acknowledged December 10, 1903, or twelve days before the attachment levy was made. Before the service of summons in the action of Holbrook v. Dahl, in which the attachment had been had and December 23d, the next day after the attachment levy, Alice J. Dahl signed an instrument entitled as was the summons and complaint, and formally confessing judgment in favor of the plaintiff Holbrook for the amount of the note particularly described, and stating that the same was wholly unpaid, verifying personally such confession of judgment. Upon the day following, an order for judgment duly entitled in the action was issued and filed, together with the usual statement of costs and disbursements in such action, which made no mention of sheriff or attachment fees, and upon which judgment was entered by the clerk December 24, 1903. The testimony of the attorney of record for Holbrook in the attachment action, received over objection of incompetency, as well as testimony of Holbrook himself similarly received, is that the confession of judgment bearing the same title identically as the attachment action was taken in that pending action to expedite judgment therein and save costs to defendant Dahl, and "that they were in one and

the same proceeding and the same court." Plaintiff's attorney testified: "The suit was commenced, the attachment started and sent out to this county for seizure and levy on the land, and Mrs. Dahl offered to confess judgment to save further costs in the matter, and my present recollection is I didn't know the amount of the sheriff fees at that time," hence did not tax any or else overlooked the matter, taxing but $8 statutory costs. With the levy thus perfected and the claim in judgment, the matter rested for six weeks until February 8, 1904, when Rother began his action against Holbrook to determine adverse claims, and particularly assailing the lien by attachment, to which a demurrer was interposed within the thirty-day period for answer, and on April 28, 1904, was argued and submitted for determination, but which was not ruled upon, however, for three years, or until August 19, 1907, when an order was entered and served sustaining the demurrer, after which an amended complaint was served upon which answer was joined. Two years later, or on April 21, 1909, on motion of the plaintiff, that action of Rother against Holbrook was dismissed without prejudice. Meanwhile by deed of May 1, 1908, Rother had conveyed the tract to one Lookingbill, who in the same month by deed conveyed the land to Mott, this plaintiff. Lookingbill in the meantime had procured a purported tax deed to the tract, void under both statute and the decisions of this court in Youker v. Hobart, 17 N. D. 296, 115 N. W. 839, and State ex rel. Ebbert v. Fouts, 26 N. D. 599, 50 L.R.A. (N.S.) 316, 145 N. W. 97. Mott, grantee of Dahl, then began this action, as plaintiff and principal party in interest, to quiet title to the land in himself as against the attachment lien unenforced and awaiting the outcome of the litigation in the previous action assailing it. This action was begun in and went to judgment in the district court of Pierce county, wherein the land is situated, and in which county the attachment lien had been obtained by levy, and wherein on December 29, 1903, after said levy and the entry of judgment in the action in Ramsey county, a transcript of that judgment had been docketed in Pierce county.

The court made its findings: "That said judgment is not a judgment rendered in said attachment action (that of Holbrook v. Dahl); . . . that said judgment is a judgment rendered in a proceeding separate and independent of said attachment action, and that the said

Wallace M. Holbrook, by his acceptance of such judgment in a proceeding separate and independent of said attachment action, as well as by his failure and neglect to prosecute said attachment action to judgment, has lost and waived and suffered to become dissolved his said attachment lien upon said premises as against the title of the plaintiff Mott, and that because the said judgment was obtained as aforesaid in a proceeding separate and independent of said attachment action, said attachment lien never became merged in said judgment as against the title of the plaintiff Mott. That said judgment is not a lien upon said premises. That the said judgment is void as against the title of the plaintiff Mott, because said judgment is a judgment upon confession, and the verified statement upon which the same is based does not state concisely nor at all the facts out of which said indebtedness arose." Judgment was entered in favor of Mott and against Holbrook, quieting Mott's title to the land as against any lien by attachment or judgment acquired by Holbrook in the action against Dahl. Defendant appeals.

The merit of the appeal and the regularity of the judgment is determined by whether the judgment in Holbrook's favor against Dahl was entered in the pending action, in which attachment was had and summons had been issued and complaint filed, or was an independent summary confession of judgment taken under §§ 7842, Rev. Codes 1905, et seq. Concededly, if the judgment be considered as one entered as a summary confession of judgment *without action,* notwithstanding the pending action, the action then pending must be taken as having been abandoned, working *ipso facto* a dissolution of any attachment lien obtained. Such is the only theory upon which the plaintiff can recover in this case, and upon which the judgment of the district court can be sustained. It is true that both the order for judgment and the judgment make no particular reference to the pending action, but instead recite "on reading the attached verified statement authorizing judgment . . . it is ordered," and "the above-named defendant having . . . made her confession of judgment and statement in writing verified by her oath, and the court by order having ordered judgment in favor of the plaintiff and against defendant, and on filing of said confession of judgment and said order of court . . . it is adjudged," that plaintiff "do have and recover," etc. The contention of appellant is that the order and judgment entitled in the pending ac-

tion did not need to recite the issuance of the summons and complaint, and that the confession of judgment was understood and taken to be the authorization of the entry of judgment in the pending action, and such being the fact, it must be found that judgment was taken in the pending action; that the record considered alone is ambiguous, and, if so, evidence outside the record was admissible to show the fact of whether the judgment was entered with or without action. But plaintiff asserts that Holbrook is bound by the record made in the action against Dahl, and that the presumption to be drawn from the order for judgment and judgment entered is that the same was taken as a confession without action, and that the action in which the attachment had been levied was abandoned, dissolving the lien on the attachment, and that no evidence *aliunde* the record on the intent of the plaintiff in taking the judgment he did is admissible. The sufficiency of the confession of judgment to authorize the taking of judgment without action is also raised, and on that ground the judgment as entered is contended to be void, and as such subject to collateral attack at the action of this plaintiff.

The proceedings in the action of Holbrook against Dahl, including the levy of the attachment and the sheriff's return thereon, are valid, and were taken in strict conformity to the statute. Thereby plaintiff obtained a quasi jurisdiction *in rem* against the property to be perfected by subsequent substituted or personal service upon the defendant Dahl. No question of good faith or necessity for the attachment is involved, the very transfer of property establishing the grounds upon which the attachment was issued; and the fact is unchallenged that the ancillary proceeding of attachment was necessary in fact to preserve Holbrook's rights of property. The record also discloses that the claim was but shortly past due, and that Holbrook was on the alert to protect his rights, a fact that would of itself negative any disputable presumption of fact, that he would willingly and knowingly abandon any rights procured by his pending attachment proceedings. If there is any presumption to be indulged in from the record it must be in favor of the regularity of proceedings, and the burden is upon him who would vitiate a prima facie valid judgment, regularly obtained, to establish the grounds of invalidity alleged, jurisdiction of person and subject-matter appearing from the record. The plaintiff Mott claims this

having control of any child or children between the ages of eight and fifteen who desire to send such child or children for a total period of not exceeding six months which may be taken in one or more years, to any parochial school, for the purpose of preparing such child or children for certain religious duties."

As we understand § 232 of art. 15, chap. 266, of the Laws of 1911, which relates to compulsory school attendance, and in a large measure stands by itself, free transportation must be furnished to children living more than 2½ miles from the school, and compulsory attendance is required of such persons no matter whether the district is consolidated or not. Such being the case, there was no necessity for proof of an election, as the evidence is clear that the school was the only one to which the children could go. This disposes of the first point of appellant.

When we come to the merits of the case, however, we are not so well satisfied with the decision of the learned trial judge, nor with his finding that the respondents "unjustly and illegally discriminated against the children of said J. J. Brand, called the relator, and wholly failed to furnish transportation for said relator's children." There is, in our opinion, no material conflict in the evidence on the real issues in the case, and the only questions to be determined are whether the language of § 232, chap, 266 of the Laws of 1911, which provides for transportation "to and from school," is to be strictly construed so that in all cases children must be actually conveyed from their house doors to the doors of the schoolhouse, or whether a reasonable discretion in such matters has been left with the school board. Also, whether, if such discretion exists, there was an abuse thereof in the case at bar.

We are firmly of the opinion that the legislative intention was that actual transportation from the door of the home to the door of the schoolhouse should only be furnished as far as the same was reasonably practicable. In other words, that, though the statute is mandatory and cannot be avoided, it should be construed as if passed by reasonable men, and should be interpreted according to its spirit rather than according to its letter.

We must, indeed, in the construction of such statutes, exercise the common sense of the ordinary man, and be willing to concede that possession and the presumption of its exercise in others. The purpose of the act is plain, and that is the promotion of the cause of education and

the making it possible for children to comply with the compulsory educational laws without being subjected unnecessarily to the storms of winter. We can never believe that the good results of education were intended to be minimized by breeding a selfish, exacting, and effeminate race of boys. It is certainly within the province of the board to take into consideration the sex and age of the children to be carried. It must have been the intention of the legislature that some reasonable discretion should be exercised in the matter, and that, though conveyance from the house to the schoolhouse should be furnished as nearly as is reasonably possible, the letter of the statute should not be made the pretext for absurd and unreasonable exactions. The evidence in the case at bar shows that the board had the choice of the following methods: (1) To drive directly to their door, and to convey the children of petitioner directly to the schoolhouse, and at the expense of conveying the other children 4 miles out of their way, and exposing them to the risks and exposures of this unnecessary ride; (2) to hire an extra team and drive at the probable cost of $35 or $40 a month for the accommodation of the children of the petitioner alone; (3) to cross the river with the team at the risk of accident or of upsetting on account of the irregular banks, and the risk of breaking through the ice with the loaded wagon; (4) to do what was done in the case at bar, which was to stop the wagon within a short distance of the banks of the river, and to require the children of the plaintiff, who were boys between the ages of ten and nineteen years, to cross the frozen river and to meet the team. We must presume that the legislature intended that the board should exercise a sound discretion in such exigencies, and that the statute was passed under the presumption that the people for whom our various educational institutions are and have been maintained and endowed by both the state and the national government are worthy of the privileges conferred upon them, and possess that spirit of neighborly helpfulness and accommodation without which there can be no social progress and no true civilization.

We cannot hold that the board abused its discretion in the premises, nor hold with the learned trial judge that the children of the petitioner are "unjustly and illegally discriminated against," or that "transportation is wholly denied to them." We must remember that petitioner's children are not delicate girls, but boys of between ten and nineteen

years of age. The plaintiff lives some 3 miles from the Logan school district and on the west side of the Mouse river. On the same side of the river, but only a mile or so from the school, and therefore not entitled, as a strict statutory right, to the transportation provided in the section of the statute under consideration, is another man by the name of Stredvick. On the east side of the river, and about a mile further from the plaintiff himself, live two families of the names of Francis and Pennewell respectively. These families are both outside of the 2½ mile limit, and are entitled to the transportation provided. In order to accommodate these two families and at the same time to accommodate that of the plaintiff and respondent, and if only one team is used, it will be necessary for the team to go some 4 miles out of its way after picking up the children of Francis and Pennewell, unless it can cross the river at a point east of the home of the plaintiff, or unless the children of the plaintiff themselves cross the river and meet the team at such a point, the place of meeting being from ¼ to ⅓ of a mile from the home of the plaintiff, and the testimony showing, as we understand it, that the river is safe and reasonably passable for pedestrians in the winter months, and it is only in the winter months that the transportation under consideration is provided for. If neither of these methods can be adopted or routes traveled, it will be necessary to send two teams, one on each side of the river, that is to say, one on the east side for the accommodation of the children of the families of Francis and Pennewell, and one, at the expense of some $35 or $40 a month, on the west side for the accommodation of the family of the plaintiff Brand alone, or to cross the river with the team, which, on account of the steep and irregular banks and the risk of breaking through the ice, might be a dangerous undertaking. When we take into consideration the fact that the children of the plaintiff are boys, as well as all the other facts of the case, we are not prepared to say, and we believe that the trial court was not justified in saying, that the board abused its sound discretion in the premises or in any way violated the spirit of the statute.

The judgment of the District Court is reversed, and the case is remanded with directions to enter judgment dismissing the complaint.

which, though not enacted, form what is known as customary or common law." And § 4005 declares what shall be evidence of such common law. By statute the provisions of the Civil Code are to be considered as but continuations of the common law as well as other statutes, and no distinction exists in this respect between this state and California, notwithstanding § 10,509, Rev. Codes 1905. Plainly this provision of the Code of Criminal Procedure can have no relation to or bearing upon the question of whether the provisions of the Civil Code and civil statutes are to be considered as continuations of the common law. Each of the seven Codes was passed as a separate bill in the Revision of 1895, and as an entirety. The term "Code" as used in many places in each of the seven Codes must refer solely to the Code of which it was a part at the time of its enactment, and this provision has reference to criminal procedure, and is not a general provision applicable to all of the seven Codes as separately enacted. The Code provisions relative to crimes and criminal procedure, as §§ 8531–8535–8538 and 10,509, prescribe a different rule as to such than generally applies to civil rights and remedies. Our penal statutes undertake to and do define all our crimes, and our Code of Criminal Procedure in the main declares the process of administration of our penal statutes. But it is vastly different as to civil rights and liabilities, to completely codify which would be an absolute impossibility. Manifestly civil statutes must be regarded as they have always been construed to be, but continuations, affirmances, modifications, or repeals of basic common law governing principles, and to be interpreted in the light of the common law as has been done for generations. If authority is needed for our conclusions, the following will suffice:

Unless otherwise provided by statute, all "statutes are to be interpreted in the light of the common law, with reference to the principles of the common law in force at the time of their passage." "The presumption against an intent to alter the existing law beyond the immediate scope and object of the enactment under construction applies as well where the existing law is statutory as where it is promulgated by decisions." "The principle is recognized that an intent to alter the common law beyond the evident purpose of the act is not to be presumed. It has indeed been expressly laid down that 'statutes are not presumed to make any alteration in the common law further or otherwise than the

Lien by attachment — prior to recorded transfer of land attached — attaching creditor prima facie in position of "purchaser in good faith, etc." — rights of.

5. Under § 5038, Rev. Codes 1905, the lien acquired by attachment in advance of the recorded transfer of the attached real estate places the attaching creditor prima facie in the position of a "purchaser in good faith and for a valuable consideration" of the property attached, with rights as purchaser accruing on levy made under § 6948, Rev. Codes 1905.

Debtor's interest in land — records — shown by — subject to lien of attachment — not actual interest — rule — statute.

6. It is not the debtor's actual interest in the real estate that is thus liened by attachment, but instead it is his interest as shown by the records of the register of deed's office affecting the real property attached, our statute, § 5038, changing the rule otherwise applicable.

Lien not waived by lapse of time — continually attacked by action.

7. The attachment lien held valid and not waived by lapse of time, it having been continually under attack by action since six weeks after it was obtained.

Opinion filed September 8, 1914.

Appeal from the District Court of Pierce county, *Burr*, J.

Reversed.

Frederic T. Cuthbert, Henry G. Middaugh, Rollo F. Hunt, Arthur R. Smythe, for appellant.

The auditor's tax deed was void upon its face. Tax sale deed must show upon its face that sale was made to person offering to accept lowest rate of interest. Youker v. Hobart, 17 N. D. 296, 115 N. W. 839.

The attachment lien of Holbrook, filed and recorded against the land, took precedence of the deed filed and recorded subsequently. Civil Code 1905, chap. 39; Rev. Codes 1905, § 5038.

Holbrook's attachment was valid, and nothing was done by him to injure or prejudice the rights of other or subsequent creditors. Wade, Attachm. & Garnishment, § 220; Drake, Attachm. 250.

An attachment is valid though there was no service on defendant, provided he appears voluntarily. Pomeroy v. Ricketts, 27 Hun, 242; Catlin v. Ricketts, 91 N. Y. 668; Shinn, Attachm. §§ 216, 217; Rev. Codes 1905, § 6850.

"The law does not require idle acts." Rev. Codes, 1905, § 6679.

"An interpretation which gives effect is preferred to one which makes void." Rev. Codes 1905, § 6688.

"The law respects form less than substance." Rev. Codes 1905, § 6675.

A confession of judgment is a voluntary submission to the jurisdiction of the court. 8 Cyc. 563; 4 Enc. Pl. & Pr. 560; Hall v. Jones, 32 Ill. 38.

The Holbrook judgment being valid in all respects, it cannot be attacked collaterally. Cordier v. Schloss, 12 Cal. 143; Richards v. McMillan, 6 Cal. 419, 65 Am. Dec. 521; Atwater v. Manchester Sav. Bank, 45 Minn. 341, 12 L.R.A. 741, 48 N. W. 187; McDowell v. Daniels, 38 Barb. 143; Harrison v. Gibbons, 71 N. Y. 59; Kern v. Chalfant, 7 Minn. 487, Gil. 393; Cleveland Co-Op. Stove Co. v. Douglas, 27 Minn. 177, 6 N. W. 628; Lee v. Figg, 37 Cal. 328, 99 Am. Dec. 271.

Kehoe & Moseley, for respondent.

The element of champerty does not exist in this case. Rev. Codes 1905, § 8733; State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357.

A junior attaching creditor may show that the first attaching creditor has lost his lien by attachment for failure to follow it up as by law provided. Gilbert v. Gilbert, 33 Mo. App. 259; 4 Cyc. 647; 11 Enc. Pl. & Pr. 1052; Kendall v. Hodgins, 1 Bosw. 659; Daly v. Matthews, 12 Abb. Pr. 403, note; Rev. Codes 1905, § 5325; Hackney v. Wollaston, 73 Minn. 114, 75 N. W. 1037.

There must first be an action properly pending, and summons must have been personally served, or issued before attachment is allowed. Gans v. Beasley, 4 N. D. 140, 59 N. W. 717.

The court's jurisdiction at such point is conditional. Personal service of the summons, or publication thereof, must be commenced within sixty days after the writ issues, or jurisdiction is lost. Rhode Island Hospital Trust Co. v. Keeney, 1 N. D. 411, 48 N. W. 341; Rev. Codes 1905, § 6940.

The attachment lien by appellant was a temporary lien which expired by reason of his failure to prosecute the attachment action to judgment. Rev. Codes 1905, § 6999; Van Loan v. Kline, 10 Johns.

Lien by attachment — prior to recorded transfer of land attached — attaching creditor prima facie in position of "purchaser in good faith, etc." — rights of.

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v. Kelly, 34 Cal. 391, 94
. 194, 5 Am. St. Rep. 836,
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. W. 370; Rev. Codes 1905,
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129; Gilbert v. Gilbert, 33 Mo. App. 259; Murray v. Eldridge, 2 Vt. 388; Hall v. Walbridge, 2 Aik. (Vt.) 215.

The so-called judgment roll in the former action clearly discloses the fact that appellant did not intend at the time he obtained such judgment, to take judgment in the attachment action. His intent, however, would not control in any event. And parol evidence in the present case is wholly incompetent to establish same, or to contradict the record. Lafferty v. Lafferty, 139 Mich. 176, 102 N. W. 626; Gutterman v. Schroeder, 40 Kan. 507, 20 Pac. 230; Weigley v. Matson, 125 Ill. 64, 8 Am. St. Rep. 335, 16 N. E. 881; Roche v. Beldam, 119 Ill. 320, 10 N. E. 191; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Carter v. Frahm, 31 S. D. 379, 141 N. W. 370; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959.

The judgment must be deemed a mere judgment by confession in a separate action from the attachment action. Rev. Codes 1905, §§ 7843, 7844; Pond v. Davenport, 44 Cal. 481.

If the judgment is not one in the attachment action, it must be one by confession. If it is such a judgment, then the attachment lien is lost, because it was not entered in Pierce county until after the recording to the Rother deed. Rev. Codes 1905, §§ 7843, 7844; Gilbert v. Gilbert, 33 Mo. App. 259; McHenry v. Shephard, 2 Mo. App. 378; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107.

The respondent, being in the position of a prior purchaser, is at least on a par with a subsequent attaching creditor, and his rights must be respected, and not destroyed or impaired. Davidson v. Alexander, 84 N. C. 621; Bernard v. Douglas, 10 Iowa, 370; Woods v. Bryan, 41 S. C. 74, 44 Am. St. Rep. 688, 19 S. E. 218; McHenry v. Shephard, 2 Mo. App. 378; Edgar v. Greer, 7 Iowa, 136; Bacon v. Raybould, 4 Utah, 357, 10 Pac. 481, 11 Pac. 510; Wells v. Gieseke, 27 Minn. 478, 8 N. W. 380; Auerback v. Giescke, 40 Minn. 258, 41 N. W. 946; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107; Chappel v. Chappel, 12 N. Y. 215, 64 Am. Dec. 496; Dunham v. Waterman, 17 N. Y. 9, 72 Am. Dec. 406; Richardson v. Fuller, 2 Or. 179; Utah Nat. Bank v. Sears, 13 Utah, 172, 44 Pac. 832; Puget Sound Nat. Bank v. Levy, 10 Wash. 499, 45 Am. St. Rep. 803, 39 Pac. 142; Wood v. Mitchell, 117 N. Y. 439, 22 N. E. 1125; Gilbert v. Gilbert, 33 Mo. App. 259; Nichols v. Kribs, 16 Wis. 76, 76 Am. Dec. 294; Kennedy v. Howe, 9 Iowa, 580.

In confession of judgment, the statement required must be more specific than a complaint. It must specify as in a bill of particulars. Lawless v. Hackett, 16 Johns. 149; Dunham v. Waterman, 17 N. Y. 9, 72 Am. Dec. 406; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107; Bernard v. Douglas, 10 Iowa, 370; Nichols v. Kribs, 10 Wis. 76, 76 Am. Dec. 294; Wood v. Mitchell, 117 N. Y. 439, 22 N. E. 1125; Bacon v. Raybould, 4 Utah, 357, 10 Pac. 481, 11 Pac. 510.

The rule is that a statement in confession of judgment, which does not attempt to state or show any of the facts out of which the debt arose, is void as to third parties. Puget Sound Nat. Bank v. Levy, 10 Wash. 499, 45 Am. St. Rep. 803, 39 Pac. 142; Chappel v. Chappel, 12 N. Y. 215, 64 Am. Dec. 496; Freligh v. Brink, 22 N. Y. 418; Dunham v. Waterman, 17 N. Y. 9, 72 Am. Dec. 406; Richardson v. Fuller, 2 Or. 179; Bernard v. Douglas, 10 Iowa, 370; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107; Nichols v. Kribs, 10 Wis. 76, 76 Am. Dec. 294; Wells v. Gieseke, 27 Minn. 478, 8 N. W. 380; Davidson v. Alexander, 84 N. C. 621; Richards v. McMillan, 6 Cal. 422, 65 Am. Dec. 521; Cordier v. Schloss, 12 Cal. 147; Auerbach v. Gieseke, 40 Minn. 258, 41 N. W. 946.

Respondent is in position which entitles him to assail the judgment in the former action by the claim that it is not a judgment in the attachment action, but one by confession.

No presumption will be indulged to contradict the recitals in a recorded judgment. The statement of confession of judgment is a part of the judgment roll and record. 23 Cyc. 1089; 17 Am. & Eng. Enc. Law, 1077; 1 Black, Judgm. § 277; Cizek v. Cizek, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Barber v. Morris, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110; Carter v. Frahm, 31 S. D. 379, 141 N. W. 370; Rev. Codes 1905, § 7844; Rasmussen v. Hagler, 15 N. D. 542, 108 N. W. 541.

Goss, J. The complaint is in the statutory form of an action to determine adverse claims. The answer sets up a lien by attachment. On the proof it appears that one Alice J. Dahl, in 1903, owned a quarter section in Pierce county. She resided at Devils Lake. Her husband was employed in the store of defendant Holbrook. On December 11,

1903, she executed and delivered to him her promissory note for $725.75, bearing interest and due six days after date, or December 17, 1903. The note covered an indebtedness for merchandise previously purchased from defendant. On December 21, 1903, the note being past due, this defendant began an action as plaintiff against Alice J. Dahl as defendant by the issuance of a summons, filing of a verified complaint on promissory note, and procured a warrant of attachment out of the district court of Ramsey county, directed to the sheriff of Pierce county as attaching officer, and regularly issued upon an undertaking and affidavit for attachment, which warrant was served the following day, December 22d, by the sheriff of Pierce county, by the recording in the office of the register of deeds of said county a notice of levy upon and describing the land in that county owned by Alice J. Dahl; and in due season, within the twenty-day period allowed, the sheriff of Pierce county made due return thereon to, and filed the same in the office of, the clerk of the district court of Ramsey county. The date of the attachment levy and lien was December 22, 1903. Three days later a deed to the Pierce county land was filed with the register of deeds of that county, conveying the same to F. C. Rother, which deed purports to be dated and acknowledged December 10, 1903, or twelve days before the attachment levy was made. Before the service of summons in the action of Holbrook v. Dahl, in which the attachment had been had and December 23d, the next day after the attachment levy, Alice J. Dahl signed an instrument entitled as was the summons and complaint, and formally confessing judgment in favor of the plaintiff Holbrook for the amount of the note particularly described, and stating that the same was wholly unpaid, verifying personally such confession of judgment. Upon the day following, an order for judgment duly entitled in the action was issued and filed, together with the usual statement of costs and disbursements in such action, which made no mention of sheriff or attachment fees, and upon which judgment was entered by the clerk December 24, 1903. The testimony of the attorney of record for Holbrook in the attachment action, received over objection of incompetency, as well as testimony of Holbrook himself similarly received, is that the confession of judgment bearing the same title identically as the attachment action was taken in that pending action to expedite judgment therein and save costs to defendant Dahl, and "that they were in one and

the same proceeding and the same court." Plaintiff's attorney testified: "The suit was commenced, the attachment started and sent out to this county for seizure and levy on the land, and Mrs. Dahl offered to confess judgment to save further costs in the matter, and my present recollection is I didn't know the amount of the sheriff fees at that time," hence did not tax any or else overlooked the matter, taxing but $8 statutory costs. With the levy thus perfected and the claim in judgment, the matter rested for six weeks until February 8, 1904, when Rother began his action against Holbrook to determine adverse claims, and particularly assailing the lien by attachment, to which a demurrer was interposed within the thirty-day period for answer, and on April 28, 1904, was argued and submitted for determination, but which was not ruled upon, however, for three years, or until August 19, 1907, when an order was entered and served sustaining the demurrer, after which an amended complaint was served upon which answer was joined. Two years later, or on April 21, 1909, on motion of the plaintiff, that action of Rother against Holbrook was dismissed without prejudice. Meanwhile by deed of May 1, 1908, Rother had conveyed the tract to one Lookingbill, who in the same month by deed conveyed the land to Mott, this plaintiff. Lookingbill in the meantime had procured a purported tax deed to the tract, void under both statute and the decisions of this court in Youker v. Hobart, 17 N. D. 296, 115 N. W. 839, and State ex rel. Ebbert v. Fouts, 26 N. D. 599, 50 L.R.A. (N.S.) 316, 145 N. W. 97. Mott, grantee of Dahl, then began this action, as plaintiff and principal party in interest, to quiet title to the land in himself as against the attachment lien unenforced and awaiting the outcome of the litigation in the previous action assailing it. This action was begun in and went to judgment in the district court of Pierce county, wherein the land is situated, and in which county the attachment lien had been obtained by levy, and wherein on December 29, 1903, after said levy and the entry of judgment in the action in Ramsey county, a transcript of that judgment had been docketed in Pierce county.

The court made its findings: "That said judgment is not a judgment rendered in said attachment action (that of Holbrook v. Dahl); . . . that said judgment is a judgment rendered in a proceeding separate and independent of said attachment action, and that the said

Wallace M. Holbrook, by his acceptance of such judgment in a proceeding separate and independent of said attachment action, as well as by his failure and neglect to prosecute said attachment action to judgment, has lost and waived and suffered to become dissolved his said attachment lien upon said premises as against the title of the plaintiff Mott, and that because the said judgment was obtained as aforesaid in a proceeding separate and independent of said attachment action, said attachment lien never became merged in said judgment as against the title of the plaintiff Mott. That said judgment is not a lien upon said premises. That the said judgment is void as against the title of the plaintiff Mott, because said judgment is a judgment upon confession, and the verified statement upon which the same is based does not state concisely nor at all the facts out of which said indebtedness arose." Judgment was entered in favor of Mott and against Holbrook, quieting Mott's title to the land as against any lien by attachment or judgment acquired by Holbrook in the action against Dahl. Defendant appeals.

The merit of the appeal and the regularity of the judgment is determined by whether the judgment in Holbrook's favor against Dahl was entered in the pending action, in which attachment was had and summons had been issued and complaint filed, or was an independent summary confession of judgment taken under §§ 7842, Rev. Codes 1905, et seq. Concededly, if the judgment be considered as one entered as a summary confession of judgment *without action,* notwithstanding the pending action, the action then pending must be taken as having been abandoned, working *ipso facto* a dissolution of any attachment lien obtained. Such is the only theory upon which the plaintiff can recover in this case, and upon which the judgment of the district court can be sustained. It is true that both the order for judgment and the judgment make no particular reference to the pending action, but instead recite "on reading the attached verified statement authorizing judgment . . . it is ordered," and "the above-named defendant having . . . made her confession of judgment and statement in writing verified by her oath, and the court by order having ordered judgment in favor of the plaintiff and against defendant, and on filing of said confession of judgment and said order of court . . . it is adjudged," that plaintiff "do have and recover," etc. The contention of appellant is that the order and judgment entitled in the pending ac-

tion did not need to recite the issuance of the summons and complaint, and that the confession of judgment was understood and taken to be the authorization of the entry of judgment in the pending action, and such being the fact, it must be found that judgment was taken in the pending action; that the record considered alone is ambiguous, and, if so, evidence outside the record was admissible to show the fact of whether the judgment was entered with or without action. But plaintiff asserts that Holbrook is bound by the record made in the action against Dahl, and that the presumption to be drawn from the order for judgment and judgment entered is that the same was taken as a confession without action, and that the action in which the attachment had been levied was abandoned, dissolving the lien on the attachment, and that no evidence *aliunde* the record on the intent of the plaintiff in taking the judgment he did is admissible. The sufficiency of the confession of judgment to authorize the taking of judgment without action is also raised, and on that ground the judgment as entered is contended to be void, and as such subject to collateral attack at the action of this plaintiff.

The proceedings in the action of Holbrook against Dahl, including the levy of the attachment and the sheriff's return thereon, are valid, and were taken in strict conformity to the statute. Thereby plaintiff obtained a quasi jurisdiction *in rem* against the property to be perfected by subsequent substituted or personal service upon the defendant Dahl. No question of good faith or necessity for the attachment is involved, the very transfer of property establishing the grounds upon which the attachment was issued; and the fact is unchallenged that the ancillary proceeding of attachment was necessary in fact to preserve Holbrook's rights of property. The record also discloses that the claim was but shortly past due, and that Holbrook was on the alert to protect his rights, a fact that would of itself negative any disputable presumption of fact, that he would willingly and knowingly abandon any rights procured by his pending attachment proceedings. If there is any presumption to be indulged in from the record it must be in favor of the regularity of proceedings, and the burden is upon him who would vitiate a prima facie valid judgment, regularly obtained, to establish the grounds of invalidity alleged, jurisdiction of person and subject-matter appearing from the record. The plaintiff Mott claims this

Wallace M. Holbrook, by his acceptance of such judgment in a proceeding separate and independent of said attachment action, as well as by his failure and neglect to prosecute said attachment action to judgment, has lost and waived and suffered to become dissolved his said attachment lien upon said premises as against the title of the plaintiff Mott, and that because the said judgment was obtained as aforesaid in a proceeding separate and independent of said attachment action, said attachment lien never became merged in said judgment as against the title of the plaintiff Mott. That said judgment is not a lien upon said premises. That the said judgment is void as against the title of the plaintiff Mott, because said judgment is a judgment upon confession, and the verified statement upon which the same is based does not state concisely nor at all the facts out of which said indebtedness arose." Judgment was entered in favor of Mott and against Holbrook, quieting Mott's title to the land as against any lien by attachment or judgment acquired by Holbrook in the action against Dahl. Defendant appeals.

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affirmatively appears from the failure of the order for judgment and judgment as entered on confession, to mention or identify any other papers than the confession of judgment, and that the judgment roll is limited to the confession order and judgment thereon. The question is one of fact as to what is the record upon which judgment was entered. This is self-evident from the necessity that a finding of fact must be made thereon decisive of the case. To determine this from a bare inspection of the files entitled in the action is impossible, unless it be resolved in Holbrook's favor. When the confession entitled the same as the other files in a pending action was two days later filed with the clerk, it was the equivalent of an appearance and authorization of judgment in that action by the party defendant therein, and upon which statement alone judgment could be ordered and entered as was done, and still constitute but a step taken in a pending action, instead of a basis for a judgment entered without action. It would be at least equally as arbitrary, therefore, to say that the judgment was one entered without action and upon a judgment roll, consisting of confession order and judgment only (§ 7844, Rev. Codes 1905), as, on the contrary, to assume from the record the judgment to be one entered in the pending action. It is certainly permissible under these circumstances to resort to those matters of common knowledge, known to all practitioners of law, as are apparent in this case from the record and as bear upon the issue of fact. The action had been begun, and complaint, affidavit, and undertaking, upon which the warrant of attachment had issued, had been filed two days prior to the date of confession. Plaintiff, having seen fit to use the remedy of attachment, and having the statutory period after the levy in which to serve the same, would naturally make the service of the warrant and make secure his levy upon the property in advance of a service of summons upon the defendant. Should he serve the defendant first, or give notoriety in advance of the levy or the issuance of the warrant, it would jeopardize the interests of his client by affording a dishonest debtor opportunity to at once dispose of her property, and defeat the collection of the debt, and render useless the attachment proceeding. The attorney for Holbrook, in levying under the warrant in advance of the service of the summons upon Dahl, was but fulfilling his duty to his client and following the usual procedure. To do this it was necessary that he send the papers to the

levying officer, the sheriff of a distant county, wherein the land was situated. And no return having been made by the sheriff on the levy until two weeks later, a natural presumption is that the papers were still with the sheriff of Pierce county on December 23d, when the defendant executed the confession of judgment. It does not appear from the papers filed who prepared that confession, but from the fact that it was verified before the attorney of record for Holbrook in the pending action and that such attorney filed the same, it is but a fair inference that he procured it from the defendant in the pending action to expedite judgment therein, as was permissible and legitimate, inasmuch as there would have been no question involved of priority, that having been determined as of the date of the attachment previously made, and as no conflicting claims to this land had yet appeared, the deed not having been filed for record until three days after the confession of judgment had been taken. But we are not limited to the presumption to be drawn from the record. If it be granted that the record is ambiguous, as it certainly must be so taken as to this question of fact unless the presumption be taken in favor of Holbrook on the record, there is no good reason why extrinsic testimony should not be received touching the same, and thus testimony of the plaintiff and his attorney as to how, and the circumstances under which, this confession was taken, remove all doubt in the matter, and establish the fact that they were taken and filed in the pending action, in which they were entitled, to hasten judgment and to save costs to Dahl as well. This is further strengthened by the probabilities arising from the nature of the claim sued on, it being a note on six days' time and given less than two weeks before the confession was executed, so that the confession itself is scarcely more of a recognition of the indebtedness than the note itself, amounting to but little more than the admission that it had not been paid, so that in giving this confession Dahl gave little that Holbrook did not then possess in the light of the fact, which presumably both parties to that action knew, that a lien had been secured by attachment. It is significant that no testimony by Dahl was offered to contradict any natural presumptions applying, or that she did not know of the pendency of the action at the time she gave the confession of judgment, although the testimony of Holbrook on this very subject had been taken on notice six months before for use at the trial at which it was offered, and the testi-

mony offered by Holbrook and his attorney, as recited heretofore in this opinion, is unequivocal and to the effect that "Mrs. Dahl offered to confess judgment to save further costs in the matter." The matter was the pending action. Her offer was accepted, the confession obtained as an appearance and waiver of defense and confession of judgment in the pending action. Holbrook, having agreed to save further costs to Dahl as a consideration for the confession of judgment, observed the stipulation to the letter, and entered but $8 costs, waiving other costs, including that of the attachment which both the record and the testimony show had not yet been returned. Holbrook immediately transcripts the judgment to Pierce county, as would be the usual practice on an execution sale, under § 7102, Rev. Codes 1905, providing that "when the execution is against the property of a judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties. Real property adjudged to be sold must be sold in the county where it lies by the sheriff of such county or by a referee." As the property was held under the lien of attachment, that lien was to be enforced by execution sale. Section 7106. It was not necessary that the judgment refer to the attachment, nor specifically "direct a sale of the property in satisfaction thereof, as the law explicitly imposes that duty upon the attaching officer." Iowa State Sav. Bank v. Jacobson, 8 S. D. 292, 66 N. W. 453, a decision on statutes identical with ours. "The inchoate lien created by the levy of the attachment for the satisfaction of the particular debt becomes perfected when the debt is merged into a judgment for the plaintiff. When a judgment is obtained *which is a lien upon the attached property* the attachment lien becomes merged into the judgment lien, and the latter relates back to the levy of the attachment, and is superior to all liens created or transfers made subsequent to the levy. And when a sale is made upon an execution issued upon the plaintiff's judgment in the attachment suit, such title as the defendant had at the time of the levy passes to the purchaser unaffected by any conveyance or encumbrance made subsequent to the levy. After the judgment is obtained, it is the judgment lien, and not the attachment lien, which must be enforced; for the latter has

become merged into the former, and has no further existence except to preserve the priority by it acquired, which must be enforced under the judgment by virtue of an execution issued thereon." Shinn, Attachm. § 323. Attention may be called to the fact that the return on the attachment was not filed until January 7th, or two weeks after the entry of judgment. This is not important, the levy being unquestionably made before the entry of judgment, the lien itself having been regularly perfected as of the date of the filing of the notice of the lien against the land in the register of deed's office. Every step of the attachment law was fulfilled to the letter, including the provision of § 6947, that "the sheriff shall within twenty days after making such seizure file such inventory and a return of his doings upon such attachment with the clerk of the district court who issued the warrant." The entry of judgment did not merge the lien previously obtained by attachment in the judgment, but the lien remained extant, notice of which was given by the notice of levy, of record in the register of deed's office of Pierce county, and record proof of which was made by the return on the writ filed January 7th. The attachment lien must live irrespective of the judgment, because the judgment entered in Ramsey county could not, even after a return of levy of the attachment filed in that county, of itself amount to a judgment lien when the land is located in a distant county from that in which the judgment is entered. Hence the necessity of transcripting the judgment to Pierce county to enable the lien there held by attachment to merge in the judgment as there transcripted. This is the importance of the italicized portion from the above quotation from Shinn on Attachments § 323, that it is only "when a judgment is obtained *which is a lien upon the attached property,*" that "the attachment lien becomes merged into the judgment lien." On these propositions, see the new and valuable work, Ruling Case Law, vol. 2, p. 842, from which we quote: "Where there is no peculiar statute to the contrary, the failure of the officer to make return on or before the return day will not affect the lien of the plaintiff under the attachment;" citing Hogue v. Corbit, 156 Ill. 540, 47 Am. St. Rep. 232, 41 N. W. 219; Riordan v. Britton, 69 Tex. 198, 5 Am. St. Rep. 37, 7 S. W. 50. And again from the same work, page 856: "The rule is where there is no peculiar statute to the contrary, that the failure of an officer to make a return on or before the return day will not affect the lien of

an attachment that was duly levied, and the validity or continuation of an attachment lien is not dependent upon the entry of the judgment in the judgment lien docket;" citing Katz v. Obenchain, 48 Or. 352, 120 Am. St. Rep. 821, 85 Pac. 617; Hogue v. Corbit, supra; Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775 and note. See also § 6948, Rev. Codes 1905, expressly providing that the "lien of the attachment shall be effectual from the time when a levy is made."

From the date of the levy by force of our recording statute, § 5038, as against this perfected lien by attachment, the subsequently recorded deed by Rother is void. As to such deed Holbrook, holding the lien by attachment, is regarded as a prior "purchaser in good faith and for a valuable consideration." Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 523, 123 N. W. 390, and a same entitled case in 21 N. D. 25, 129 N. W. 1024. Under the statute and the holdings of this court, this attaching creditor is a purchaser in good faith as of the date of the attachment. Hence the equities are with, not against, such attaching creditor under the express terms of the statute. It might be otherwise in the absence of the statute, "An attachment lien on land is subject to every equity which exists against the debtor at the time of the levy, and courts of equity will so limit it. However, where a statute declares a previous transfer of title void as to creditors of the transferrer, there is an exception to this rule. The exception is, of course, founded upon the theory that, as the law makes the transfer void as to the creditor, there is as to him no transfer at all, and the title to the property for his benefit remains in the debtor, notwithstanding a previous legal transfer good as against all others;" 2 R. C. L. 857; citing National Bank v. Western P. R. Co. 157 Cal. 573, 27 L.R.A.(N.S.) 987, 108 Pac. 676, 21 Ann. Cas. 1391; Westervelt v. Hagge, 61 Neb. 647, 54 L.R.A. 333, 85 N. W. 852.

Cases may be found apparently holding contrary to our conclusions until facts and procedure are considered, such as Hall v. Walbridge, 2 Aik. (Vt.) 215; Murray v. Eldridge, 2 Vt. 388; Gilbert v. Gilbert, 33 Mo. App. 259, and similar holdings. The Vermont decisions are based upon an intentional and express discontinuation of the attachment for the purpose of expediting judgment to procure an advantage over another attaching creditor, and the Missouri case likewise is one between attaching creditors. The law applicable to conflicting attachment credi-

tors, or of fraudulent or preferred attachment, is not involved in this decision.

There is no evidence to support the conclusions of the trial court that the attachment action was discontinued and that judgment was taken in a separate proceeding. Both evidence and presumptions are all to the contrary. The many cases cited by respondent are not in point. For reasons above given, the lien by attachment perfected in strict accord with the statutes is valid. It is not lost by failure to earlier enforce it, as either this plaintiff or his grantors have ever since about a month after its perfection assailed the same by some action pending. This defendant was not obliged to sell under the attachment, and in the face of the attack upon it, as he had the right to await final determination of the validity of his attachment lien before taking further steps to enforce such lien.

The judgment appealed from is therefore reversed, and the District Court will enter judgment in conformity herewith to the effect that said lien by attachment is valid, and the rights of the attaching creditor thereunder are superior to any rights of the plaintiff Mott, who holds title subject to the amount of said lien and judgment under which the same is claimed. Defendant will recover costs and disbursements allowable on trial and on this appeal.

REEVES & COMPANY, a Corporation, v. S. R. RUSSELL, A. L. Arbogast, Northern Pacific Railway Company, a Corporation, and J. J. Boyle and J. T. Boyle, Individually and as Copartners, Doing Business under the Firm Name and Style of Boyle Brothers.

(L.R.A. —, 148 N. W. 654.)

Action for foreclosure of chattel mortgage of record. Boyle Brothers answer, asking affirmative relief for foreclosure of their artisan's lien for materials, repairs, and labor, performed upon the mortgaged personal property under a contract with the owner of the mortgaged personalty. The mortgage was taken in 1906, has been renewed, and is a valid mortgage upon the property.

Note.—The question of the priority of a mechanic's lien over earlier mortgages is treated in notes in 14 L.R.A. 305, and 2 L.R.A.(N.S.) 615.

Boyle Brothers performed the work in 1911, immediately filing a claim for artisan's lien under chap. 168, Laws of 1907; and also retained possession of the property under a claim of lien by virtue of such possession under § 6295, Rev. Codes 1905, in case chap. 168, Laws of 1907, be unconstitutional, and claim their lien under § 6295 to have priority over a lien by mortgage of record. *Held:*—

Artisan's lien — common-law lien — dependent upon possession — has priority over existing chattel mortgages.

1. That an artisan's lien is a common-law lien, and where possession was retained, as here, the statute being but declaratory thereof and such a lien at common law having priority over mortgage liens, an artisan's lien under § 6295, Rev. Codes 1905, where possession is retained, has priority over existing mortgage liens, and this independent of the provisions of chap. 168, Laws of 1907, in express terms granting such priority.

Statute — constitutionality — immaterial in such case.

2. It therefore becomes unnecessary to determine whether the 1907 statute is, or is not, unconstitutional, because, though the same may be assumed to be unconstitutional, Boyle Brothers must recover under the prior existing law, § 6295, Rev. Codes 1905, while, if the 1907 statute be constitutional, it in express terms authorizes defendants' recovery.

Points unnecessary to a recovery — supreme court will not decide.

3. This court will decline to pass upon the constitutionality of a statute, where the same is unnecessary to a decision of the right of recovery.

Mortgage rights — no question of waiver — artisan's lien superior in any event.

4. No question of waiver of mortgage rights is involved, because all rights of plaintiff under its mortgage were subordinate to the rights of those claiming under the artisan's lien.

Owner — purchasing from mortgagor without consent of mortgagee — title not affected — artisan's lien may still be created — agency.

5. The fact that the owner, employing Boyle Brothers to repair the engine, had purchased from the mortgagor who sold the mortgaged property without written consent, does not affect the title of such property in the purchaser, who, as owner, could authorize repairs thereto, and subject the same to an artisan's lien for repairs so authorized, such owner being, for such purposes, considered in law as the agent of the mortgagee.

On Petition for Rehearing.

Common law — liens — statutory provision declaratory of common law.

6. Where at common law an artisan's common-law lien had priority over existing contract liens, and the statute granting an artisan's lien is but

declaratory of common-law principles, and is silent on such question of priority, the common law granting priority to the common-law lien must be construed to grant priority to the lien so declared by statute, and but declaratory of the common law.

Common law — basic law as to civil rights not defined by statute.

7. The common law is adopted by statute as the basic law applicable to civil rights and remedies not defined by statute.

Common law — legislative declarations thereof — civil rights and remedies fixed.

8. The common law must as to civil rights and remedies be considered in the construction and application of statutes declaratory thereof, and such statutes construed and applied as continuations of or legislative declarations of the common law so far as covered by such statutes.

Presumption — statutes — common law.

9. The statute will not be presumed to alter the common law "other than what has been specified and besides what has been plainly pronounced."

Statute declaratory of common law — silent as to priority — effect will not be enlarged by construction — continuation of common law.

10. The statute here declaratory of the common law as to the lien, but silent on its priority, will not be enlarged by negative construction to deny priority existing at common law to the lien so defined, but will be limited in application to the definition of the lien; and the common-law priority considered as continuing in force and applicable to the lien, the common law as to priority supplementing the lien as at common law. The statute will be construed as a continuation of the common law, and not as excluding the common law on that part of the subject not covered by the statute.

Repealing of statute — no provision against continuation of common law — common law is revived.

11. Where a statute either declaratory of or changing the common law is repealed without express provision against the revivor of the common law, the common law is *ipso facto* revived by such repeal, which repeal will be regarded, in the absence of a contrary legislative intent appearing, as an affirmance of the common law, reviving the same.

Opinion filed May 8, 1914. On petition for rehearing, September 9, 1914.

Appeal from a judgment of the District Court of Stutsman County, *Coffey*, J.

Affirmed.

Lawrence & Murphy, for appellants.

The statute as applied by the trial court is a retroactive law, impair-

ing the obligations of a contract. Walker, Am. Law, pp. 217–222; Yeatman v. King, 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 728.

Acts creating liens cannot be construed retroactively, because they would defeat vested rights. 8 Cyc. 900; National Bank v. Jones, 18 Okla. 560, 12 L.R.A.(N.S.) 310, 91 Pac. 191, 11 Ann. Cas. 1041; Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; Crowther v. Fidelity Ins. Trust & S. D. Co. 29 C. C. A. 1, 42 U. S. App. 701, 85 Fed. 43; Yeatman v. King, 2 N. D. 428, 33 Am. St. Rep. 797, 51 N. W. 721; Kilpatrick v. Kansas City & B. R. Co. 41 Am. St. Rep. 758, note; Giles v. Stanton, 86 Tex. 620, 26 S. W. 615; 1 Jones, Liens, § 701.

"Nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." State Const. § 20; Yeatman v. King, 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 728; Vermont Loan & T. Co. v. Whithed, 2 N. D. 82; Edmonds v. Herbrandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970; Plummer v. Borsheim, 8 N. D. 565, 80 N. W. 690; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State v. Walsh, 136 Mo. 400, 35 L.R.A. 231, 37 S. W. 1112; State v. Minor, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; People v. Marx, 99 N. Y. 380, 52 Am. Rep. 34, 2 N. E. 29; Cooley, Const. Lim. 6th ed. § 681; Sutherland, Stat. Constr. §§ 121, 137; Luman v. Hitchens Bros. Co. 90 Md. 14, 46 L.R.A. 393, 44 Atl. 1051; Moher v. Rasmusson, 12 N. D. 71, 95 N. W. 152; Jones, Liens, §§ 105, 106; First Nat. Bank v. Scott, 7 N. D. 312, 75 N. W. 254; Wright v. Sherman, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; Miller v. Anderson, 1 S. D. 539, 11 L.R.A. 317, 47 N. W. 959; Owen v. Burlington, C. R. & N. R. Co. 11 S. D. 153, 74 Am. St. Rep. 786, 76 N. W. 302.

Appellant did not waive its mortgage. Intention to waive a lien will not be presumed in the absence of evidence clearly tending to show it. Muench v. Valley Nat. Bank, 11 Mo. App. 144; Stribling v. Splint Coal Co. 31 W. Va. 82, 5 S. E. 321; Wright v. Sherman, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; Kansas City Sav. Asso. v. Mastin, 61 Mo. 435; First Nat. Bank v. Maxwell, 123 Cal. 360, 69 Am. St. Rep. 64, 55 Pac. 980; Ross v. Swan, 7 Lea, 467; Gardner v. New London, 63 Conn. 267, 28 Atl. 42; Smiley v. Barker, 28 C. C. A. 9, 55 U. S.

App. 125, 83 Fed. 684; Armstrong v. Agricultural Ins. Co. 130 N. Y. 560, 29 N. E. 991; Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. 576; Hollings v. Bankers' Union, 63 S. C. 192, 41 S. E. 90; Crandall v. Moston, 24 App. Div. 547, 50 N. Y. Supp. 145; Ripley v. Ætna L. Ins. Co. 30 N. Y. 138, 86 Am. Dec. 362; Bucklen v. Johnson, 19 Ind. App. 406, 49 N. E. 612; Re Auerbach, 23 Utah, 529, 65 Pac. 488; Bennecke v. Connecticut Mut. L. Ins. Co. 105 U. S. 355, 26 L. ed. 990; Freedman v. Fire Asso. of Philadelphia, 168 Pa. 249, 32 Atl. 39; Johnson v. Schar, 9 S. D. 536, 70 N. W. 838; St. Louis Electric Light & P. Co. v. Edison General Electric Co. 64 Fed. 997; Stiepel v. German American Mut. Life Asso. 55 Mo. 224; Maloney v. Northwestern Masonic Aid Asso. 8 App. Div. 575, 40 N. Y. Supp. 918; Fairbanks, M. & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113.

R. G. McFarland, for respondent (*Burt M. King,* of counsel).

Appellant's brief should be stricken out, and not considered by the court, and the judgment should be affirmed because it contains no demand for a review of the entire case, or of any specified part. Supreme Court Rule XXVIII.; Wells, Jurisdiction of Courts, § 141.

There is no evidence that plaintiff had any right or title to or lien upon the plows mentioned.

It is immaterial whether Arbogast was the actual owner of the property, if he was in the legal possession of the same. Lambert v. Davis, 116 Cal. 292, 48 Pac. 123; Chuch v. Garrison, 75 Cal. 199, 16 Pac. 885; Scott v. Delehunt, 5 Lans. 372.

Defendants Boyle Brothers, while retaining possession of the property upon which they had labored and placed repairs, had a lien upon the same at common law, for their reasonable charges. McIntire v. Carver, 37 Am. Dec. 519, and note, 2 Watts & S. 392; Garr v. Clements, 4 N. D. 563, 62 N. W. 640; Hammond v. Danielson, 126 Mass. 294; Williams v. Allsup, 10 C. B. N. S. 417, 30 L. J. C. P. N. S. 353, 8 Jur. N. S. 57, 4 L. T. N. S. 550; Watts v. Sweeney, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680; Scott v. Delahunt, 65 N. Y. 128; Tucker v. Werner, 2 Misc. 193, 21 N. Y. Supp. 264; Meyer v. Berlandi, 40 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; White v. Smith, 44 N. J. L. 105, 43 Am. Rep. 347; Drummond Carriage Co. v. Mills, 54 Neb. 417, 40 L.R.A. 761, 69 Am. St. Rep. 719, 74 N. W. 966; Kirtley v. Morris, 43 Mo. App. 144; Loss v. Fry, 1

N. Y. City Ct. Rep. 7; Herman, Chatt. Mortg. §§ 474, 535; Browne, Civil & Admiralty Law, p. 204; Jones, Liens, § 744.

The mortgagee expressly made the mortgagor its agent for the purpose of keeping said property in repair. Drummond Carriage Co. v. Mills, 54 Neb. 417, 40 L.R.A. 764, 69 Am. St. Rep. 719, 74 N. W. 966; Hammond v. Danielson, 126 Mass. 294; Kirtley v. Morris, 43 Mo. App. 144.

The mere granting of some additional remedy does not invalidate the law. 8 Cyc. 900, note 90; 36 Cyc. 1173, 1174; Bolton v. Johns, 5 Pa. 145, 47 Am. Dec. 404; Parkison v. Bracken, 1 Pinney (Wis.) 174, 39 Am. Dec. 296; Vermont Loan & T. Co. v. Whithed, 2 N. D. 82, 49 N. W. 318; Edmonds v. Herbrandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970; Sasser v. Martin, 101 Ga. 447, 29 S. E. 281; Craig v. Herzman, 9 N. D. 140, on appeal 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703; Notes Dak. Rep. 162, 174; See Generally: Cowden v. Wright, 24 Wend. 429, 35 Am. Dec. 633; 38 Cyc. 1144, 1145, and notes; Quist v. Sandman, 154 Cal. 748, 99 Pac. 207; Michaelson v. Fish, 1 Cal. App. 116, 81 Pac. 662.

One who does not belong to the class that might be injured by a statute cannot raise the question of its validity. Red River Valley Nat. Bank v. Craig, 181 U. S. 558, 45 L. ed. 1000, 21 Sup. Ct. Rep. 703, and cases cited.

Goss, J. Plaintiff corporation brings this action to foreclose its chattel mortgage upon a threshing engine, and to determine priority of liens thereon, and particularly as against a blacksmith's lien filed against the engine by Boyle Brothers, defendants. Plaintiff sold the engine to one Russell in 1906, taking a mortgage back, which was duly filed and has been renewed, and admittedly is, and always has been, a valid lien upon the property. On April 11, 1911, Russell wrote plaintiff for its written consent to a sale of the mortgaged engine, receiving a reply dated April 15, 1911, in effect withholding consent until it could investigate and until certain conditions were complied with. Russell, however, took no further steps to obtain such written consent, and sold it to Arbogast, for valuable consideration, who bought with notice of the encumbrance. Arbogast thereafter consulted Boyle Brothers, machinists, at Jamestown, as to repairing the engine, and one of them went to Russell's

place, where the machine still remained, and inspected the same as to the probable cost of overhauling, rebuilding, and putting it in suitable condition, and made an estimate that to do so would cost in the neighborhood of $800. Defendants Boyle Brothers, were then engaged by Arbogast, with the knowledge and acquiescence of Russell, to move the engine to the machine shop of Boyle Brothers for repairs and rebuilding the engine, which was thereafter completed at an expense for labor, material, and repairs and incidental expenses, totaling $882.11, and incurred between April 27 and May 26, 1911, and for which amount a blacksmith's lien was soon filed by Boyle Brothers against Arbogast, Russell, and the Reeves Company, by the filing of an affidavit of lien, accompanied with an itemized and verified statement of all labor and items of material and charge entering into the account. Written notice of this was at once given. Plaintiff thereupon demanded possession from Boyle Brothers, who had at all times since the completion of the work retained possession of the engine, and upon their refusal thereof the property was taken under warrant of foreclosure. Boyle Brothers in defense pleaded their artisan's lien and possession for the purpose of foreclosure thereof, and asked that their lien, claimed both under § 6295, Rev. Codes 1905, and chap. 168, Laws of 1907, be adjudged to be a prior lien to the mortgage of the plaintiffs. With this question of priority of liens, plaintiff seeks to raise the following questions: (1) Whether an artisan's lien takes priority over a mortgage of record on the property liened; and (2) whether chap. 168 of the Session Laws of 1907, amending § 6295, Rev. Codes 1905, passed after this mortgage lien had accrued, and in express terms declaring that "said lien shall have priority over all other liens, chattel mortgages, or encumbrances against said personal property," and providing the method for the perfecting of the artisan's lien without retention of possession of property, is constitutional. Appellant asserts said chap. 168 to be unconstitutional on several grounds alleged. For reasons hereinafter stated we find it unnecessary to pass upon any constitutional question, so any statement of appellant's claims in this respect is needless.

Section 6295, Rev. Codes 1905, which does not declare priority of an artisan's lien over recorded mortgages or encumbrances, was the only statute on the subject in 1906, at the time plaintiff's lien became effective. Chapter 168, Laws of 1907, became effective a year after this

mortgage was given, and in express terms granted artisans' liens priority over mortgages. Whether this priority is granted as to mortgages taken and in force before its passage is one question arising, but for the purposes of this suit we shall assume the statute to be retrospective in this instance, and as in terms making the artisan's lien superior to the mortgage lien. Whether the statute is thus retrospective or not is immaterial under the law controlling this decision. In construing statutes on liens, the first consideration is whether the lien is one given at common law, or is instead dependent for its existence solely upon the terms of the statute. Where the statute is merely declaratory of the common law it is construed together with, and in the light of, the common law; the legislature being presumed to know the common law on the subject and to enact the statute as merely declaratory thereof, and to be so interpreted in the light of its origin and common-law definition where the statute does not depart from the governing common-law principles. And this here applies, as artisans' liens are a creation of the common law, and not a special lien originating under, and dependent upon, statute for its creation and existence. This is ably discussed and is the settled law of this state under the opinion of this court by Justice Corliss in Garr v. Clements, where the artisan's lien law declared by chap. 88 of the Laws of 1890, was sustained as constitutional on the ground (equally applicable to the legislation before us) that the statute merely declared the existing law on the same subject, or, in other words, that, without the statute, the lien of the common law would exist under the facts of that case the same as with it, and that portion of the Laws of 1890 corresponding to chap. 168 of the Laws of 1907, granting priority to the artisan's lien, was not innovation, and did not create any new rights not already enjoyed and in existence at common law at the time the statute became operative. This statute of 1890 was repealed by the enactment of the Code of 1895 (see ¶ 12, p. 1519) § 6295, taking its place as § 4844 of the Code of 1895. But chap. 88 of the Laws of 1890 (almost identical with chap. 168 of the Laws of 1907) was passed upon in Garr v. Clements, 4 N. D. 559, 62 N. W. 640. Our earliest enactment on the subject was subdiv. 2 of § 1814 of the Revised Codes of Dakota territory 1877, which, like § 6295, Rev. Codes 1905, did not, even by inference, declare the artisan's lien to be a prior lien to the mortgage. The same was, nevertheless, in Garr v. Clements, held

superior to the mortgage lien as entitled at common law to such priority, though the statute of 1890 was the one directly passed upon; and such holding and the reasoning upon which it is based are equally applicable to § 6295, Rev. Codes 1905, which section must be held to grant the artisan a superior lien to that of the mortgagee, even though the same is not declared by statute. And such was the law in 1906, when plaintiff took this mortgage. So, without any reference to chap. 168, Laws of 1907, plaintiff's mortgage must be held to be subordinate to the lien of defendants, as such was the law at the time the mortgage was taken, where the party entitled to the lien has retained possession, as have defendants, at all times after the completion of the work. And this is decisive of the rights of appellant, as chap. 168 of the Laws of 1907, if applicable, is but declaratory of the equivalent of § 6295, Rev. Codes 1905, as supplemented by the common law concerning priority, which by express terms it purports to amend. It consists, among other things, in declaring the procedure necessary for the perfection and foreclosure of the lien, the notice therein provided for perhaps being inspired by what is said in Garr v. Clements, 4 N. D. 559, on page 564, 62 N. W. 640, where a defect in the statute of 1890, in failing to provide notice to be given to mortgagees of record, is pointed out. It is not necessary, therefore, to pass upon the constitutionality of chap. 168 of the Session Laws of 1907, although defendants have also perfected their lien by filing their lien statement and account thereunder. It may be assumed that such statute is unconstitutional and void in its entirety, but yet Boyle Brothers are entitled to prevail under their lien, dependent on possession, which would then be valid under § 6295, Rev. Codes 1905, they having at all times, after completion of this work, retained possession of the personal property upon which the work was performed under a claim of lien therefor, demanding payment of their charges for labor, material, and repairs. If § 168 is constitutional, Boyle Brothers, having strictly complied therewith, are then certainly entitled to prevail, as possessing a prior lien, not only declared by common law, but expressly defined by chap. 168, Laws of 1907. Plaintiff is thus caught upon one horn or the other of the dilemma, one or the other of which he must choose. Hence he is in no position to exact a holding upon the constitutionality of the law of 1907, as any discussion thereof must be unnecessary to a decision. Under such circumstances, it is the duty of

the court to refrain from passing upon constitutional questions. This likewise disposes of whether appellant waived its rights under its mortgage. The holding that the artisan's lien in any event is prior to the mortgage lien is the equivalent of deciding that appellant had no rights to waive under its mortgage. Nor is there any merit in appellant's contention that Arbogast, in buying the mortgaged property without written consent having been given the mortgagor to sell the same, could acquire no right or interest sufficient to constitute him an implied agent of the mortgagee, as is the owner of mortgaged property, for the authorization of repairs thereto, whose act as such binds the mortgagee and subordinates the mortgage lien to that of the artisan. Russell acquiesced in the contract for repairing, though the same was wholly immaterial, as Arbogast, by purchase from Russell, became the owner of said property, and as such enjoyed all rights formerly possessed by Russell. True, the sale by Russell without written consent of the plaintiff constituted commission of a crime by the seller under § 9442, Rev. Codes 1905, but no liability, civil or criminal, unless arising by implied contract from provisions of the mortgage of record (Ellestad v. Northwestern Elevator Co. 6 N. D. 88–93, 69 N. W. 44) was assumed by the purchaser by a mere purchase of mortgaged property. Sanford v. Duluth & D. Elevator Co. 2 N. D. 6–10, 48 N. W. 434; Black v. Minneapolis & N. Elevator Co. 7 N. D. 129–134, 73 N. W. 90; Willard v. Monarch Elevator Co. 10 N. D. 400–407, 87 N. W. 996; Gorder v. Hilliboe, 17 N. D. 281–284, 115 N. W. 843; Taugher v. Northwestern P. R. Co. 21 N. D. 111, 112, 129 N. W. 747. And Arbogast therefore became owner thereof, and as such could repair the property and subject it to an artisan's lien for repairs so authorized. The judgment appealed from is affirmed.

On Petition for Rehearing.

Goss, J. Appellants filed a petition for rehearing, challenging as judicial legislation consideration by the court of the common law priority of this common-law artisan's lien, and maintaining that because of § 6295, Rev. Codes 1905, in terms recognizing an artisan's lien but silent on its priority, the court must find that no priority of such lien can exist, and that any priority must be given by statute under § 6138, Rev.

Codes 1905, the general statute concerning priority of liens, providing that, "other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia." In other words appellant asserts that in the determination of this question we are limited to a construction of statutes, and cannot resort to the common-law rights of the parties to determine the question of priority where the statute is silent thereon; and counsel cite in support of that contention § 4006, Rev. Codes 1905, a provision of the Civil Code, reading: "In this state there is no common law in any case where the law is declared by the Codes," and also cite § 10,509, Rev. Codes 1905, next to the last provision of the Code of Criminal Procedure, providing that "the provisions of this Code, so far as they are the same as existing statutes, must be construed as continuations thereof, and not as new enactments." From these statutes, appellant reasons that there can be no common law on artisan's liens, the Code having spoken on the subject by the declaration therein providing for such a lien, and that, treating § 10,509 as a general provision applicable to all the Codes and all Code provisions, the statutes are to be considered as continuations of statutes, but not as continuations of the common law in all instances civil and criminal. To emphasize this claim, appellant has cited § 4 of the Civil Code of California reading: "The provisions of this Code, so far as they are substantially the same as existing statutes *or the common law,* must be construed as continuations thereof, and not as new enactments." Under this California Code provision, and its construction by the courts of that state—Quist v. Sandman, 154 Cal. 748, 99 Pac. 204, at pages 207, 208; Michaelson v. Fish, 1 Cal. App. 116, 81 Pac. 662; Lux v. Haggin, 69 Cal. 255, at page 384, 10 Pac. 674; and Sharon v. Sharon, 75 Cal. 1, at page 13, 16 Pac. 345—statutes are but continuations of the basic common law, a determination of rights under which necessitates consideration of both the common law and the statute, where the statute is either silent or ambiguous. But appellant parallels this provision of the Civil Code of California with § 10,509, Rev. Codes 1905, a portion of our Code of Criminal Procedure, nearly identical, but omitting the phrase of the California Civil Code provision of "or the common law," and therefore contends that in this state in no instance are the statutes to be considered as continuations of the common law. It is urged that the common law

is excluded by our Code provision 4006, reading: "In this state there is no common law in any case where the law is declared by the Codes." This decision then narrows to the question of whether the common-law priority still exists notwithstanding § 6295, declaring a lien in the possessor of the property with the right of possession until the charges for repairs are paid, but silent on the question of priority of such lien unless governed by § 6138, declaring priority of liens according to time of creation "other things being equal," and § 6724, Rev. Codes 1905, that "the rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this Code. This Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." In its last analysis the decision resolves to whether the provisions of our Civil Code are to be considered as continuations of the common law as well as continuations of statute; or whether, on the contrary, the fact that a common-law lien has been declared by statute makes all rights thereunder dependent solely on the statute, without regard to common-law incidents, rights, or history, in which case a priority that would here exist under the same circumstances at common law as an incident to the same lien given by common law as here declared, also by statute, would be negatived and defeated by the mere silence of the statute on priority. If the statute is to be considered as but a continuation of the common-law lien, without regard to common-law priority, the priority still exists, the statute then declaring the lien and the common law defining priority. If the statute is not a continuation of the common law, but works an abolition of all common law on the subject, inclusive of the incident of priority, then some general statute must be found conferring priority, the particular statute giving none, otherwise there is no priority of artisans' liens over earlier liens.

The conclusions in the main opinion are sustained by all authority, and appellant's attack thereon loses all force in the face of the fact that common law is by statute, §§ 4003, 4004, and 4005, Rev. Codes 1905, declared to be the basic law thereby requiring statutory enactment, to be considered as but a continuation of the common law as to civil rights and liabilities. Section 4003 reads: "The will of the sovereign power is expressed (4) by the decisions of the tribunals enforcing those rules

which, though not enacted, form what is known as customary or common law." And § 4005 declares what shall be evidence of such common law. By statute the provisions of the Civil Code are to be considered as but continuations of the common law as well as other statutes, and no distinction exists in this respect between this state and California, notwithstanding § 10,509, Rev. Codes 1905. Plainly this provision of the Code of Criminal Procedure can have no relation to or bearing upon the question of whether the provisions of the Civil Code and civil statutes are to be considered as continuations of the common law. Each of the seven Codes was passed as a separate bill in the Revision of 1895, and as an entirety. The term "Code" as used in many places in each of the seven Codes must refer solely to the Code of which it was a part at the time of its enactment, and this provision has reference to criminal procedure, and is not a general provision applicable to all of the seven Codes as separately enacted. The Code provisions relative to crimes and criminal procedure, as §§ 8531–8535–8538 and 10,509, prescribe a different rule as to such than generally applies to civil rights and remedies. Our penal statutes undertake to and do define all our crimes, and our Code of Criminal Procedure in the main declares the process of administration of our penal statutes. But it is vastly different as to civil rights and liabilities, to completely codify which would be an absolute impossibility. Manifestly civil statutes must be regarded as they have always been construed to be, but continuations, affirmances, modifications, or repeals of basic common law governing principles, and to be interpreted in the light of the common law as has been done for generations. If authority is needed for our conclusions, the following will suffice:

Unless otherwise provided by statute, all "statutes are to be interpreted in the light of the common law, with reference to the principles of the common law in force at the time of their passage." "The presumption against an intent to alter the existing law beyond the immediate scope and object of the enactment under construction applies as well where the existing law is statutory as where it is promulgated by decisions." "The principle is recognized that an intent to alter the common law beyond the evident purpose of the act is not to be presumed. It has indeed been expressly laid down that 'statutes are not presumed to make any alteration in the common law further or otherwise than the

is excluded by our Code provision 4006, reading: "In this state there is no common law in any case where the law is declared by the Codes." This decision then narrows to the question of whether the common-law priority still exists notwithstanding § 6295, declaring a lien in the possessor of the property with the right of possession until the charges for repairs are paid, but silent on the question of priority of such lien unless governed by § 6138, declaring priority of liens according to time of creation "other things being equal," and § 6724, Rev. Codes 1905, that "the rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this Code. This Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." In its last analysis the decision resolves to whether the provisions of our Civil Code are to be considered as continuations of the common law as well as continuations of statute; or whether, on the contrary, the fact that a common-law lien has been declared by statute makes all rights thereunder dependent solely on the statute, without regard to common-law incidents, rights, or history, in which case a priority that would here exist under the same circumstances at common law as an incident to the same lien given by common law as here declared, also by statute, would be negatived and defeated by the mere silence of the statute on priority. If the statute is to be considered as but a continuation of the common-law lien, without regard to common-law priority, the priority still exists, the statute then declaring the lien and the common law defining priority. If the statute is not a continuation of the common law, but works an abolition of all common law on the subject, inclusive of the incident of priority, then some general statute must be found conferring priority, the particular statute giving none, otherwise there is no priority of artisans' liens over earlier liens.

The conclusions in the main opinion are sustained by all authority, and appellant's attack thereon loses all force in the face of the fact that common law is by statute, §§ 4003, 4004, and 4005, Rev. Codes 1905, declared to be the basic law thereby requiring statutory enactment, to be considered as but a continuation of the common law as to civil rights and liabilities. Section 4003 reads: "The will of the sovereign power is expressed (4) by the decisions of the tribunals enforcing those rules

which, though not enacted, form what is known as customary or common law." And § 4005 declares what shall be evidence of such common law. By statute the provisions of the Civil Code are to be considered as but continuations of the common law as well as other statutes, and no distinction exists in this respect between this state and California, notwithstanding § 10,509, Rev. Codes 1905. Plainly this provision of the Code of Criminal Procedure can have no relation to or bearing upon the question of whether the provisions of the Civil Code and civil statutes are to be considered as continuations of the common law. Each of the seven Codes was passed as a separate bill in the Revision of 1895, and as an entirety. The term "Code" as used in many places in each of the seven Codes must refer solely to the Code of which it was a part at the time of its enactment, and this provision has reference to criminal procedure, and is not a general provision applicable to all of the seven Codes as separately enacted. The Code provisions relative to crimes and criminal procedure, as §§ 8531–8535–8538 and 10,509, prescribe a different rule as to such than generally applies to civil rights and remedies. Our penal statutes undertake to and do define all our crimes, and our Code of Criminal Procedure in the main declares the process of administration of our penal statutes. But it is vastly different as to civil rights and liabilities, to completely codify which would be an absolute impossibility. Manifestly civil statutes must be regarded as they have always been construed to be, but continuations, affirmances, modifications, or repeals of basic common law governing principles, and to be interpreted in the light of the common law as has been done for generations. If authority is needed for our conclusions, the following will suffice:

Unless otherwise provided by statute, all "statutes are to be interpreted in the light of the common law, with reference to the principles of the common law in force at the time of their passage." "The presumption against an intent to alter the existing law beyond the immediate scope and object of the enactment under construction applies as well where the existing law is statutory as where it is promulgated by decisions." "The principle is recognized that an intent to alter the common law beyond the evident purpose of the act is not to be presumed. It has indeed been expressly laid down that 'statutes are not presumed to make any alteration in the common law further or otherwise than the

act does expressly declare; therefore in all general matters the law presumes the act did not intend to make any alteration; for if the parliament had that design they would have expressed it in the act' that 'the rules of the common law are not to be changed by doubtful implication.'" Endlich, Interpretation of Statutes, § 127. "First in importance . . . is the consideration of what was the rule at the common law, 'to know what the common law was before the making of a statute whereby it may be seen whether the statute was introductory of a new law or only affirmative of the common law, is the very lock and key to set open the windows of the statute.' Further, as a rule of exposition, statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified and besides that has been plainly pronounced; for if the parliament had had that design it is naturally said they would have expressed it," Potter's Dwarris on Statutes and Constitutions, p. 185, concerning which rule that author quotes Chancellor Kent as follows: "This has been the language of courts in every age; and when we consider the constant, vehement, and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction." Sections 454, 455, of 2 Lewis's Sutherland Statutory Construction, 2d ed., announce the same rule that "in all doubtful matters and when the statute is in general terms it is subject to the principles of the common law; it is to receive such construction as is agreeable to that law in cases of the same nature. *A statute in affirmance of a rule of the common law will be construed as to its consequences in accordance with such law.*" See Lavin v. Bradley, 1 N. D. 291, 47 N. W. 384; Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313; Garr v. Clements, 4 N. D. 559, at pages 562, 563, 62 N. W. 640. This rule is here applicable, as the statute, § 6295, declaring the right to an artisan's lien dependent on possession, is but declaratory of that common-law lien. "In some of the states of the Union the common law of England and English statutes enacted prior to a specific time have been expressly adopted by a

constitutional provision. In others they have been adopted by statute." 8 Cyc. 373, in note 32 of which mention is made that this state has by §§ 4003, 4005, and 4006 by statute expressly adopted the common law as the fundamental law, except as modified or supplanted by statute or ordinance. Section 6737, Rev. Codes 1905, a general provision of the Code of Civil Procedure, also in express terms in prescribing the rule of construction of civil statutes recognizes such fact by the provision that, "but technical words and phrases and such other as have acquired a peculiar and appropriate meaning *in law* or are defined by statute are to be construed according to such peculiar and appropriate meaning or definition." California by express enactment in 1850 adopted the common law of England evidently to set at rest any question of conflict between whether the English common law or the civil law, in force in the adjoining Mexican territory, and once in effect in such parts of that state as had been Mexican territory, would prevail. See the discussion in Lux v. Haggin, 69 Cal. 255, at page 384, 10 Pac. 674. As to the statute being declared to be but a continuation of the common law to be construed therewith, see Sharon v. Sharon, 75 Cal. 1, at page 13, 16 Pac. 345: "But the purpose of a statute can only be derived from its words read in the light of the previous law. If it is so confused and uncertain that it can be given no intelligible meaning, we must consider the common law unchanged by it, . . . and *it is a cardinal rule of interpretation* that the common law continues except as altered by the statute." It is true that California has a statute to this effect (§ 5 of the Civil Code of that state) that, "the provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments," which statute has been in force since 1872, and that we have no statute explicitly so providing, but the omission is immaterial as to civil rights and remedies in the face of the fact that the common law is by statute adopted as to such rights and liabilities, the statutes having since territorial times declared the same consequences in the statutory provisions that, "the evidence of the common law is found in the decisions of the tribunals," and "there is no common law in any case where the law is declared by the Codes," §§ 5 and 6, Civil Code of 1877, and §§ 4005, 4006, Rev. Codes 1905. Where the Codes declare the law they preclude application of the common law, which as to the matter

covered by the Codes during the existence of the Code provision becomes nonexistent, but inasmuch as the common law is the basis it governs as to matters wherein the law is not so declared. The Codes being but a continuation of the common law, to be construed therewith to constitute the great complete body of law, the two must be considered together where, as here, the Code but declares the lien already recognized at common law, and is silent on the question of priority of such common-law lien. State ex rel. Morris v. Sullivan, 26 L.R.A.(N.S.) 514, and note (81 Ohio St. 79, 90 N. E. 146, 18 Ann. Cas. 139).

But counsel in support of his contention would emphasize the fact that the territorial statute declared no priority of this lien, and that by the Laws of 1890 priority was granted, which provision was repealed in the Revision of 1895, which priority provision has been again expressly re-enacted by chap. 168 of the Laws of 1907; and counsel inquires how the double repeal and enactment on priority can be considered other than as evidencing a successive legislative expression of denial and reaffirmance of priority, and that the lien by mortgage of the appellant having attached at a time when priority of artisans' liens was thus refused recognition and by inference denied, upon what basis can it be found that a lien at common law could exist during such interval? In territorial times, and until the enactment of the statute of 1890 granting it, priority existed at common law, as is held in Garr v. Clements, 4 N. D. 559, 62 N. W. 640. Upon repeal of the statute of 1890, no mention of priority being made in the repealing statute, and there being nothing to positively evidence a legislative intention to the contrary, the common-law rule as to priority was revived; "the repeal of the statute which abrogated a common-law rule revives that rule." Beaven v. Went, 155 Ill. 592, 31 L.R.A. 85, 41 N. E. 91; Baum v. Thoms, 150 Ind. 378, 65 Am. St. Rep. 368, 50 N. E. 357; Burleigh County v. Rhud, 23 N. D. 362, 136 N. W. 1082; Lewis's Sutherland Stat. Constr. § 294, quoting above rule and declaring same applicable "even though there is a statute that a repeal of the repealing act shall not revive the act repealed," similar to § 6739, Rev. Codes 1905, identical with § 20 of Civil Code of California in force since 1872. "Where a statute repeals the common law, and is then itself repealed, the common law is revived, and the authorities say that if a statute that is declaratory of the common law is repealed the common law more clearly

remains in force for the reason that the statute is an affirmance of it." Harper v. Middle States Loan, Bldg. & Constr. Co. 55 W. Va. 149, 46 S. E. 817, 2 Ann. Cas. 42 at page 45; Endlich, Interpretation of Statutes, § 475. Under this rule, and the presumption that the common law is abrogated by statute only so far as is necessary to give force to the statute and the legislative intent thereby, and no farther—State ex rel. Morris v. Sullivan, 81 Ohio St. 79, 26 L.R.A.(N.S.) 514, 90 N. E. 146, 18 Ann. Cas. 139; Chicago & E. R. Co. v. Luddington, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273, citing much authority—the territorial statute, subdiv. 2, § 1814 of Civil Code of 1877, did not efface the common-law priority of artisans' liens. Chapter 88, Laws of 1890, by declaring that priority was but declaratory of the prevailing common law and repeal of the Laws of 1890, instead of leaving no law on the subject, revived or made applicable the common law, and such was the situation when this appellant's mortgage was taken. That the legislature has by chap. 168, Laws of 1907, again re-enacted the common-law provision of priority, is of no consequence as a legislative construction on the question or otherwise. If it be assumed to be a legislative construction, as contended, it is not binding on the courts, as it is beyond legislative power or province to interpret retrospectively by legislative act prior statute or common law. The duty and power of interpretation of past legislative enactment lies in the courts alone. But against revival of the common law, it is contended that the legislature cannot be presumed to have needlessly declared a statutory priority when a common-law priority existed, and on that assumption it is urged that no priority existed before 1890 or during the interval from January 1, 1896 to 1907. If appellant's basis of exclusion from common law by the statute of every subject touched upon by statute is accepted, this rule would be applicable. But the civil statutes being but continuations of the prior common law to be construed therewith, the fact that a statute declares one incident of the common law on the subject does not of itself and alone signify an exclusion of all other common law touching rights on which the statute is silent. Nearly all the substantive law as contained in our Civil Code is but declaratory of established and prior existing common law, a fact which of itself establishes such legislation to be needless except to render the same accessible and easy of reference, the principal benefit of our codification of a small portion of common-

law principles. Appellant insists that the general statute as to priority of liens, § 6138, Rev. Codes 1905, first found as § 1711, Civil Code of 1877, declaring that "other things being equal, different liens upon the same property have priority according to the time of their creation," here controls to exclude any common-law priority. This statute is but another principle of the common law codified. By its terms only when "other things being equal" is it applicable. The exception made is to exempt from its application instances, as here, where other things are not equal, in that the lien recognized by statute has a common-law origin. Adjudications on statutory liens are in no wise applicable. Hence, Moher v. Rasmusson, 12 N. D. 71, 95 N. W. 152, concerning a purely statutory thresher's lien, is not in point, and the same is true with First Nat. Bank v. Scott, 7 N. D. 312, 75 N. W. 254, as to an agister's statutory lien. Manifestly a lien dependent solely on the statute for its creation and priority is measured in such respects by the enactment as its source, and definitive of rights thereunder. This distinction has already been made between statutory and common-law liens in our decisions—Lavin v. Bradley, 1 N. D. 291, at page 296, 47 N. W. 384, where the following is found: "In construing the seed lien statute, the fact must not be overlooked that the lien given is wholly statutory in its nature and origin. It was unknown at common law, and hence can neither be acquired nor enforced unless there has been a substantial compliance with the act of the legislature from which the lien arises;" quoted in Parker v. First Nat. Bank. 3 N. D. 87, 54 N. W. 313, and distinguished again in Garr v. Clements, 4 N. D. 559 at pages 562, 563, 62 N. W. 640. There the statute was upheld as not by retrospective operation according to its provisions abrogating obligation of contracts, because at common law, in the absence of the statutory priority by statutes of 1890, priority existed under the territorial Code of 1877. "An unbroken line of authority, a settled rule of the common law, sound principle, and a due regard for business convenience, all join to sustain this statute." The same reasons sustain our holding of a common-law priority of artisans' liens in 1906, when appellant's contract lien became effective. Our statute of 1907 is not therefore retrospective in operation as to appellant's contract rights in the priority. Neither does Duncan v. Great Northern R. Co. 17 N. D. 610, 19 L.R.A. (N.S.) 952, 118 N. W. 826, hold contrary to our conclusions. Instead

it recognizes that an exemption from liability may arise to exonerate a common carrier as to goods received for transportation in other instances than those declared by § 5690, Rev. Codes 1905, and in doing so resort to common-law principles is approved. In addition to the express conditions enumerated in the statute as exonerating the carrier, the court says: "Where the shipper interferes with the property after accepted by the railway company, and the loss is occasioned by such interference, it may well be contended that the carrier is *also relieved.*" The court there divided on whether the statute in question was intended as a complete codification or in part a departure from the common law, in effect thereby recognizing the necessity of the construction of the statute in the light of the common law as to the carrier's liability. The case is to such extent authority against appellant's contention. Nor are the South Dakota holdings of Banbury v. Sherin, 4 S. D. 88, 55 N. W. 724, and McClain v. Williams, 11 S. D. 227, 49 L.R.A. 610, 74 Am. St. Rep. 791, 76 N. W. 930, contrary to principles here announced. These holdings are that the statutes under consideration there covered the case, and thereby excluded the common-law contentions urged, and in the last case it was held, also that if the ambiguous statute under construction be considered supplemented by the common law as to rights of third persons under consideration, the whole statute itself would be void as unconstitutional, and hence such an interpretation was adopted as would uphold the statute, and it was held not to cover the property of third persons. This was remarked as an aid or added reason for that holding on an ambiguous statute. McClain v. Williams and Duncan v. Great Northern R. Co. supra, may well be considered as authority inferentially contrary to appellant's contention.

The petition for rehearing is denied.

SPALDING, Ch. J. I concur in denying petition for rehearing.

RAY SWALLOW v. FIRST STATE BANK, a Corporation.

(148 N. W. 630.)

Motion for new trial — sufficiency.

1. Notice of motion for new trial examined, and *held* sufficient, under § 7064, Rev. Codes 1905.

Mortgage — discharge of record — refusing to do so — common-law penalty — tort — statutory provision — exemplary damages.

2. Chapter 176, Sess. Laws 1907, amends the common-law penalty for the tort of refusing to discharge of record a mortgage that has been paid, and the penalties provided by said section are in lieu of exemplary damages.

Opinion filed June 6, 1914. Rehearing denied September 9, 1914.

Appeal from the District Court of Hettinger County, *Crawford* and *Nuchols*, JJ.

Affirmed.

J. K. Murray, for appellant.

It is a jurisdictional prerequisite to the granting of a new trial that the motion therefor shall set forth the grounds upon which it is made. Rev. Codes, § 7064; Hall v. Harris, 1 S. D. 279, 36 Am. St. Rep. 730, 46 N. W. 931.

Specifications of error are jurisdictional prerequisites. French v. Chicago, 26 S. D. 125, 128 N. W. 498; Jackson v. Ellerson, 15 N. D. 533, 108 N. W. 241.

The pretended specifications of error are defective because they fail to point out the separate errors of which complaint is made. Rev. Codes, § 7058; Pease v. Magill, 17 N. D. 166, 115 N. W. 260; Bertelson v. Ehr, 17 N. D. 339, 116 N. W. 335; State v. School Dist. 18 N. D. 617, 138 Am. St. Rep. 787, 120 N. W. 555; Raymond v. Thexton, 7 Mont. 313, 17 Pac. 260; Herbert v. Dufur, 23 Or. 462, 32 Pac. 302; Mack v. Parkieser, 53 Neb. 528, 74 N. W. 38; Fletcher v. Brewer, 88 Neb. 196, 129 N. W. 288; Diers v. Mallon, 46 Neb. 121, 50 Am. St. Rep. 598, 64 N. W. 722; Minot Flour Mill Co. v. Swords, 23 N. D. 571, 137 N. W. 828; Hughes v. Hill, 30 S. D. 255, 138 N. W. 290.

Where several acts of error are assigned jointly, all of such acts must be erroneous in order to sustain the exception. Bowman v. Phillips, 47 Ind. 341; Cincinnati, H. & I. R. Co. v. Madden, 134 Ind. 462, 34 N. E. 230; Good v. Daland, 121 N. Y. 1, 24 N. E. 15; Hall v. Susskind, 120 Cal. 559, 53 Pac. 46.

If error was committed by the court, same was waived by defendant when it introduced evidence in support of its defense. Pease v. Magill, 17 N. D. 166, 115 N. W. 260; Wheaton v. Liverpool & L. & G. Ins.

Co. 20 S. D. 62, 104 N. W. 850; Lowry v. Piper, 20 N. D. 637, 127 N. W. 1046; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224.

A specification is not good when based upon a bad exception. State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. 17 N. D. 257, 16 L.R.A. (N.S.) 227, 115 N. W. 846; Bohnert v. Bohnert, 95 Cal. 444, 30 Pac. 590; Joyce v. White, 95 Cal. 236, 30 Pac. 524.

Assignment that a group of instructions is erroneous, is insufficient if one of them was properly given. Ledwith v. Campbell, 1 Neb. (Unof.) 695, 95 N. W. 838; Fletcher v. Brewer, 88 Neb. 196, 129 N. W. 288; Diers v. Mallon, 46 Neb. 121, 50 Am. St. Rep. 598, 64 N. W. 722; Pennsylvania Co. v. Sears, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; Ohio & M. R. Co. v. McCartney, 121 Ind. 385, 23 N. E. 258; Chicago Furniture Co. v. Cronk, 35 Ind. App. 591, 74 N. E. 627.

Damages and penalty, or either one without the other, is recoverable. Laws 1907, chap. 176; Greenberg v. Union Nat. Bank, 5 N. D. 483, 67 N. W. 597; Kronebusch v. Raumin, 6 Dak. 243, 42 N. W. 656; Jones v. Fidelity Loan & T. Co. 7 S. D. 122, 63 N. W. 553.

Where tender and offer of payment are made, and no objection is made at the time, as to conditions attached, the same are waived and the offer is good. Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115; Rev. Stat. 6562; Greenberg v. Union Nat. Bank, 5 N. D. 483, 67 N. W. 597; Jones v. Fidelity Loan & T. Co. 7 S. D. 122, 63 N. W. 553; Wilkins v. Western U. Teleg. Co. 68 Miss. 6, 8 So. 678; Western U. Teleg. Co. v. Lindley, 89 Ga. 484, 15 S. E. 636.

Exemplary damages may be recovered in an action for failure to release a mortgage. 27 Cyc. 1427; Chinn v. Wagoner, 26 Mo. App. 678; Mickie v. McGehee, 27 Tex. 134; People v. Winters, 125 Cal. 325, 57 Pac. 1067; State v. Carter, 15 Wash. 121, 45 Pac. 745; State v. Winney, 21 N. D. 72, 128 N. W. 680; First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 280, 91 N. W. 436.

Failure to request certain instructions waives the failure of the court to instruct on such points. Landis v. Fyles, 18 N. D. 587, 120 N. W. 566; State v. Fleming, 20 N. D. 105, 126 N. W. 565; Garrigan v. Kennedy, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 Ann. Cas. 1125.

Not necessary that refusal to satisfy a mortgage be wilful and malicious. Laws 1907, chap. 176; Renfro v. Adams, 62 Ala. 302; Rev.

Stat. 7175; N. D. Laws 1907, chap. 177; Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390.

Specification that the evidence is insufficient, must state in what particular, and specifically point out in what respects the same is insufficient. Rev. Codes, § 7058; Baumer v. French, 8 N. D. 319, 79 N. W. 340; Jackson v. Ellerson, 15 N. D. 533, 108 N. W. 241.

Conclusions of law, in this respect, are insufficient. Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Mor. Min. Rep. 26.

A debtor may make his offer, conditioned upon the performance of an obligation to which he is rightfully entitled. Rev. Codes 1905, § 5257; Ugland v. Farmers' & M. State Bank, 23 N. D. 536, 137 N. W. 572; Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115; Drake v. Great Northern R. Co. 24 S. D. 19, 123 N. W. 82.

Where objection is made to the sufficiency of the evidence, facts, and not conclusions of law, or mere evidence, must be specified. N. D. Laws 1907, chap. 176, § 6173; Hall v. Hurd, 40 Kan. 740, 21 Pac. 585; Coveny v. Hale, 49 Cal. 552; Cal. Code, § 659; 3 Kerr's Cal. Cyc. pt. 1, p. 1084; King v. Lincoln, 26 Mont. 157, 66 Pac. 836; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Mor. Min. Rep. 26; Pritchard Rice Mill. Co. v. Jones, — Tex. Civ. App. —, 140 S. W. 817; Thorne v. Hammond, 46 Cal. 530; Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123; Zickler v. Deegan, 16 Mont. 198, 40 Pac. 410; First Nat. Bank v. Roberts, 9 Mont. 323, 23 Pac. 718; Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; Haight v. Tryon, 112 Cal. 4, 44 Pac. 318; Jackson v. Ellerson, 15 N. D. 533, 108 N. W. 241.

The evidence must show that plaintiff was damaged by reason of the giving and recording of the mortgage. King v. Lincoln, 26 Mont. 157, 66 Pac. 836; 13 Cyc. 215; 2 Sutherland, Damages, § 416; Chicago, P. & St. L. R. Co. v. Lewis, 48 Ill. App. 274; St. Louis, I. M. & S. R. Co. v. Saw, 68 Ark. 218, 57 S. W. 258; 1 Sutherland, Pl. p. 245; Riser v. Walton, 78 Cal. 490, 21 Pac. 362; Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743; Weaver v. Mississippi & R. River Boom Co. 28 Minn. 542, 11 N. W. 113; Bank of British Columbia v. Port Townsend, 16 Wash. 450, 47 Pac. 896.

Failure to specify insufficiency of the evidence on any given point is a waiver of any obligation thereto. Rauer v. Fay, 128 Cal. 523, 61

Pac. 90; Nelson v. Jordeth, 15 S. D. 46, 87 N. W. 140; Thompson v. Cunningham, 6 N. D. 426, 71 N. W. 128; Todd v. Winants, 36 Cal. 129; Wetherbee v. Carroll, 33 Cal. 549; Laird v. Upton, 8 N. M. 409, 45 Pac. 1010; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Smith v. Kunert, 17 N. D. 120, 115 N. W. 76; Bertelson v. Ehr, 17 N. D. 339, 116 N. W. 335; McNish v. Wolven, 22 S. D. 621, 119 N. W. 999.

In any event, the evidence is sufficient to sustain the verdict. Williams v. Hawley, 144 Cal. 97, 77 Pac. 762; Hayne, New Trials, New ed. §§ 98, 475; Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336; Razzo v. Varni, 81 Cal. 289, 22 Pac. 848.

Crane & Stone, for respondent.

All points relied upon must be clearly specified in the statement of errors filed with the notice of appeal. 29 Cyc. 942, 943; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762.

The burden of proving a tender rests upon the party alleging it. Nothing is presumed in favor of an alleged tender. Must be present, absolute, and unconditional, and so understood. 35 Cyc. 178-D; Pittsburg Plate Glass Co. v. Leary, 25 S. D. 256, 31 L.R.A.(N.S.) 746, 126 N. W. 271, Ann. Cas. 1912B, 928; Hopkins v. Gray, 51 Iowa, 340, 1 N. W. 637; Tompkins v. Batie, 11 Neb. 147, 38 Am. Rep. 361, 7 N. W. 747; Williams v. Eikenbery, 22 Neb. 210, 34 N. W. 373; TePoel v. Shutt, 57 Neb. 592, 78 N. W. 288; Brace v. Doble, 3 S. D. 110, 52 N. W. 586; Mann v. Roberts, 126 Wis. 142, 105 N. W. 785; Elderkin v. Fellows, 60 Wis. 339, 19 N. W. 101; Bailey v. Buchanan County, 115 N. Y. 297, 6 L.R.A. 562, 22 N. E. 155; 27 Cyc. 1407, (11); Parks v. Allen, 42 Mich. 482, 4 N. W. 227; Fields v. Danenhower, 65 Ark. 392, 43 L.R.A. 519, 46 S. W. 938; 38 Cyc. 179, E.

Where a man who can read executes an instrument without reading it, trusting to the party to whom it is given to read it to him, he will be guilty of negligence. Woollen v. Ulrich, 64 Ind. 120; Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co. 37 L.R.A. 598, note; Bacon v. Markley, 46 Ind. 116; Hazard v. Griswold, 21 Fed. 178; Raymond v. Edelbrock, 15 N. D. 231, 107 N. W. 194.

Where mortgage is in good faith, placed in the hands of an attorney for foreclosure, a tender must include the lawful attorney's fee. 27 Cyc. 1408 (lv), 1428 G.; Mjones v. Yellow Medicine County Bank, 45

Minn. 335, 47 N. W. 1072; McEldon v. Patton, 4 Neb. (Unof.) 259, 93 N. W. 938; 38 Cyc. 178 D.; Parks v. Allen, 42 Mich. 482, 4 N. W. 227; Moore v. Norman, 43 Minn. 428, 9 L.R.A. 55, 19 Am. St. Rep. 247, 45 N. W. 857; Burrows v. Bangs, 34 Mich. 304; Canfield v. Conkling, 41 Mich. 371, 2 N. W. 191; Schumacher v. Falter, 113 Wis. 563, 89 N. W. 485; Johnson v. Huber, 117 Wis. 58, 93 N. W. 826.

The penalties provided by statute for refusal to satisfy mortgages are merely the measure of exemplary damages permitted. They are not in the nature of a fine or forfeiture, but of a penal nature, and must be strictly construed. Shields v. Klopf, 70 Wis. 69, 35 N. W. 284; 27 Cyc. 1425-5; Giffen v. Barr, 60 Vt. 599, 15 Atl. 190; Murray v. Brokaw, 67 Ill. App. 402; Kronebusch v. Raumin, 6 Dak. 243, 42 N. W. 656; 13 Cyc. 109, 118–N.; Louisville & N. R. Co. v. Sanders, 19 Ky. L. Rep. 1941, 44 S. W. 644; Baxter v. Campbell, 17 S. D. 475, 97 N. W. 386 and cases cited; Williams v. Newberry, 32 Miss. 256; Bowie v. Spaids, 26 Neb. 635, 42 N. W. 700; Crete v. Childs, 11 Neb. 252, 9 N. W. 55; Dunbier v. Day, 12 Neb. 596, 41 Am. Rep. 772, 12 N. W. 109; Farmers' Loan & T. Co. v. Montgomery, 30 Neb. 33, 46 N. W. 214.

In charging the jury, it is the duty of the judge to see that every case so goes to the jury that they may have clear and intelligent ideas about the points they are to decide. Brickwood's Sackett, Instructions to Juries, § 155; Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93.

Acceptance of offer or tender was duly and timely made. Moore v. Norman, 43 Minn. 428, 9 L.R.A. 55, 19 Am. St. Rep. 247, 45 N. W. 857; Union Mut. L. Ins. Co. v. Union Mills Plaster Co. 3 L.R.A. 90, 37 Fed. 286; Canfield v. Conkling, 41 Mich. 371, 2 N. W. 191; 27 Cyc. 1425–5, 1428–g; Burrows v. Bangs, 34 Mich. 304; Raymond v. Edelbrock, 15 N. D. 231, 107 N. W. 194; Woollen v. Ulrich, 64 Ind. 120; Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co. 37 L.R.A. 598, note; Bacon v. Markley, 46 Ind. 116; Hazard v. Griswold, 21 Fed. 178; 20 Cyc. 123–M, and notes; Brenot v. Brenot, 102 Cal. 294, 36 Pac. 672.

An order granting new trial on the ground of errors which occurred during the trial will not be reversed on appeal if it appear that any errors prejudicial to the respondent were committed on the trial. Re Crozier, 74 Cal. 180, 15 Pac. 618; McCarthy v. Loupe, 62 Cal. 300; Nilson v. Horton, 19 N. D. 187, 123 N. W. 397.

BURKE, J. On December 23, 1909, plaintiff borrowed from the defendant bank the sum of $725, and to secure the debt executed a chattel mortgage upon four horses and 600 bushels of wheat. At that time plaintiff was living upon a government homestead, but had not made sufficient residence to obtain patent. A real estate mortgage covering the government homestead, securing the same indebtedness, was signed by the plaintiff and was filed for record the following day. Plaintiff insists that this mortgage was signed by him through the fraud of the defendant's cashier, who placed the same among the other papers in such a way that it was signed without plaintiff's knowledge of its nature. There was also executed by plaintiff an application for a loan upon said government homestead in the sum of $1,000, which contains detailed answers to some twenty-seven questions regarding the plaintiff and his financial standing. Plaintiff insists that this application was signed by him under the same fraudulent circumstances. The defendant bank insists that plaintiff signed those instruments with full knowledge of their contents, and the cashier and another employee of the bank gave testimony substantiating this position. The note was extended by the bank until about the 23d day of March, 1912. In the meantime, plaintiff had a conversation with the cashier of the bank relative to the proposed real estate loan upon his homestead, and had informed the bank that he would need more than $1,000 to pay up his various debts, and the cashier had informed him that the bank could not negotiate such a loan, and that he might obtain a loan elsewhere. This conversation occurred in 1910. Plaintiff insists that this application for loan was signed shortly before this conversation. In the spring of 1912, plaintiff secured patent to his land, and had negotiated a loan elsewhere, and went into the banking establishment of the defendant, and asked the cashier how much he owed, and told him he had the money with him to make payment in full. There is some dispute as to the conversation that followed, but in the main it is agreed that Mr. Orr stated that the amount due upon the note was $845.80, but that the defendant bank demanded $50 damages on account of obtaining the real estate loan elsewhere. Plaintiff thereupon tendered the said sum of $845.80 in cash, and later deposited the same to the credit of the bank in another reputable bank as a tender of said amount. Mr. Orr, the cashier, testifies that the tender was made upon the express con-

dition that the bank release its claim for damages under the real estate loan application, while plaintiff, his attorney, and the officials of the other bank maintain that the tender was unconditional. Plaintiff at the same time demanded that the defendant bank satisfy the real estate and chattel mortgage, furnishing suitable forms and offering expenses; and brings this action under chapter 176, Sess. Laws 1907, to recover the penalty therein provided "for all damages which he may sustain by reason of such refusal," and for the forfeit of $100 for failure to discharge real estate mortgage, and $10 for failure to satisfy the chattel mortgage, as well as upon the common-law liability in tort. Trial was had to jury, where the issues were determined in favor of the plaintiff, and damages assessed in the sum of $800. Thereafter a statement of the case was settled containing specifications of error, specifications of particulars wherein the evidence was claimed insufficient to sustain the verdict, and exceptions to the instructions of the court to the jury. Thereafter and on the 16th day of May, 1913, the defendant filed the following motion for a new trial: "Comes now the defendant and moves the court to grant the defendant a new trial of said action. Said motion is made upon all of the records and files in said action, including the settled statement of the case, containing specifications of error and specifications of particulars therein." Upon the same day a hearing was had whereupon the plaintiff objected to hearing the same upon the grounds that said notice of motion for a new trial was defective and void, because it did not set forth the statutory grounds, or any grounds, for a new trial, and that the purported specifications of error incorporated in the statement of the case failed to specify the particulars relied upon, nor point out wherein the evidence is insufficient to sustain the verdict, and that the said specifications do not comply with the statute relative thereto. On the 9th day of June, the court granted a new trial and set forth four reasons upon which said order was based, as follows: "1. That the damages awarded by the jury are so excessive as to convince the court that they were awarded under the influence of passion or prejudice, or given as punitive damages under erroneous instructions by the court as to the amounts of punitive damages under the first and third causes of action alleged in the complaint. 2. That the evidence, especially that part of the evidence relating to damages, is insufficient to support the verdict. 3. That the instructions of the court

as to the rights of the jury to award punitive damages under the first and third causes of action alleged in the complaint are erroneous, to the prejudice of plaintiff. 4. That the instructions of the court, as to the amount which the jury might award to plaintiff as a penalty for failure to furnish a certificate of discharge or satisfaction of a lien upon personal property, when such lien was satisfied by the payment of the debt secured thereby, are erroneous, to the prejudice of plaintiff."

This appeal is from this order granting a new trial.

(1) Appellant insists that the trial court should not have entertained the motion for a new trial, because the same was insufficient. Said motion is meager, but refers specifically to the settled statement of the case wherein the errors are set forth. The motion was made under § 7064, Rev. Codes 1905, which has been since superseded by chapter 131, Sess. Laws 1913. Thus this decision will apply to a law which has ceased to exist. We content ourselves, therefore, with saying that we consider the notice sufficient under the law as it existed at the time the motion was made.

(2) The trial court gives four reasons for granting a new trial. We consider it unnecessary to discuss more than one of these. The instructions to the jury contain the following language: "If you find in favor of the plaintiff on the first and third causes of action in his complaint, that is, for the refusal to satisfy the real estate mortgage and the chattel mortgage; if you further find that the refusal of the defendant to execute a certificate of release and discharge of these mortgages was maliciously done, or was done in a spirit of ill-will and to harass and injure the plaintiff by so refusing, then you have a right to assess as exemplary damages such sum as you think should be assessed against the defendant for his wrongful conduct in that matter. Of course, if you do not find in favor of the plaintiff as to those causes of action, you cannot consider either actual damages or exemplary damages in either of those two causes of action."

The jury were thus advised that they might allow the actual damages which plaintiff had sustained, also the penalty provided by chapter 176, Sess. Laws 1907, of $100 for the real estate mortgage and $10 for chattel mortgage, and in addition might allow exemplary damages in case the refusal was tainted with malice. The verdict of $800 would indicate that the jury had assessed exemplary damages. Respondent

dition that the bank release its claim for damages under the real estate loan application, while plaintiff, his attorney, and the officials of the other bank maintain that the tender was unconditional. Plaintiff at the same time demanded that the defendant bank satisfy the real estate and chattel mortgage, furnishing suitable forms and offering expenses; and brings this action under chapter 176, Sess. Laws 1907, to recover the penalty therein provided "for all damages which he may sustain by reason of such refusal," and for the forfeit of $100 for failure to discharge real estate mortgage, and $10 for failure to satisfy the chattel mortgage, as well as upon the common-law liability in tort. Trial was had to jury, where the issues were determined in favor of the plaintiff, and damages assessed in the sum of $800. Thereafter a statement of the case was settled containing specifications of error, specifications of particulars wherein the evidence was claimed insufficient to sustain the verdict, and exceptions to the instructions of the court to the jury. Thereafter and on the 16th day of May, 1913, the defendant filed the following motion for a new trial: "Comes now the defendant and moves the court to grant the defendant a new trial of said action. Said motion is made upon all of the records and files in said action, including the settled statement of the case, containing specifications of error and specifications of particulars therein." Upon the same day a hearing was had whereupon the plaintiff objected to hearing the same upon the grounds that said notice of motion for a new trial was defective and void, because it did not set forth the statutory grounds, or any grounds, for a new trial, and that the purported specifications of error incorporated in the statement of the case failed to specify the particulars relied upon, nor point out wherein the evidence is insufficient to sustain the verdict, and that the said specifications do not comply with the statute relative thereto. On the 9th day of June, the court granted a new trial and set forth four reasons upon which said order was based, as follows: "1. That the damages awarded by the jury are so excessive as to convince the court that they were awarded under the influence of passion or prejudice, or given as punitive damages under erroneous instructions by the court as to the amounts of punitive damages, under the first and third causes of action alleged in the complaint. 2. That the evidence, especially that part of the evidence relating to damages, is insufficient to support the verdict. 3. That the instructions of the court

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contends that the penalty prescribed by the statute is intended by the legislature to be in lieu of exemplary damages, and cites us to 27 Cyc. 1425, § 5, which reads: "The statutes in force in several states, authorizing the recovery of a specific sum against a mortgagee who fails or refuses to release or satisfy the mortgage on receiving payment thereof, and on being requested to satisfy it, are not unconstitutional. They are not to be regarded as imposing a fine or forfeiture, but only as awarding exemplary damages, although they apply the same penalty in the case of all mortgages, whether large or small." Also page 1427, subdivision D: "In some states, in addition to the fixed penalty, the statute allows the recovery of such damages as may be shown, but these include only such damages as are the natural and necessary result of the mortgagee's breach of duty, and the mortgagor is not entitled to exemplary damages where he is not shown to have been actually injured."

Shields v. Klopf, 70 Wis. 69, 35 N. W. 284; Giffen v. Barr, 60 Vt. 599, 15 Atl. 190, wherein it is said: "At the trial the defendant contended that exemplary damages could not be recovered in this action, and excepted to the holding of the court to the contrary. We think this holding was error. Whether the plaintiff might not have maintained a common-law action for the neglect or refusal of the defendant to discharge the mortgage upon proper request after the mortgage was satisfied, and in such action have recovered upon proof of wilful neglect, exemplary damages need not be determined. This is not such an action, but an action upon the statute by which, for the refusal or neglect to discharge the mortgage . . . the plaintiff was entitled to recover a fixed sum, $10, and 'all damages occasioned' by the neglect or refusal. The fixed sum of $10 was evidently intended as the limit of the damages recoverable for the neglect or refusal above 'all damages occasioned thereby.' Exemplary damages are based upon the wilful misconduct of the defendant in the transaction, and are not recoverable as a matter of right, are largely in the sound discretion of the jury, and cannot be said to be damages occasioned by the neglect or refusal of the defendant. Having based his action upon the statute, the plaintiff must be confined in recovery of damages to the limits given by the statute. Hence, in this form of action, based as it is upon the statute, it was error for the court to tell the jury that the plaintiff could re-

cover exemplary damages, if he showed he was entitled to any actual damages." See also Mickie v. McGehee, 27 Tex. 135.

Appellant, however, contends that the citations above given apply only to actions brought to recover the statutory penalty, whereas the action herein is upon five separate counts, one of which relates to the statutory penalty, and another to the common-law cause of action in tort. We do not believe this makes any difference. The legislature, by singling out this particular tort and imposing $100 penalty in addition to all actual damages, undoubtedly considered the subject of penalties, and had they intended that punitive damages should be allowed in cases of malice, that provision would have been inserted in the law. In other words, having specifically legislated upon the subject of penalty, it will be presumed that the common law upon the subject was modified. It was thus error of the trial court to give the instruction above mentioned, and a new trial was properly granted.

C. L. KAYE v. J. B. TAYLOR.

(148 N. W. 629.)

Competent evidence — neglect and failure to produce by litigant — cannot introduce secondary and incompetent evidence — admitting introduction of incompetent evidence — court may exclude same from jury by proper instruction.

1. The neglect of a litigant to produce competent evidence which is in his possession does not justify a court in permitting the introduction of that which is secondary and incompetent, and if such court has inadvertently admitted the same under objection he can later correct the error by excluding the same from the consideration of the jury.

Adjournment allowed to enable litigant to obtain evidence — discretionary — abuse of discretion.

2. The granting of an adjournment to allow a litigant time in which to obtain evidence is discretionary with the trial court, and will only be interfered with where such discretion has been clearly abused. There is no such abuse of

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Note.—The admissibility of secondary evidence of contents of absent account books is treated in a note in 52 L.R.A. 604, and the admissibility of statements taken from such books is considered in a note in 52 L.R.A. 847.

discretion where a plaintiff who sues upon a book account has failed to bring with him his books of account so that they may be introduced during the process of the trial, and asks for an adjournment in order that he may obtain the same.

Application for adjournment — must disclose nature and competency and materiality — "certain documents" — insufficient.

3. An application for an adjournment for the purpose of obtaining evidence must disclose the nature and materiality of that evidence. Where the evidence sought to be obtained consists of books of account, a statement that the evidence sought to be obtained consists of "certain documents" is not sufficient.

Book account — suit upon — books in possession of plaintiff — oral evidence of debt incompetent.

4. Where a litigant sues upon a book account and the books of account are shown to be in his possession, a statement by the plaintiff that there is owing to him on such account a certain sum of money does not constitute competent evidence.

Book account — balance due — suit to recover — prima facie case — not made out by parole proof of debits and credits.

5. In a suit upon a balance due on a book account, a prima facie case is not made out by proof merely of the debits and a parole statement of a general balance where there is no competent proof of the credits, though it is admitted that there are such.

Opinion filed May 27, 1914. Rehearing denied September 9, 1914.

Appeal from the District Court of Burleigh County, *Winchester,* J.

Action to recover balance due on book account. Judgment for defendant. Plaintiff appeals.

Affirmed.

F. E. McCurdy, for appellant.

Plaintiff is not restricted to the use of his books and records to prove an account, but he may use other means of evidence to prove his account, such as admissions by the defendant, etc. 1 Enc. Ev. 157; 2 Elliott, Ev. § 1260; 3 Enc. Pl. & Pr. 536; Providence Tool Co. v. Prader, 32 Cal. 634, 91 Am. Dec. 598.

Where evidence, admittedly incompetent, is admitted on the trial, the court cannot direct a verdict against party offering same. McCloud v. O'Neall, 16 Cal. 392; Pierce v. Jackson, 21 Cal. 641; Watt v. Nevada C. R. Co. 23 Nev. 163, 62 Am. St. Rep. 772, 44 Pac. 423, 46 Pac. 52, 726; Choctaw & M. R. Co. v. Goset, 70 Ark. 430, 68 S.

W. 879; Betz v. People's Bldg. Loan & Sav. Asso. 23 Utah, 605, 65 Pac. 592; Ashton v. Dashaway Asso. 84 Cal. 61, 7 L.R.A. 809, 22 Pac. 660, 23 Pac. 1091.

The court erred in not granting plaintiff's request to adjourn ten minutes earlier than usual, to permit plaintiff to produce and offer in evidence his documents. Illinois C. R. Co. v. Slater, 139 Ill. 190, 28 N. E. 830; Sun Ins. Co. v. Stegar, 129 Ky. 808, 112 S. W. 922; Zipperer v. Savannah, 128 Ga. 135, 57 S. E. 311; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209.

Newton, Dullam, & Young, for respondent.

This action is brought to recover the balance due upon an account. It was therefore necessary for plaintiff to prove all of the items of such account with proper credits, so that the jury could determine for itself the amount of the balance unpaid, if any. This was not done, and therefore the court properly directed a verdict for defendant. Coats v. Gregory, 10 Ind. 345; O'Loughlin v. Ayrault, 133 N. Y. Supp. 444; Allen v. Brown, 11 Tex. 520.

It was improper for the court to permit plaintiff to prove by parole or to testify to any balance due, especially over objections timely made.

Such evidence was clearly incompetent. Great Western Life Assur. Co. v. Shumway, 25 N. D. 268, 141 N. W. 479; Solomon v. Creech, 82 Ga. 445, 9 S. E. 165; Birmingham Lumber Co. v. Brinson, 94 Ga. 517, 20 S. E. 437.

The evidence showed that plaintiff kept his accounts in books for such purpose. The books of account were therefore the best evidence. Great Western Life Assur. Co. v. Shumway, supra.

If evidence is erroneously admitted during the course of the trial, the court may cure its error by distinctly withdrawing such evidence from consideration by the jury, or by striking it out and giving the jury proper instructions in reference thereto. Turner v. American Security & T. Co. 213 U. S. 257, 53 L. ed. 788, 29 Sup. Ct. Rep. 420; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Ware v. Pearsons, 98 C. C. A. 364, 173 Fed. 878; Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903; Fowles v. Rupert, 143 Mich. 246, 106 N. W. 873; Bishop v. Chicago, M. & St. P. R. Co. 4 N. D. 536, 62 N. W. 605; Mighell v. Dougherty, 86 Iowa, 480, 17 L.R.A. 755, 41 Am. St. Rep. 511, 53 N. W. 402; Yakima Valley Bank v. McAllister,

37 Wash. 566, 1 L.R.A.(N.S.) 1075, 107 Am. St. Rep. 823, 79 Pac. 1119; Mallory v. Fitzgerald, 69 Neb. 312, 95 N. W. 601; Townsend v. Greenwich Ins. Co. 39 Misc. 87, 78 N. Y. Supp. 897, 86 App. Div. 323, 83 N. Y. Supp. 909, affirmed in 178 N. Y. 634, 71 N. E. 1140; Megrue v. Lennox, 59 Ohio St. 479, 52 N. E. 1022; Sanborn v. Lefferts, 16 Abb. Pr. N. S. 42, 58 N. Y. 179.

Application for continuance will usually be denied after trial has begun or after party has announced himself ready for trial, except for a cause arising at the trial. 4 Enc. Pl. & Pr. 872; Porter v. Triola, 84 Ill. 325; Stokes v. Stokes, 127 Ga. 160, 56 S. E. 303; Cross v. Cross, 56 W. Va. 185, 49 S. E. 129; Leavitt v. Kennicott, 54 Ill. App. 633; Knauber v. Watson, 50 Kan. 702, 32 Pac. 349.

Appearing and going to trial without asking for a continuance is a waiver of the right thereto. Hanna v. McKenzie, 5 B. Mon. 314, 43 Am. Dec. 122; Reed v. Wangler, 46 Mo. 508.

The application must show diligence. Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605; Kuhland v. Sedgwick, 17 Cal. 123; Owens v. Hart, 66 Iowa, 565, 24 N. W. 41; Payne v. First Nat. Bank, 16 Kan. 147; Leach v. Detroit Electric R. Co. 125 Mich. 373, 84 N. W. 316; Allen v. Brown, 72 Minn. 459, 75 N. W. 385; Swope v. Burnham, 6 Okla. 736, 52 Pac. 924; State ex rel. Hallam v. Lally, 134 Wis. 253, 114 N. W. 447, 15 Ann. Cas. 242; Pacey v. McKinney, 60 C. C. A. 365, 125 Fed. 675.

The rule is emphasized regarding documentary evidence in possession of or easily accessible to party. Owens v. Hart, 66 Iowa, 565, 24 N. W. 41; Cole v. Strafford, 12 Iowa, 345; Morrison v. Morrison, 102 Ga. 170, 29 S. E. 125; Steed v. Cruise, 70 Ga. 168; Anderson v. Citizens' Nat. Bank, — Tex. —, 5 S. W. 503; Owen v. Cibolo Creek Mill & Min. Co. — Tex. Civ. App. —, 43 S. W. 297; Spengler v. Davy, 15 Gratt. 381.

Or in its absence where party has had ample time to procure it. Huttig Sash & Door Co. v. Montgomery, 57 Mo. App. 91; Owen v. Cibolo Creek Mill & Min. Co. — Tex. Civ. App. —, 43 S. W. 297.

The materiality and character of the documents must clearly appear. Lomax v. Holbine, 65 Neb. 270, 90 N. W. 1122; Weston v. Proctor, 37 Misc. 800, 76 N. Y. Supp. 950; Hibbets v. Hibbets, 117 Iowa, 177, 90 N. W. 613; Gaines v. White, 1 S. D. 434, 47 N. W. 524.

Applicant for continuance must also clearly show facts material which are to be established by such absent documents, and that such facts cannot be proved in any other proper manner. Stewart v. Sutherland, 93 Cal. 270, 28 Pa. 947; Avery v. Wilson, 26 Iowa, 573; Jarvis v. Shacklock, 60 Ill. 378; Anderson v. Citizens' Nat. Bank, — Tex. —, 5 S. W. 503.

An oral unsworn statement by counsel of absent proof, etc., is entirely insufficient to support a motion for continuance. Cheney v. Dry Wood Lumber Co. 34 Minn. 440, 26 N. W. 236; Whaley v. King, 92 Cal. 431, 28 Pac. 579.

The granting or refusing of a continuance is in the discretion of the court. Webb v. Wegley, 19 N. D. 606, 125 N. W. 562; Kerr v. Grand Forks, 15 N. D. 294, 107 N. W. 197; Armour & Co. v. Kollmeyer, 16 L.R.A.(N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78.

Bruce, J. This is one of the numerous cases in which a client has been directed by his attorney to bring his books of account with him when attending a trial as a witness on his own behalf, but has neglected and failed to comply with the request, and has then complained because his own negligence has made it impossible to prove his case. The neglect of a litigant to produce competent evidence which is in his possession does not justify a court in permitting the introduction of that which is secondary and incompetent; and if such court has inadvertently admitted the same under objection, he can later correct the error by excluding the evidence from the consideration of the jury. Turner v. American Security & T. Co. 213 U. S. 257, 53 L. ed. 788, 29 Sup. Ct. Rep. 420; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Ware v. Pearsons, 98 C. C. A. 364, 173 Fed. 878; Fowles v. Rupert, 143 Mich. 246, 106 N. W. 873; Bishop v. Chicago, M. & St. P. R. Co. 4 N. D. 536, 62 N. W. 605; Mighell v. Dougherty, 86 Iowa, 480, 17 L.R.A. 755, 41 Am. St. Rep. 511, 53 N. W. 402; Yakima Valley Bank v. McAllister, 37 Wash. 566, 1 L.R.A.(N.S.) 1075, 107 Am. St. Rep. 823, 79 Pac. 1119; Mallory v. Fitzgerald, 69 Neb. 312, 95 N. W. 601; Townsend v. Greenwich Ins. Co. 86 App. Div. 323, 83 N. Y. Supp. 909, affirmed in 178 N. Y. 634, 71 N. E. 1140; Megrue v. Lennox, 59 Ohio St. 479, 52 N. E. 1022.

The neglect of a litigant to produce competent evidence which is in

his possession does not justify the court in forcing the opposing party to meet and contradict that which is hearsay and incompetent, provided it is seasonably objected to. Nor does the fact that a client has neglected to furnish and bring with him competent evidence which he has in his possession make it obligatory upon a court to adjourn the case, and to keep in idleness a jury which is maintained at great expense by the community, in order to allow the litigant time in which to obtain such evidence. The granting of a continuance or adjournment, indeed, is discretionary with the trial court, and this discretion will only be interfered with where it has been clearly abused. Webb v. Wegley, 19 N. D. 606, 125 N. W. 562; Armour & Co. v. Kollmeyer, 16 L.R.A. (N.S.) 1110, 88 C. C. A. 242, 161 Fed. 87; Cole v. Strafford, 12 Iowa, 345; Leach v. Detroit Electric R. Co. 125 Mich. 373, 84 N. W. 316. In any event due diligence should be shown on the part of the applicant. Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605; Kuhland v. Sedgwick, 17 Cal. 123; Allen v. Brown, 72 Minn. 459, 75 N. W. 385. So, too, when an application is made for an adjournment for the purpose of obtaining evidence, the materiality and nature of that evidence should be shown. In the case at bar, the evidence sought to be obtained consisted of books of account, but the application merely stated that "certain documents were required." The character and materiality of the evidence was therefore not clearly shown. Stewart v. Sutherland, 93 Cal. 270, 28 Pac. 947; Lomax v. Holbine, 65 Neb. 270, 90 N. W. 1122; Weston v. Proctor, 37 Misc. 800, 76 N. Y. Supp. 950; Hibbets v. Hibbets, 117 Iowa, 177, 90 N. W. 613; Gaines v. White, 1 S. D. 434, 47 N. W. 524.

When an action is brought upon a balance claimed to be due upon a book account, and the books of account are in the possession of the plaintiff, a statement of the plaintiff that there is owing him on such account a certain sum of money does not constitute competent evidence. Great Western Life Assur. Co. v. Shumway, 25 N. D. 268, 141 N. W. 479.

These are practically the only questions to be decided upon this appeal. Plaintiff sued upon a book account. He failed to produce the books in evidence as a whole, or to have them proved by the bookkeeper who made the entries therein. He merely introduced some sheets from a loose leaf ledger which were the work of his bookkeeper, and a mem-

orandum of account which was made by such bookkeeper. It is true that as to the debits on the account, he testified from the original drafts which were introduced in evidence. The credits, however, he sought to prove without any independent knowledge or recollection, and from the memoranda made by the bookkeeper, and by stating generally that there was a balance due him of some $425.

It is quite clear that even though the evidence of the debits was admissible and the drafts were the best evidence, the testimony as to the credits was entirely hearsay. It seems to be clear that when one sues on a balance claimed to be due on a book account, he does not establish that balance by merely proving the debit side of the account, and testify generally that a certain balance is due when he admits that there are numerous credits. It is true that some of the hearsay and incompetent evidence was admitted by the court, but it was admitted under objection, and the error could afterwards be corrected by excluding the evidence from the consideration of the jury, which was done in the case at bar. We may add that even upon the application of the plaintiff for an adjournment in order to allow him to get his books, which had been sent for, and which he expected upon a later train, there was no showing of the nature and materiality of the evidence.

The judgment of the District Court is affirmed.

Goss, J. (specially concurring). I concur in affirmance, but not in the fourth or fifth subdivisions of the syllabus and the discussion in the opinion thereunder. Whether such testimony constitutes competent proof depends upon the state of the record, and the rules announced are too general to be applicable to all cases.

CLARA B. SCHMIDT RUSSELL v. CITY OF FARGO, a Corporation, H. F. Emery, R. B. Blakemore, Joseph Ames, J. J. Jordan, Alex Stern, Constituting the Commissioners for the Government of the City of Fargo, and F. L. Anders, City Engineer.

(148 N. W. 610.)

Buildings — evidence of deterioration — safety of pedestrians.

1. Evidence reviewed, and *held:* (a) That it is not shown that the building involved in this litigation had deteriorated 50 per cent in value; (b) the evidence, showing that the condition of the building was such as to endanger the safety of pedestrians on the adjoining sidewalk, preponderates.

Cities — fire limits — powers of cities — rule — buildings then existing — buildings subsequently erected.

2. When fire limits are established in a city, within which buildings of certain classes may not be erected, a different rule relating to the powers of the city applies to buildings of such classes erected prior to the establishment of the fire limits than applies to those subsequently erected.

Buildings in existence — fire limits thereafter established to include — owner has vested rights — not lost without lawful reason.

3. The owner of a building erected within territory subsequently included within fire limits acquires a vested property right therein, of which he cannot be deprived without some lawful reason.

Owner — holds subject to right of public to provide reasonable safeguards — cannot be sacrificed — public safety.

4. The owner of a building holds it subject to the right of the public to pre-

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Note.—There can be no doubt that the prevention of danger from possible fires will justify some direct confiscation of certain structures which are not nuisances. The question is one of degree, and the reasonableness which is requisite to bring within the scope of the police power regulations adopted in pursuit of the policy of ultimately discontinuing wooden buildings within fire limits must be found in contrasting the magnitude of the private loss with the increment to the public safety. As to just what degree of restriction or rate of confiscation is reasonable, the cases are not agreed, as shown by a review of the authorities in notes in 21 L.R.A.(N.S.) 454, and 51 L.R.A.(N.S.) 62.

As to what constitutes repair, reconstruction, alteration, etc., of a building within the meaning of a fire-limit statute or ordinance, see note in 26 L.R.A.(N.S.) 124; and the kindred question of remodeling, reconstructing, or augmenting building, as construction or erection within the meaning of such a statute or ordinance, is treated in a note in 26 L.R.A.(N.S.) 120.

scribe reasonable safeguards and regulations for its protection, and the interests of the individual must in such case give way to the requirements necessary for public safety, but it must be clear that the safety of the public makes action necessary, and the right of the owner in his property cannot be sacrificed on mere guesswork or surmise.

Percentage of deterioration — not proper test — owner must make property safe.

5. The proper test as a basis for action by the authorities in protecting pedestrians from falling walls or similar dangers is not the percentage of deterioration, but rather the ability and willingness of the owner to make the structure safe.

Powers of city council — construction of buildings — fire limits — must be reasonable.

6. Paragraphs 46 and 47 of § 2678, Rev. Codes 1905, which section prescribes the powers of city councils, empower such councils to prescribe the thickness, strength, and manner of constructing stone, brick, and other buildings, and to provide for the inspection of all buildings, and authorize the city council to prescribe the limits within which wooden buildings shall not be erected or placed or repaired without permission, and to direct that all or any buildings within said limits, which shall be known as the fire limits, when the same shall have been damaged by fire, decay, or otherwise to the extent of 50 per cent of the value, shall be torn down or removed, and to prescribe the manner of ascertaining such damage, . . . and by ordinance provide for issuing building permits and appointment of building inspectors; and ¶ 57 of the same section empowers the city council to declare what shall be a nuisance and abate the same, and impose fines upon persons who may create, continue, or suffer nuisances to exist. In an attempt to exercise the power thus granted, the city council of Fargo enacted ordinances prescribing the fire limits, and containing very lengthy and detailed regulations regarding the construction of buildings in said city, and especially within such limits. It makes the city engineer inspector of buildings, and requires a permit before the erection, construction, or material alteration or repair of any building in the city, and the submission of a statement regarding the dimensions, etc., together with full specifications and plans, to the building inspector, makes it unlawful for anyone to proceed to construct or materially alter any building without such permit, and makes the alteration in or addition to any building already erected, except necessary repairs not affecting the construction of the external walls, roofs, chimneys, or sidewalks, subject to the regulations of the ordinance. Section 57 of such ordinance makes it unlawful to repair any frame building within the fire limits, when it has been damaged by the elements or decay to the extent of 50 per cent exclusive of the foundation, and provides a method for determining the extent of the depreciation. A fee of from $1 to $7 is required to be paid for the issuance of a building permit, the amount of the fee depending on the cost of the building or im-

provements. *Held* that such provisions are not so unreasonable that this court can say they are invalid for the purposes for which they are intended and to which they are applicable.

Municipal corporations — powers — removal of buildings — fire limits — construction in favor of property owners — statutes — nuisance.

7. Statutory provisions giving municipal corporations power to prescribe fire limits and direct the removal of buildings therein should receive a strict construction in favor of the owners of such buildings, and the power to destroy valuable property, lawfully erected, is inoperative and void, unless the thing is in fact a nuisance.

Fees for examination — statutory requirement — reasonable.

8. The requirement that a fee be paid for the examination of plans and specifications and the issuance of a permit, ranging from $1 to $7, according to the valuation, is not unreasonable.

Construction and repair of buildings — ordinance — compliance with — power of council to determine — police power — courts.

9. The power conferred upon a city council and commission to determine whether proposed construction or repairs of buildings come within the provisions of the ordinance, and to abate a nuisance, is delegation of police power, and does not constitute judicial power in the sense that such power is vested by the Constitution in the courts.

Opinion filed June 6, 1914. Rehearing denied September 10, 1914.

Action to enjoin the city commission and city engineer of the city of Fargo from interfering with the rights of plaintiff to make repairs upon a building owned by her within the fire limits of the city of Fargo, and from constructing and maintaining a fence to turn pedestrians off the sidewalk adjoining such building. The defendants had judgment dismissing plaintiff's action, from which this appeal was taken. *Hon C. A. Pollock,* J.

Affirmed.

M. A. Hildreth, for appellant.

The ordinance which is the foundation for these proceedings on the part of the defendant is unconstitutional and void. Its provisions are arbitrary and unreasonable. Sioux Falls v. Kirby, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156; Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188; Montgomery v. Louisville & N. R. Co. 84 Ala. 129, 4 So. 626; Newton v. Belger, 143 Mass. 598, 10 N. E. 464.

The ordinance is void because conferring upon the building inspector arbitrary, unreasonable, and unjust powers. State v. Tenant, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387.

The ordinance is void because it requires the payment of a fee into the city treasury. It attempts to create a further and unwarranted tax upon appellant and her property. Dunham v. Rochester, 5 Cow. 462; 1 Dill. Mun. Corp. 423–425; 2 Dill. Mun. Corp. 4th ed. 940; St. Mary's Industrial School v. Brown, 45 Md. 310; Com. v. Stodder, 2 Cush. 562, 48 Am. Dec. 679; Mays v. Cincinnati, 1 Ohio St. 268; St. Paul v. Traeger, 25 Minn. 248, 33 Am. Rep. 462; People ex rel. Lynch v. Special Sessions Justices, 12 Hun, 65; State, Benson, Prosecutor, v. Hoboken, 33 N. J. L. 280; People v. Jarvis, 19 App. Div. 466, 46 N. Y. Supp. 596; Buffalo v. Stevenson, 145 App. Div. 117, 129 N. Y. Supp. 125; Solomon v. Hughes, 24 Kan. 211; New York v. Hexamer, 59 App. Div. 4, 69 N. Y. Supp. 198; New York v. Second Ave. R. Co. 32 N. Y. 261; Anderson v. Wellington, 40 Kan. 173, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719; Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; Re Frazee, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; State ex rel. Garrabad v. Dering, 84 Wis. 585, 19 L.R.A. 858, 36 Am. St. Rep. 948, 54 N. W. 1104; Newton v. Belger, 143 Mass. 598, 10 N. E. 464; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Noel v. People, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616.

The ordinance is void because there is no grant of such power in the charter, as a basis therefor. Keokuk v. Scroggs, 39 Iowa, 447; Pye v. Peterson, 45 Tex. 312, 23 Am. Rep. 608; Kneedler v. Norristown, 100 Pa. 368, 45 Am. Rep. 383; Champaign v. Harmon, 98 Ill. 491; Hudson v. Thorne, 7 Paige, 261, 4 L. ed. 148, note; State v. Schuchardt, 42 La. Ann. 49, 7 So. 67; Troy v. Winters, 2 Hun, 63; State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089; Mayville v. Rosing, 19 N. D. 98, 26 L.R.A. (N.S.) 120, 123 N. W. 393.

The city council or commission form of government cannot deprive a person of property by condemnation provided for in such ordinance. Judicial powers cannot be so vested in administrative officers. Connecticut River R. Co. v. Franklin County, 127 Mass. 50, 34 Am. Rep. 339; Holland v. Baltimore, 11 Md. 186, 69 Am. Dec. 195; Baltimore

v. Porter, 18 Md. 284, 79 Am. Dec. 686; Third Ave. R. Co. v. New York, 54 N. Y. 159; Atlanta v. Jacobs, 125 Ga. 523, 54 S. E. 534; Hewin v. Atlanta, 121 Ga. 723, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296.

Emerson H. Smith, for respondent.

The real or decisive point in this case is whether or not the police power and authority is extended to the city council for the welfare and safety of the public.

Respondents contend that cities have such power and that an ordinance is valid. McGehee, Due Process of Law, 303; Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Evansville v. Miller, 146 Ind. 613, 38 L.R.A. 161, 45 N. E. 1054; Brady v. Northwestern Ins. Co. 11 Mich. 446; Eichenlaub v. St. Joseph, 113 Mo. 395, 18 L.R.A. 593, 21 S. W. 8; Hine v. New Haven, 40 Conn. 478; Carthage v. Frederick, 122 N. Y. 268, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480.

The fact that the license fee is payable into the city treasury, provided the fee be a reasonable one, does not impress it with the character of a tax. Johnson v. Philadelphia, 60 Pa. 445; Welch v. Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383; Wilson v. Eureka City, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 319, 50 L. ed. 210, 26 Sup. Ct. Rep. 100; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Gundling v. Chicago, 176 Ill. 340, 48 L.R.A. 233, 52 N. E. 44; Bowditch v. Boston, 101 U. S. 16, 25 L. ed. 980; Camfield v. United States, 167 U. S. 524, 42 L. ed. 262, 17 Sup. Ct. Rep. 864; Brady v. Northwestern Ins. Co. 11 Mich. 446.

A municipal corporation possesses not only the powers specifically conferred upon it by its charter, but also all such powers as are necessarily incident to, or may be implied from, those powers, including all that are essential to the declared object of its existence. Carthage v. Frederick, 122 N. Y. 268, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L.

ed. 849, 16 Sup. Ct. Rep. 714; Reetz v. Michigan, 188 U. S. 508, 47 L. ed. 566, 23 Sup. Ct. Rep. 390; Davison v. Walla Walla, 52 Wash. 453, 21 L.R.A.(N.S.) 454, 132 Am. St. Rep. 983, 100 Pac. 981.

The right to tear down a wooden building remodeled in fire limits contrary to the ordinance is police right, and *not* a *judicial* question. Eichenlaub v. St. Joseph, 113 Mo. 395, 18 L.R.A. 593, 21 S. W. 8; Davison v. Walla Walla, 52 Wash. 453, 21 L.R.A.(N.S.) 454, 132 Am. St. Rep. 983, 100 Pac. 981; McKibbin v. Ft. Smith, 35 Ark. 352; Klingler v. Bickel, 117 Pa. 326, 11 Atl. 555; King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; Hine v. New Haven, 40 Conn. 478.

A characteristic of the action of the police and legislative power is that it does not require the taking of private property for public use in the constitutional sense, and no compensation need be made as a condition thereto. McGehee, Due Process of Law, 303; Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Evansville v. Miller, 146 Ind. 613, 38 L.R.A. 161, 45 N. E. 1054; Brady v. Northwestern Ins. Co. 11 Mich. 446.

Plaintiff, in any event, is estopped to receive the relief demanded. Gundling v. Chicago, 176 Ill. 340, 48 L.R.A. 234, 52 N. E. 44, 177 U. S. 186, 44 L. ed. 728, 20 Sup. Ct. Rep. 633.

SPALDING, Ch. J. The object of this suit is to obtain a decree adjudging that the building ordinance of the city of Fargo, known as Chapter 13 of the Consolidated Ordinances, as amended in § 9 of title 2, chap. 2, and §§ 1 and 2 thereof, by an ordinance approved June 16, 1910, is null and void; that certain proceedings instituted thereunder, as relating to a building owned by the plaintiff and appellant in July, 1913, situated on lots 1 and 2 of S. G. Robert's addition to the city of Fargo according to plat No. 2, be adjudged illegal and void; and that plaintiff have a permanent injunction restraining the defendants, city of Fargo, the members of its commission, and its city engineer, from interfering in any wise with the rights of the plaintiff

with reference to such building, or interfering with her making such repairs as she may be advised are necessary with reference thereto, and for general equitable relief.

The defendant's answer alleges that the defendant Anders was the city engineer and building inspector; that, as such, and under the powers conferred by the said chapter 13, he notified plaintiff in writing of his action in stopping repairs unlawfully being made on the building described, that the defendants had not at any time under consideration the tearing down of said building, but had acted solely to protect life and property, and especially of those using the sidewalks along said building, from injury, in case the building should collapse, by building a railing on the outside of said sidewalk, in front of and on the north side of said building, leaving openings therein to accommodate the occupants and pedestrians; that this was done, believing that there was imminent danger that a collapse would occur in case the four walls should be pulled off the foundation on the north side, which they were liable to be, and in which case it was believed that the north and east walls would fall outward on the sidewalk and endanger the lives of persons passing; that said block is an old frame building, covered with brick veneer, located within the fire limits, and during all times mentioned was damaged by the elements and decay more than 50 per cent of its value above its foundation; that no building permit was or had been applied for to make repairs thereon as required by the ordinance. It is then alleged that she had submitted the matter to arbitration in accordance with the terms of the ordinance, and deposited the sum of $30 as required by said ordinance, as fee; that three appraisers were chosen, one by the city of Fargo; that the plaintiff acquiesced in the appointment of one Larson to represent her, and that the two appointed a third; that they duly qualified and made a report that the building was damaged to an extent exceeding 50 per cent of its original cost value; that, at her request, a more detailed report was made, and that thereafter she appeared in person and by attorney before the board of city commissioners, and was heard; that, having acquiesced in the appointment of the appraisers, she was estopped from denying the amount or percentage of damages found by them.

Reference was made to § 57 of the ordinance referred to, and the dismissal of plaintiff's complaint was demanded, and judgment for

costs, and the cost of establishing and maintaining the wooden railing heretofore referred to, and that she be enjoined from repairing said block, or any part thereof, or occupying the same.

A trial was had, findings of fact and conclusions of law were made, and judgment entered. It was found that the Ely block was located within the fire limits, was about 28 feet wide and 140 feet long, two stories in height, built about thirty years ago, veneered with brick, and had been damaged by the elements and decay to exceed 50 per cent of its value above its foundation, that it was liable to collapse, and was a constant and imminent menace and danger to the lives of pedestrians passing on the sidewalks in front, and particularly on the north side thereof; that the city had caused a fence to be built along the sidewalk, shutting off travel, but had never attempted to tear down, destroy, or remove said building; that the acts of defendants were in conformity with the building ordinance and in consonance with the law of the state, constitutional and valid. Judgment was for the dismissal of plaintiff's complaint. This appeal is to secure a trial *de novo*.

The building known as the Ely block, which is the subject of this controversy, faces east on Broadway in Fargo. The north side faces an avenue, and there is a sidewalk on the east end and north side. It is two stories high, a frame structure veneered with brick, the first floor used for mercantile purposes and the second floor for rooming. It was built more than thirty years ago, and long before the enactment of any ordinance prescribing fire limits or restricting the erection of wooden buildings within the city of Fargo.

The statute under which the ordinance involved in this case is claimed to be authorized is found in § 2678, Rev. Codes 1905, prescribing the powers of city councils. Paragraph 46 of that section empowers the city council to prescribe the thickness, strength, and manner of constructing stone, brick, and other buildings, and to require the construction of fire escapes therein, and to provide for the inspection of all buildings. Paragraph 47 authorizes the council to "prescribe the limits within which wooden buildings shall not be erected or placed, or repaired without permission, and to direct that all and any buildings within said limits, which shall be known as the fire limits, when the same shall have been damaged by fire, decay, or otherwise, to the extent of 50 per cent of the value, shall be torn down or removed, and to pre-

scribe the manner of ascertaining such damage, and to provide for the removal of any structure or building erected contrary to such prescription, and to declare each day's continuance of such structure or building a separate offense, and prescribe penalties therefor; and define fireproof material, and by ordinance provide for issuing building permits and appointment of building inspectors." Paragraph 57 empowers the council to "declare what shall be a nuisance and abate the same and impose fines upon persons who may create, continue or suffer nuisances to exist." In an attempt to comply with the power granted by these provisions, the city council of Fargo enacted the ordinances referred to in the complaint. The main building ordinance is of great length, and goes into particulars as to the construction of buildings in the city, and especially within the fire limits. The Ely block is within such limits.

It provides that before the erection, construction, or material alteration or repair of any building in the city, there shall be filed with the inspector of buildings a statement in writing giving the intended location, dimensions, materials, manner of construction, and estimated cost, and, if within fire limits, in addition to the above statement, there must be submitted for examination full specifications and plans of the proposed building or alterations, and for the issuance of a permit, and it is made unlawful for anyone to proceed to construct or materially alter any building within the city without such permit. It also provides that any alteration in or addition to any building already erected, except necessary repairs not affecting the construction of the external or party walls, roofs, chimneys, or sidewalks, shall to that extent be subject to the regulations of the ordinance.

The particular feature of the ordinance in question in the case at bar is § 57, which provides that "it shall be unlawful to repair any frame building within the fire limits of the city, when such building shall have been damaged by the elements or decay to the extent of 50 per cent of such building exclusive of the foundation thereof;" that "the decision of the inspector of buildings shall be conclusive as to the amount of damage to any building caused by the elements or decay, unless within twenty-four hours after his decision the owner files a petition asking for the appointment of arbitrators to determine the question of damages." It is provided that the arbitrators shall consist of three disinterested, competent persons, one to be chosen by the inspector, one by the owner,

and a third by the two thus chosen; that they shall make a true and just report of the amount and extent of such damage, and that the decision of the majority of such arbitrators, filed with the inspector within ten days from the time they qualify, shall be final and conclusive; that the party asking for arbitrators shall pay $30 to the city auditor. This ordinance, as amended in 1910, makes the city engineer *ex-officio* inspector of buildings, and prohibits the construction or erection within the city of any building without a permit first obtained from the inspector. Fees are prescribed for the issuance of such permits, of $1 for buildings costing $500 or less, and graduated up to the sum of $7 for buildings costing more than $10,000, and all persons are prohibited from continuing any building operations after the inspector has directed the suspension thereof, with a like provision as to materially altering any building without a permit.

In the case at bar, repairs were started on the interior and top floor of the building. The nature and extent of such repairs is not shown. One Larson entered complaint to the building inspector that repairs were being made without a permit, and that the building was in an unsafe condition, whereupon the inspector ordered all work discontinued, and arbitration was had. The arbitrators were named Hancock, Jenson, and the same Larson who made the complaint. They reported that the building had deteriorated more than 50 per cent in value.

The first specification on which a reversal is claimed is that the evidence was wholly insufficient to show that the building had been damaged to the extent of 50 per cent of its value, but showed the contrary. On this question a review of the evidence discloses that the owner testified that the building, exclusive of the land, was worth $12,000. She was not interrogated as to its value above the foundation. One O'Shea, an architect of Fargo, testified that he had been acquainted with the building for nearly twenty years; that he had made a personal inspection for the purpose of determining how necessary repairs would compare with the value of the building; that it was worth from $7,000 to $10,000 as it stood; that there was not a deterioration of 50 per cent of its value; that there was nothing dangerous about the building except in two places, which were on the south side and away from any street; that the cost of making the building structurally safe would be $1,037; that it was out of plumb, leaning south; that it had been in that con-

dition for twenty years; that there was absolutely no danger of the building coming down. He testified that it would cost not to exceed $70 to put in a cross-brick wall from the basement to the second floor, and lock that to the joists; that he would tie it to a building adjoining it and extending about half the length of this building and owned by the plaintiff, at a cost of $84; that he proposed to take out about 70 or 80 lineal feet of the south wall and replace it with a new wall, which would cost $368, and certain repairs on the veneering on the south side would cost $210; that the taking out of certain piers and rebuilding them to make them plumb would cost $75; odds and ends $200. The repair of certain joists which were rotted off near one end was also recommended. He testified that the repair of the whole building, puting it in good condition, would cost about $2,500; that of the $1,037 necessary to make it structurally safe, he would put about $400 above the foundation, but that of the $2,500 mentioned as repairing the whole block, about $1,600 would go in above the first floor, and that the proportion of the repairs to the value of the building would be as 16 to 80. He testified that there was positively no danger of the building's falling upon pedestrians on the north side; that it was practically in the same condition as to its walls as it was eighteen or twenty years ago.

Frank L. Anders, the building inspector, testified on cross-examination by the plaintiff, that he figured that the building had deteriorated more than 50 per cent of its value. He did not claim to be an expert upon the subject, but relied largely upon the method used by insurance companies in determining the value of buildings for insurance purposes, starting on the supposition that the life of a building is fifty years; he testified that probably it would cost $12,000 to $14,000 to build the building new above the ground; that the value of the building as it stood was two fifths of its original value, based upon a useful life of fifty years. Testifying on behalf of the defendants, Anders said that no plans and specifications for repairs were presented to him until after proceedings had been had; that his sole purpose in prohibiting repairs was to protect the lives of the people who were passing along on the sidewalk, because he was satisfied that it was dangerous to pedestrians; that he was largely guided in his estimates by scientific figures adopted and used by engineers; that he was also guided by his personal obser-

vations; that the floors of the second floor were not worth anything, but those on the first floor were in much better condition; that he also made figures based on his observation of the condition of the building, and estimated the deterioration would exceed 50 per cent of its actual value above the foundation, and, being inside the fire limits, nothing could save it except reconstruction or practically a new building from the basement up.

George Hancock, a witness for the city and an architect for many years, testified that he went into the building the day that he testified, but that he did not arrive at any conclusion as to the deterioration of the building above the foundation; that it was stupid and silly to talk about the deterioration above the foundation. In answer to a question as to the value of the property, he testified that he made an examination three or four months previously, and then estimated that there was a scrap value of possibly $500. Motion was made to strike out this evidence as incompetent, immaterial, and irrelevant, no foundation laid, and as an improper basis upon which to compute the value under the terms of the ordinance. The trial court under the statute was required to receive all the evidence offered, hence did not rule on this question. It is evident that the scrap value had little, if any, bearing on the issues. He was asked what, in view of the whole structure as now located, inside and out, the percentage of deterioration above the foundation was. Objection was made to this on the ground that he had previously testified that the entire difficulty with the building was in the foundation, and that his information was without any basis on which to predicate it. This objection was well taken. His answer was that the building was damaged over 75 per cent of its original value; that the second story was damaged by reason of the foundation's giving way and getting out of plumb; that it could not be repaired and made plumb without taking the building down. Motion was made to strike out his answer as incompetent and as without proper foundation. It was clearly incompetent. He then testified that he would be willing to take a contract to build a similar building new for $10,500.

J. H. Bowers testified for plaintiff that he had been engaged in the city as a contractor for about thirty-three years; that he was familiar with the Ely block and saw it built; that he had seen the building every day; that it was not damaged to the extent of 50 per cent; that he

went into the building and looked it over; that it could be straightened and fixed up for much less than 50 per cent of its value; that he would guess from his observation that it would cost $16,000 or $17,000 to put up a new building like it or under the same system of building; that he did not pretend his estimate was accurate.

Thomas Powers testified that he had been in business as a builder about thirty-two years and as a contractor about fourteen years; that he was familiar with the Ely block from the outside; that he did not testify that he had inspected it, but that he had seen it; that the veneering was dangerous, all ready to fall in some places; that the salvage would be worth probably $500; that he was in the upstairs once and in the downstairs twice; that the building was much out of plumb; that he would not be surprised to see most any part of the veneering fall off any time; that he thought the building would cost a little less than $10,000 new.

It is evident that superficially the evidence is in conflict as to the percentage of deterioration of the building above the foundation. Mr. Hancock practically refused to testify as to what the percentage of deterioration was above the foundation, as he said the foundation was the basis of the building and of the deterioration. O'Shea was the only person testifying who had made anything which approached a careful examination and estimate of the building, aside from the city engineer. The estimate of the latter was based largely upon the method pursued by insurance companies in fixing the amount of insurance a building should carry. It is, however, a subject of general knowledge that insurance companies, in making such estimates, allow a considerable margin, and we are therefore of the opinion that, standing alone, that does not form a basis for determining the deterioration sufficiently accurate to form a proper foundation on which to adjudicate that a building shall be torn down, especially when the margin on such basis is only about 5 per cent according to the witness. This structure was erected in conformity with the law as it then stood. The fire limits were established many years afterward. The owner had acquired a vested property right, of which she could not be deprived without some lawful reason. Buffalo v. Chadeayne, 134 N. Y. 163, 31 N. E. 443; Allison v. Richmond, 51 Mo. App. 133. It must be clear that the safety of the public, either by protection from fire or from injury by

falling walls, makes it necessary. Every owner of property holds it subject to the right of the public to prescribe reasonable safeguards and regulations for the public protection; and the interests of the individual must give way to the public safety (Klingler 1. Bickel, 117 Pa. 326, 11 Atl. 555; L'Hote v. New Orleans, 177 U. S. 587, 44 L. ed. 899, 20 Sup. Ct. Rep. 788), but the right in private property cannot be taken away on mere guesswork or surmise. To permit this would unsettle nearly every property right in existence.

Summing it all up, we think the evidence largely preponderates in favor of the plaintiff, to the effect that the deterioration above the foundation was less than 50 per cent. We say this by reason of the detailed estimate made by the architect, O'Shea, who was the only witness who had given any considerable time or attention to detailed estimates, and his specific testimony on the subject must outweigh the at least superficial estimates of others. It must be remembered also that a very different rule applies to buildings erected before the enactment of the ordinance fixing the fire limits, from that applicable to those erected subsequent to the passage of such ordinance.

Statutory provisions giving municipal corporations power to prescribe fire limits and direct the removal of buildings therein, which may be damaged to a certain extent, should receive a strict construction in favor of the owners of such buildings. Louisville v. Webster, 108 Ill. 414; McEwan v. Gilker, 38 Ind. 235; Hooper v. Emery, 14 Me. 375; Robb v. Indianapolis, 38 Ind. 51; Frank v. Atlanta, 72 Ga. 428; Wood, Nuisances, § 738. When the law gives city officials the power to remove a building erected within the fire limits in violation of the statute or ordinance, the power to compel the removal of the building grows solely from the fact that its erection was in violation of the ordinance, and not because it is a nuisance; and the power to abate nuisances does not warrant destruction of valuable property, which was lawfully erected, or anything which was erected by lawful authority; and the power to do so, when given by the legislature, is held to be inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it. This is the distinction between the rights of the city regarding buildings erected before the fire limits were established and those subsequently built. Wood, Nuisances, 823; First Nat. Bank v. Sarlls, 129

Ind. 201, 13 L.R.A. 481, 28 Am. St. Rep. 185, 28 N. E. 434. We construe ¶ 47 of § 2678, Rev. Codes 1905, and the portion of the city ordinance under which the authorities were attempting to act, as having been enacted solely with reference to protection from fire, and as not necessarily furnishing a proper basis for protecting the public against personal injury by reason of the danger of brick walls or other portions of a superstructure falling.

The proper test as a basis for the action of the authorities in protecting pedestrians from falling walls or similar dangers consists not in the percentage of deterioration, but rather whether the structure can be made safe, and whether the owner will make it safe. So long as it is in an unsafe condition, and of this the officials must in the first instance be the judges, endangering the lives of pedestrians, the city may act in such reasonable manner as shall protect the public from injury.

The constitutionality of this 50 per cent test ordinance is questioned, but we are satisfied that, for the purpose for which it was intended, it is a valid enactment. The authorities indicate that there must be some method of determining whether changes made in an old structure are sufficient to constitute a rebuilding or the erection of a new structure, and such provisions are based on the supposition that there is a point somewhere between a perfect or safe building and one which cannot be made safe as to fire, etc., without complete demolition, and a rebuilding. Both the legislature and the city council have fixed that point at 50 per cent deterioration above the foundation, evidently taking the view that, where it has deteriorated more than half in value, that is, has so deteriorated that, on a reconstruction, the building will be more new than old, it is the erection of a new building, rather than the repairing of an old one (First Nat. Bank v. Sarlls, supra), but an arbitrary prohibition is invalid. We cannot pronounce this an unreasonable test.

But the officials of the city of Fargo protest that they were not proceeding with a view to protecting other property from danger from fire, but solely with a view of protecting the lives of pedestrians, especially those using the sidewalk on the north side of this building. With this end in view, they erected a fence on the outside of the sidewalk to warn pedestrians of the danger, and to turn them into the street. Under ¶ 57 of the section referred to, defining the powers of city councils, they are

authorized to declare what shall be a nuisance and abate the same. Under this and the other laws relating to the abating of nuisances and the protection of the public, appropriate proceedings may be instituted with that end in view, and we are satisfied that summary action, may be taken, as was in effect done in the case at bar. It cannot be that, when officials observe the dangerous condition of a structure, they should be compelled to allow the lives of the public to be imperiled until the commencement and determination of appropriate proceedings in court, possibly rendering the city in the meantime liable for injuries which might have been prevented by summary action. Eichenlaub v. St. Joseph, 113 Mo. 395, 18 L.R.A. 590, 21 S. W. 8; Hine v. New Haven, 40 Conn. 478. Of course, when they are protected by the judgment of a court, their liability is not the same as when they proceed on their own judgment and responsibility. In the latter case, it appears that they do so at their own risk of being able to prove the fact of peril to the public. In the case at bar, we think the evidence preponderates in favor of the attitude of the city, that there was danger to occupants of the sidewalk, and that therefore the officials were justified, regardless of the percentage of deterioration of the building, either above or below the foundation, in taking the steps which they did take to protect the public.

The same reasons, however, do not apply to their order discontinuing repairs. If the repairs were to affect the construction of the external or party walls, roofs, chimneys, or stairways, they were subject to the provisions of the ordinance relating to permits and the furnishing of plans and specifications. We are unable to determine from the record the nature of the repairs, hence we cannot say whether they were subject to the regulations of the ordinance or not. We refer to the provisions of § 3 of the building ordinance, one paragraph of which reads: "Any alteration or addition to any building already erected, or hereafter to be erected, except necessary repairs not affecting the construction of the external or party walls, roofs, chimneys, or stairways, shall to the extent of such work be subject to the regulations of this ordinance." What we have said renders it unnecessary to determine several questions which are raised in appellant's brief. However, we shall refer to some which may, to a limited extent, be involved.

The third proposition is that the ordinance is void, because it requires

the payment of a fee into the city treasury. We have heretofore indicated the amount of such fees as depending upon the cost of the structure, the highest being $7 for buildings over $10,000 in cost. This is not an unreasonable fee. The city may in proper cases require the payment of such a fee as shall reasonably compensate it or its officials for services performed. The authorities sustain this. Johnson v. Grand Forks County, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071, is a case directly in point. In the cases contemplated by the ordinance in question, the building inspector is required to examine the plans and specifications, or perhaps buildings to be repaired, before issuing permits; and we cannot see that fees ranging from one to seven dollars are unreasonable compensation for the labor and skill required in ascertaining whether the building or repairs are in conformity with lawful requirements.

We are not called upon to pass upon all the provisions of the ordinance. They are very numerous, and few of them have any bearing on the questions before the court. It is argued that it is void because there is no grant of power in the municipal charter as a basis for the ordinance. We only need refer to ¶ 47 of § 2678, supra, to find the power granted by the legislature to the city to prescribe fire limits and regulations as to the extent of repairs which may be made within such limits, and authority for fixing the limit at 50 per cent of the value, and for issuing building permits and the appointment of building inspectors. Inasmuch as counsel does not point out the specific lack of power which he claims, we need not specify more definitely.

It is said that it is already condemned in the decision of this court in Mayville v. Rosing, 19 N. D. 98, 26 L.R.A.(N.S.) 120, 123 N. W. 393. We do not so construe it. Both the ordinance and question involved in that action were very different from those here attacked.

It is next argued that the council or commission of the city is by this ordinance vested with judicial power. We do not construe it as authorizing the exercise of judicial power in excess of that permitted in the case of many administrative or executive officers. The law specifies the facts which, when found to exist, are to control the action of the officials. It leaves very little room for the exercise of judgment or discretion on their part when the facts are once found. This does not constitute the exercise of judicial power in the sense that it is vested by the

Constitution and our form of government in the courts. There is a sense in which nearly all administrative officials exercise judicial power, and in so far as the portion of the ordinance which seems to be attacked attempts to delegate such power to the council or building inspector, we think it comes within the legal requirements, unless it be the attempt to make the decisions of the arbitrators final, and this need not be determined.

The ordinance requires impartial arbitrators; these plaintiff did not have, and she was apparently ignorant of the fact that Larson, who in some manner not disclosed became an arbitrator, entered the complaint against her.

In view of the insufficiency of the evidence as to the nature of the repairs being made, we cannot say that the city was not justified in ordering them discontinued; and the evidence being adequate to show danger to pedestrians, the judgment dismissing appellant's action is affirmed.

JOHN MARTYN v. JOURGEN OLSON.

(L.R.A.1915B, 681, 148 N. W. 834.)

Government land — issuance of patent — compliance with law by entryman — no complete title until — estate — heirs.

1. Until the issuance of a final patent, or until the doing of all things by the entryman upon government land which are prerequisite thereto, such entryman has no complete title in the land, either legal or equitable, nor has his estate after his decease.

Heirs of deceased entryman — take directly from the government — by donation or purchase — not by inheritance.

2. Though the heirs of a deceased entryman who homestead or commute land under the provisions of U. S. Rev. Stat. §§ 2291, 2301, have preferred rights as new entrymen or homesteaders, and in making proof are allowed to credit the improvements and period of residence of their ancestor, such heirs take directly from the government by donation or purchase, rather than by inheritance.

Note.—The general question of the validity of a mortgage upon public lands executed by a claimant under the homestead acts, prior to patent or final proof, is the subject of a note in 6 L.R.A.(N.S.) 934.

Mortgage executed by entryman — dies before final proof or commutation — before compliance with homestead laws — not a lien upon the real estate — not assumed by heirs.

3. A mortgage which has been executed by a deceased entryman who died before making final or commutation proof, or before he has done the things prerequisite and necessary thereto, is not a lien on such real estate, and is not assumed by his heirs who enter upon and take said land under the provisions of U. S. Rev. Stat. §§ 2291, 2301.

Opinion filed September 12, 1914.

Appeal from the District Court of Ward County, *Leighton*, J.

Action to quiet title. Judgment for defendant. Plaintiff appeals. Reversed.

Statement by BRUCE, J.

This is an action to quiet title. In December, 1904, one Robert J. Martyn, a single man, made homestead entry, under the government land laws of the United States, upon the land described in the complaint, and under such entry, lived upon, occupied, and made the same his home for about thirty-eight months continuously thereafter, when he died intestate, unmarried, without issue, and without having made or attempted to make final proof upon said land, or to otherwise secure title thereto, and without having secured any such title. About a year prior to his death, being indebted to the respondent, Jourgen Olson, the said Robert J. Martyn executed and delivered to said respondent his promissory note for the amount of his indebtedness, and as security for the same also executed and delivered to respondent a mortgage upon the land in question and upon another quarter section of land, which latter piece of land, however, was already encumbered. No part of this indebtedness had been paid at the time of the death of the said Robert J. Martyn, and the mortgage securing the same has ever since remained of record unsatisfied. There is no showing that the money was used in improving the land. It is admitted, however, that it was used to defray the expenses of the homesteader while living upon it. Shortly after the death of the said Martyn, the said Olson, under a power of sale, in the usual form, contained in said mortgage, caused his mortgage to be foreclosed by a sale of the land covered thereby, himself became the

purchaser, and a sheriff's certificate of said mortgage sale was duly issued to him, which he caused to be recorded and which now appears of record. On April 24, 1908, that is to say, two months after the death of the said Robert J. Martyn, and without any further residence on or cultivation of the land than that furnished by the deceased, the heirs of said Martyn took the proceedings required by the homestead laws of the United States to commute said homestead entry and procure patent to said land to be issued to them. They paid the government purchase price, together with all fees, made the required proof, and a patent was subsequently issued to the appellant, John Martyn, as the sole non-alien heir of the said Robert J. Martyn, as was duly established and decree by a former decree of the district court of the eighth judicial district, Ward county, North Dakota. The appellant then instituted this action to have the record of the said mortgage and certificate of sale canceled as clouds on this title, and to have the title to said land quieted in him as against the respondent. The district court having decided adversely to him, he has now appealed to this court and has asked for a trial *de novo*.

Gray & Myers, and *Myers & Myers,* for appellant.

The lien of a mortgage can only attach to some legal or equitable title or ownership, vested in the mortgagor at the time. Such title must be tangible,—"capable of being transferred." Rev. Codes 1905, §§ 6154, 6155 and 6163.

This is not only statutory, but it is in harmony with the general law. 27 Cyc. 1034a, 1035b, 1138–2, 1139d.

Where the heirs of a deceased homestead entryman who has not made final proof and obtained patent or made full compliance with the homestead laws, make such proof and receive patent, they acquire complete title as by original purchase or as donees from the government, and *not* through inheritance from deceased entryman. No "privity of estate" exists between them and the entryman. Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Gould v. Tucker, 20 S. D. 226, 105 N. W. 624; Aspey v. Barry, 13 S. D. 220, 83 N. W. 91; Haun v. Martin, 48 Or. 304, 86 Pac. 371; Kelsay v. Eaton, 45 Or. 70, 106 Am. St. Rep. 662, 76 Pac. 770; Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Council

Improv. Co. v. Draper, 16 Idaho, 541, 102 Pac. 7; Powell v. Powell, 22 Idaho, 531, 126 Pac. 1058; Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50; Braum v. Mathieson, 139 Iowa, 409, 116 N. W. 789; Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; Demars v. Hickey, 13 Wyo. 371, 80 Pac. 521, 81 Pac. 705; Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218; McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78; Hayes v. Carroll, 74 Minn. 134, 76 N. W. 1017; Doran v. Kennedy, 122 Minn. 1, 141 N. W. 85; Marley v. Sturkert, 62 Neb. 163, 89 Am. St. Rep. 749, 86 N. W. 1057.

The term "privity" denotes mutual or successive relationship to the same right of property. 6 Words & Phrases, 5606; Boughton v. Harder, 46 App. Div. 352, 61 N. Y. Supp. 574; Sherin v. Brackett, 36 Minn. 152, 30 N. W. 551; Patton v. Pitts, 80 Ala. 373.

It is immaterial that the entryman could have committed, or was in a position to rightfully commute his homestead entry, and obtain title. The fact still remains that he did do so, or attempt to do so. Circular No. 10, General Land Office and U. S. Laws; U. S. Rev. Stat. § 2291, U. S. Comp. Stat. 1901, p. 1390, 6 Fed. Stat. Anno. p. 292; 39 Cyc. p. 1239 (b).

The full title to government lands remains in the government until patent issues, or, in commutation cases, until the full compliance with the requirements of the law and the payment of the purchase price. Kneen v. Halin, 6 Idaho, 621, 59 Pac. 14; Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253.

Such land so held is no part of the estate of the entryman, and does not descend as such. It is disposed of by act of Congress, and the patentee takes his title, not by descent from the ancestor, but by purchase from the government. Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851.

There being no "privity of estate" between the patent holder and such deceased entryman, neither the doctrine of estoppel nor that of "relation back" will subordinate the rights of the patent holder to those of a mortgagee under a mortgage made by the entryman before final proof or patent. 16 Cyc. "Who Are Privies," p. 716 (c); "Heirs and Devisees," p. 718 (III.); Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253.

Such a mortgage is not enforceable against the heirs of the deceased

entryman, who receive their patent from the government. Marley v. Sturkert, 62 Neb. 163, 89 Am. St. Rep. 749, 86 N. W. 1057.

Coyle & Herigstad, for respondent.

Heirs at law take land subject to preliminary mortgages placed thereon by the homestead entryman. Title, after acquired by patent to the homesteader, inures to the mortgagee as of date of execution and delivery of mortgage. N. D. Rev. Codes 1905, § 6155; Circular No. 10 of the Department of Interior, § 32; U. S. Rev. Stat. § 2448, U. S. Comp. Stat. 1901, p. 1512; Meinhold v. Walters, 102 Wis. 389, 72 Am. St. Rep. 888, 78 N. W. 574; U. S. Rev. Stat. § 2296, U. S. Comp. Stat. 1901, p. 1398; Marley v. Sturkert, 62 Neb. 163, 89 Am. St. Rep. 749, 86 N. W. 1056; Gould v. Tucker, 20 S. D. 226, 105 N. W. 624.

A mortgage executed by a homesteader after he had done all he was required to do under the law, although patent has not issued, is valid and enforceable. Cheney v. White, 5 Neb. 261, 25 Am. Rep. 487; Nycum v. McAllister, 33 Iowa, 374; Lewis v. Wetherell, 36 Minn. 386, 1 Am. St. Rep. 674, 31 N. W. 356; Fuller v. Hunt, 48 Iowa, 163; Lang v. Morey, 40 Minn. 396, 12 Am. St. Rep. 748, 42 N. W. 88; Skinner v. Reynick, 10 Neb. 323, 35 Am. Rep. 479, 6 N. W. 369; Meinhold v. Walters, 102 Wis. 389, 72 Am. St. Rep. 888, 78 N. W. 574; Ford v. Ford, 24 S. D. 644, 124 N. W. 1111.

A homesteader whose good faith is otherwise apparent may mortgage his homestead claim before final certificate, to procure money with which to work and improve his claim. Mudgett v. Dubuque & S. C. R. Co. 8 Land Dec. 243; U. S. Rev. Stat. § 2262; Kezar v. Horde, 27 Land Dec. 148.

This is an equitable action for the purpose of having title to real estate quieted in plaintiff, and to remove the mortgage from such land as a cloud upon such title. Therefore, he who seeks equity must do equity. Tracy v. Wheeler & Scott, 15 N. D. 249, 6 L.R.A.(N.S.) 516, 107 N. W. 68; Cotton v. Horton, 22 N. D. 1, 132 N. W. 225.

BRUCE, J. (after stating the facts as above). Although the courts at first doubted the validity of a mortgage which was made before the issuance of the patent, and this even as against the original homesteader, they later, and in a number of recent decisions, have asserted the doctrine of what may be termed the inchoate right to legal title in

the entryman, and have upheld such mortgages as promises to mortgage and inchoate liens which become vested and enforceable when the patent is once issued to the entryman. See Adam v. McClintock, 21 N. D. 483, 131 N. W. 394, and cases cited. They have, on the other hand, held that until the issuance of such final patent, or at any rate, until the doing of all things by the entryman which are prerequisite thereto the entryman has no complete title in the land, either legal or equitable, nor has his estate after his decease. Whatever right he had under his homestead entry they have held is terminated at his death and the title to the land reverts to the government and does not pass to his heirs or to his estate after his decease. These heirs, under U. S. Rev. Stat. §§ 2291, 2301, U. S. Comp. Stat. 1901, pp. 1390, 1406, 6 Fed. Stat. Anno. pp. 292, 317; section 32, Circular No. 10, of the Department of the Interior, have preferred rights as new entrymen or homesteaders and in making proof and in commuting are allowed to credit the period of residence of their ancestor. They are looked upon, however, as new entrymen who have no privity with their ancestor and who take directly from the government by donation or purchase rather than by inheritance. Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Gjerstadengen v. Hartzell, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230; Gould v. Tucker, 20 S. D. 226, 105 N. W. 624; Aspey v. Barry, 13 S. D. 220, 83 N. W. 91; Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; McCune v. Essig, 199 N. Y. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78; Council Improv. Co. v. Draper, 16 Idaho, 541, 102 Pac. 7; Haun v. Martin, 48 Or. 304, 86 Pac. 371; Marley v. Sturkert, 62 Neb. 163, 89 Am. St. Rep. 749, 86 N. W. 1056.

Such being the case, there was no estate in the deceased Robert J. Martyn to which the inchoate mortgage to the respondent ever attached. The deceased had no complete legal or equitable title before his death, and his heirs took not as his heirs, but as donees or purchasers of the land, which, upon the death of their ancestor, had reverted to the general government, free and clear of all liens and encumbrances. Counsel for respondent seeks, we know, to base an equitable if not a legal title in Robert J. Martyn, the deceased, upon the fact that before his death he had lived upon the land for a sufficient length of time to enable him to commute his proof if he had so desired, and that his heirs afterwards relied upon this fact and commuted their proof upon

the strength of their ancestor's residence, and without further work or residence on their part. The fact remains, however, that the ancestor did not commute or at any time pay to the government the sum of money necessary therefor, nor is there any evidence that he intended so to do. It may be, as counsel for respondent suggests, that in certain cases equitable as well as legal titles are recognized, and that equitable titles have been held to exist in cases where the entryman has done everything necessary to his final proof but has not actually received his patent. See Adam v. McClintock, supra.

Unfortunately no such state of facts is before us. The payment of the amount provided by the statute is as necessary to commutation as is the residence upon the land which is required by the statute, and at no time did the deceased pay this amount, nor have we any evidence that he ever intended to do so, nor in fact that he had any intention of commuting at all. Such being the case, there was no complete title in the said Robert J. Martyn, deceased, either legal or equitable, to which the mortgage could or did attach. See Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; Marley v. Sturkert, 62 Neb. 163, 89 Am. St. Rep. 749, 86 N. W. 1056; Stark v. Fallis, 26 Okla. 357, 109 Pac. 66. We may personally be of the opinion that in cases where an heir obtains title by relying upon the residence and labor of his ancestor, it would be an equitable and wise rule to make him liable to the payment of mortgages such as that before us. It is not for us, however, to establish the public policy of the national Congress or of the national courts. All that we can do is to announce the law as we believe it to have been announced by that Congress and by those courts.

Nor is there any merit in the argument of counsel for respondent that this is an equitable action, and that under the maxim that he who seeks equity must do equity, the plaintiff and appellant should be required to pay the mortgage before he is entitled to the relief prayed for. We are aware of the decisions in the cases of Tracy v. Wheeler & Scott, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68, and Cotton v. Horton, 22 N. D. 1, 132 N. W. 225. All that these cases decide, however, was that a court of equity will not cancel a real estate mortgage securing a just debt which concededly has not been paid, at the suit of the mortgagor, or one standing in his shoes, when the only ground

urged for such relief is that the statute of limitations is available as a defense against its foreclosure. The distinction between the case at bar and the cases cited is that in the case at bar there was no privity of estate between the plaintiff and his ancestor, nor had the mortgage ever attached to the land. The plaintiff owed no debt, nor had he any legal obligations to anyone. He did not claim under his ancestor, nor was he in privity with him. "The doctrine of relation," says the Supreme Court of the United States in Gibson v. Chouteau, 13 Wal. 92, 20 L. ed. 534, "is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that . . . acquired the equitable claim or right to the title" of the land. (See also Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; 16 Cyc. 1716.)

The judgment of the District Court is reversed, and the trial court is directed to enter a decree canceling the said mortgage and the records thereof as clouds on the title of the appellant, and quieting his title as against the respondent. The defendant and respondent will pay the costs and disbursements of this appeal.

HENRY C. WESTBROOK and ETHEL M. WESTBROOK v. THOMAS A. RICE.

(148 N. W. 827.)

Judgment — counsel — neglect and inadvertence — vacating judgment — discretion of court.

1. The question of vacating a judgment entered through inadvertence or neglect of counsel is ordinarily largely within the discretion of the trial court.

Note.—It is generally held, contrary to the position apparently taken in the North Dakota cases, that the neglect of an attorney, not reaching the point of collusion or fraud, in permitting a judgment to be entered against his client, is the neglect of the client, and that such neglect cannot be successfully urged as a ground of relief. A full review of the authorities on this question will be found in a note in 27 L.R.A.(N.S.) 858.

Judgment — application to vacate — before judge who did not try case — rule.

2. When an application to vacate such judgment is not heard by the judge who tried the case and ordered judgment, but by another judge who knows nothing of the facts and circumstances not disclosed by the motion papers, and such papers are all before this court, the rule announced in ¶ 1 has but little force.

Review of order — defense upon the merits — neglect of counsel.

3. The court reviewing an order made on a motion to vacate a judgment on the ground of excusable neglect or inadvertence will determine whether, in the interests of justice and right and under a liberal construction of the statute, a defense upon the merits should be permitted, and if so found, the neglect of counsel will be excused when otherwise it would not be.

Excusable neglect — circumstances of the case — attention to cause — terms of court.

4. A lack of attention to the progress of the cause, or failure to attend the trial, which is excused or justified by the peculiar circumstances of the case, constitutes excusable neglect, and among the facts sometimes constituting excusable neglect is the well-founded belief that the case would not be reached for trial as quickly as it was in fact reached.

Facts and circumstances — counsel — excusable neglect.

5. The facts and circumstances surrounding entry of judgment in this case are examined in the opinion, and it is *held* that they show excusable neglect on the part of counsel for the defendant.

Opinion filed September 12, 1914.

Appeal from an order of the District Court of Sheridan County denying defendant's application to vacate a judgment. *Hon. W. H. Winchester,* J.

Reversed.

J. E. Williams and *F. E. McCurdy,* for appellant.

A default judgment should be set aside where the absence of the defendant and his counsel was caused by reliance upon a statement made by plaintiff's attorney, or by the clerk of court, that nothing would be done without notice. 23 Cyc. 932.

Excusable neglect means a lack of attention to the progress of the case or failure to attend the trial, which is excused or justified by the peculiar circumstances of the case. 23 Cyc. 935, 936; Pier v. Millerd, 63 Wis. 33, 22 N. W. 759; Douglas v. Badger State Mine, 41 Wash. 266, 4 L.R.A.(N.S.) 196, 83 Pac. 178.

Courts are inclined to grant such relief, rather than deny it. The court has no discretion in a case where the moving party shows himself clearly entitled to such relief. 23 Cyc. 896, 897; Board of Education v. National Bank, 4 Kan. App. 438, 46 Pac. 36; Cavanaugh v. Toledo, W. & W. R. Co. 49 Ind. 149; Lawler v. Bashford-Burmister Co. 5 Ariz. 94, 46 Pac. 72; Hanthorn v. Oliver, 32 Or. 57, 67 Am. St. Rep. 518, 51 Pac. 440; Cloud v. Markle, 186 Pa. 614, 40 Atl. 811.

Frank I. Temple, for respondents.

The term of court was fixed, notice given, note of issue filed, and the cause noticed for trial. It was the duty of the defendant and his counsel to be on hand. Under these circumstances their neglect to do so was inexcusable. Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252; Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; 23 Cyc. 930.

Attorney's negligence is imputable to his client. 23 Cyc. 939.

One who would open a default judgment must excuse his failure to appear, and must offer a good defense on the merits. Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; 23 Cyc. 930, note 32; Racine–Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228.

Such motion is addressed to the sound judicial discretion of the trial court. The mere fact that the appellate court does not entirely agree with the trial court does not show an abuse of discretion. Rosebud Lumber Co. v. Serr, 22 S. D. 389, 117 N. W. 1042; Meade County Bank v. Decker, 19 S. D. 128, 102 N. W. 597; Fargo v. Keeney, 11 N. D. 484, 92 N. W. 836; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Griswold Linseed Oil Co. v. Lee, 1 S. D. 531, 36 Am. St. Rep. 761, 47 N. W. 955; Buell v. Emerich, 85 Cal. 116, 24 Pac. 644; Olson v. Sargent County, 15 N. D. 146, 107 N. W. 43; Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75.

SPALDING, Ch. J. This is an appeal from an order denying a motion to vacate a judgment. The action was brought to secure the discharge of a thousand dollar real estate mortgage. The defendant answered, ad-

mitting that he held the mortgage described, but alleged that he agreed to make a loan of that amount on plaintiff's real estate, and had advanced on such loan the sum of $453.05, and had at all times been ready and willing to advance the balance of the thousand dollars, but that there were liens against the security which would take priority over his mortgage, and that the plaintiffs had refused and neglected to pay the same, although they had agreed to furnish defendant with an abstract showing his mortgage to be a first lien.

From the affidavits it appears that the attorney for defendant resides at Turtle Lake, 22 miles from McClusky, the county seat of Sheridan county, while the attorney for plaintiff resides at McClusky. A term of court was fixed by law to be held in Sheridan county, commencing on the 15th day of October, 1912. Counsel for plaintiff on the 11th day of October, 1912, served notice of trial upon counsel for defendant, and at the proper time filed note of issue, and on the 11th day of October wrote defendant's attorney that in his opinion they would not have a term of court in October, but that he did not positively know, and because of that fact he had served the notice of trial, so in case court should convene the case could be brought on for final determination.

Court convened at the time set, and when the case was reached on the first day of the term, counsel for plaintiff stated to the court that counsel for defendant was not present and he did not wish to take a snap judgment. The court informed him that, inasmuch as notice of trial had been duly served and note of issue filed, defendant had ample notice, and judgment taken at such time would not be a snap judgment. Counsel for plaintiff then attempted to get defendant's counsel by telephone, but found that he was in the country, and could not be reached. A second attempt was made to reach him, but without success; and in the afternoon the court called the case for trial, and directed plaintiff to produce his witnesses, which he did, and this resulted in a judgment for plaintiff.

It is apparent that the failure to be present at the trial and participate therein was due to the oversight or inadvertence or neglect, or all of these, of defendant's attorney. Defendant himself is a nonresident of the state, and knew nothing about the proceedings, but left the matter with his attorney to attend to. We are aware that this court has repeatedly held, and we still hold, that the question of vacat-

ing a judgment is ordinarily largely within the discretion of the trial court, and that its exercise of such discretion will not be reversed, except in clear case of abuse; and here is a case where, through no fault of the defendant, he was unrepresented at the trial at which he had arranged to be represented, and the facts bring the case squarely within the rule announced in Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102, where we held that courts favor the trial of cases upon their merits, and where a trial court has refused to open a default and permit a defense to be made, the reviewing court will not only inquire as to whether the discretion of the trial court in denying the application has been soundly exercised, but will also examine the facts shown for the purpose of determining whether, in the interests of justice and right, and under a liberal construction of the statute, a defense upon the merits should be permitted, and that the neglect of counsel in matters necessary to the ordinary and orderly procedure in a case is a surprise to the party, within the meaning of the statute.

In the case at bar the answer states a good defense to a portion of the relief sought by the plaintiff, a defense which it would be unjust to preclude defendant from making if he can make it by compliance with the ordinary and orderly methods of procedure prescribed. Affidavits submitted on his behalf support a defense shadowed in the answer. We, however, do not need to rely upon the case of Citizens' Nat. Bank v. Branden, supra. We think the facts surrounding this case are such as to disclose excusable neglect. Sheridan county is a new county with but little litigation. The term of court at which this judgment was entered was one of the very first yet held in that county. It was held by the judge of the third judicial district, acting for the judge of the sixth district. Counsel for defendant made inquiry of the sheriff and of the state's attorney within four days prior to the date fixed for the term of court, and they had heard nothing about there being a term. His case was No. 15 on the calendar of causes, and naturally would not be reached the first day of the term. In fact, in most jurisdictions of this state courts try no cases on the first day, except such as may be set by stipulation of the parties or by order of the court, of which notice has been given in time to enable parties to be present with witnesses. Counsel for plaintiff did not move this case for trial. He hesitated

about entering upon the trial in the absence of the attorney for defendant, but the court called it for trial and directed counsel to produce his witnesses. In view of these and other facts disclosed by the record, we think the neglect or inadvertance of counsel was excusable. Excusable neglect is defined as a lack of attention to the progress of the cause or failure to attend the trial, which is excused or justified by the peculiar circumstances of the case. 23 Cy. 935. Among the instances of such neglect is the well-founded belief that the case would not be reached for trial as quickly as it was in fact reached. Cameron v. Carroll, 67 Cal. 500, 8 Pac. 45; Re Davis, 15 Mont. 347, 39 Pac. 292. While the rule is that applications of this kind are addressed to the sound discretion of the trial court, that rule has but little force in the case at bar, for the reason that the judge who passed upon the application to open the judgment was not the judge before whom the case was tried. This court has before it all the evidence of the facts and circumstances surrounding the trial that were before the judge who passed upon the motion to vacate and from whose order this appeal is taken. We think the record brings this case within the authorities above cited. The order of the District Court is reversed, but appellant, in lieu of terms which under the circumstances would ordinarily be imposed as a condition of vacating the judgment and permitting a trial, will pay all costs on this appeal for which he would have been liable, had the respondent prevailed.

STATE OF NORTH DAKOTA EX REL. LOUIS A. LEU v. J. A. COFFEY, Judge of the District Court in and for the Fifth Judicial District of the State of North Dakota.

(148 N. W. 664.)

Opinion filed September 25, 1914.

Application for a writ of mandamus to compel the judge of the district court of Wells county to entertain jurisdiction to hear, try,

and determine a contest involving the nomination as a candidate for the office of member of the legislative assembly.

The alternative writ which was issued is ordered quashed.

B. F. Whipple, Fessenden, N. D., *Geo. R. Robbins,* and *Geo. A. Bangs,* Grand Forks, N. D., for relator.

John O. Hanchett, Harvey, N. D., for defendant.

PER CURIAM. An alternative writ of mandamus was issued by this court, commanding the judge of the district court of Wells county to entertain jurisdiction to hear and decide a contest involving the nomination, at the June primary, of a Republican candidate for representative to the legislative assembly in and for the 33d senatorial district, or to show cause why he refuses to do so. That court entered a judgment dismissing such contest upon the sole ground of alleged want of jurisdiction to hear the same.

Pending this proceeding the contestant appealed from the judgment dismissing such contest, and this court has just decided such appeal in contestant's favor. See Leu v. Montgomery, — N. D. —, 148 N. W. 662. Such decision in effect disposes of the merits of this mandamus proceeding, and renders further consideration thereof unnecessary.

The alternative writ is accordingly quashed.

LOUIS GREBE v. GEORGE W. SWORDS, as Receiver of the First National Bank of Rugby, North Dakota.

JOHN GREBE v. GEORGE W. SWORDS, as Receiver of the First National Bank of Rugby, North Dakota.

(149 N. W. 126.)

Mortgages — failure of consideration — act to cancel — grantee's transfer to bank of which he was cashier — estoppel.

1. Action to cancel and satisfy of record certain mortgages upon the ground

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Note.—A well-recognized exception to the general rule that a principal is chargeable with the knowledge acquired by his agent exists where the officers of a bank are personally interested in a transaction, to which the bank is also a party in in-

of failure of consideration for the notes secured thereby. Such instruments were executed and delivered by plaintiffs to one A. H. Jones, who, prior to their maturity and for full value, sold and indorsed them to the First National Bank of Rugby, of which he was at the time its cashier. The receiver of such bank defends upon the alleged ground: 1st. That there was not a failure of consideration. 2d. That the bank acquired such paper in due course, and 3d. That plaintiffs are estopped, as against the receiver, from urging any infirmity in the notes. Upon a trial *de novo* in this court, the findings and conclusions of the trial court favorable to plaintiffs on all issues are sustained.

Conveyance by deed — in trust — mortgages — security — bail bonds.

2. The contention that Jones acquired title to the land involved through one Henry Grebe, the former owner, who gave him a warranty deed, and that he subsequently sold the land to the plaintiffs, taking the notes in controversy in payment of the purchase price, is held without support in the proof. While such deed was given by Henry Grebe to Jones, and a written agreement in form entered into between them purporting to fix the terms and mode of payment of the purchase price, the undisputed testimony discloses that no sale was contemplated, the intention being merely to transfer such title to Jones in trust with the understanding that he should deed the same to the plaintiffs, who are brothers of Henry Grebe, which trust Jones thereafter executed by giving deeds of the land to the plaintiffs; and the undisputed testimony is to the effect that the notes and mortgages executed and delivered by them to Jones were intended merely as security and indemnity to Jones against loss for furnishing certain bail bonds and agreeing to make certain advancements in connection with criminal proceedings pending or about to be commenced against Henry Grebe.

Parol evidence — admissible to show real nature of transactions — written contract — evidence to disprove its existence — not to contradict its terms — admissible.

3. Parol evidence was admissible to show the real nature of the transaction between Jones and the Grebes. The rule excluding parol evidence does not apply where it is offered, not for the purpose of contradicting or varying the effect of a written contract of admitted authority, but to disprove the legal existence or rebut the operation of the instrument; and in order to determine the validity of the writing the true character of the transaction may always be shown.

Notes and mortgages — consideration — contingent loss — no loss occurring — consideration failed.

4. The notes and mortgages were not given in consideration of Jones' promise

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terest, but some cases do not recognize this exception to the general rule where such officer is the sole representative of the bank in the transaction. The conflicting authorities are reviewed in a note in 29 L.R.A.(N.S.) 558.

The general question of parol evidence to verify, add to, or alter a written contract, is the subject of a note in 17 L.R.A. 270.

to furnish bail and make advancements for Henry Grebe, but rather to secure and indemnify him against any future contingent loss or liability growing out of these matters; and no such loss or liability having occurred, the consideration failed.

Trust — breach of faith — fraud to negotiate the paper — burden of proof on holder to show title in due course.

5. Under the facts it was a breach of faith amounting to fraud upon Jones' part to negotiate this paper to the bank. This being true, his title thereto was defective under the express provisions of § 6357, Rev. Codes 1905, and under § 6361, Rev. Codes, the burden shifted to defendant to prove that the bank acquired title to the notes in due course.

Jones as an individual sold the paper — as cashier of the bank, he purchased it — infirmity — knowledge of — imputed to the bank.

6. In negotiating the paper Jones acted in a dual capacity. As an individual he sold the paper, and as cashier of the bank he purchased it. His knowledge of the infirmity in his title was therefore imputed to the bank. Emerado Farmers Elevator Co. v. Farmers Bank, 20 N. D. 270, cited and followed.

Plaintiff's acts in renewing the paper with the bank — do not constitute estoppel.

7. Appellant's contentions that plaintiff's acts in renewing the paper to the bank, and in permitting it to remain as an asset of such bank until a receiver was appointed, should operate to estop them from urging any infirmity in such paper, are held without merit.

Opinion filed October 1, 1914.

Appeal from District Court of Pierce County, *A. G. Burr*, J.

Actions in equity to cancel certain mortgages of record for failure of consideration of the notes secured thereby.

From a judgment in favor of each of the plaintiffs, defendant appeals.

Affirmed.

Statement by Fisk, J.

The record on this appeal presents two distinct suits,—one by John Grebe and the other by Louis Grebe, as plaintiffs against George W. Swords, as receiver of the First National Bank of Rugby, North Dakota. These actions were brought to cancel and satisfy of record certain mortgages executed by the Grebes upon the lands described in

their respective complaints, upon the ground of a failure of consideration of the mortgages and the notes secured thereby.

By stipulation the two actions were tried together with the understanding that separate judgments should be entered. At the conclusion of the trial in the district court, findings of fact and conclusions of law favorable to the plaintiff in each case were made, and separate judgments entered granting the relief prayed for in the complaints, from which judgments these appeals are prosecuted, the appellant demanding a trial *de novo* of the entire case in this court, and, by stipulation of counsel, the two causes which involve the same facts and legal questions may be tried anew in this court as one case, but with the understanding that separate judgments shall be entered in each action.

The salient facts are not in dispute, and they are narrated in appellant's brief, in substance, as follows: On July 7, 1907, one Henry Grebe was arrested in Pierce county on a criminal charge, and a few days later was rearrested on a charge of conspiracy. He had difficulty in obtaining bonds in both cases, and began negotiations with one A. H. Jones, then cashier of the First National Bank of Rugby, North Dakota, to procure the necessary bonds for his release, which negotiations resulted in their signing a written instrument, Exhibit "1," as follows:

This agreement made and entered into on this 19th day of July, A. D. 1907, by and between A. H. Jones, party of the first part, and Henry Grebe, party of the second part,

Witnesseth: Whereas, Henry Grebe, party of the first part, has on this day sold to A. H. Jones, party of the first part, certain lands in Pierce county, N. D., more particularly described in that certain warranty deed executed by me upon this 19th day of July, A. D. 1907, for the sum of $5,100, it is hereby agreed that the payment for the same shall be made as follows, to wit:

(1) That the said A. H. Jones shall deduct from said purchase price of $5,100 whatever sums as attorneys' fees or expenses he shall pay or cause to be paid on my behalf for my defense in any criminal action that is now started or shall hereafter be started against me.

(2) That said A. H. Jones shall deduct from the said purchase price the amount of any bonds that he may sign for me in connection with said criminal actions.

(3) That said A. H. Jones shall, after deducting said amounts heretofore described, execute a promissory note payable to the said Henry Grebe for the balance of said purchase price payable November 1, 1908, drawing interest at the rate of 7 per cent per annum.

It is further agreed that at any time that said A. H. Jones is released from said bonds heretofore mentioned that he shall pay to said party of the second part whatever he has deducted by reason thereof, except that he is not required to pay the same before November 1, 1908. Said A. H. Jones to use his best judgment concerning expenses and hiring of attorneys for as heretofore mentioned.

A. H. Jones.
Henry Grebe.

At the same time Henry Grebe deeded to Jones all of his real estate, consisting of the northeast quarter of section fifteen (15), and the southwest quarter of the northeast quarter, the northwest quarter of the southeast quarter, the south half of the southeast quarter of section eleven (11), all in township one hundred fifty-six (156), range seventy-three (73), also the south half of the northwest quarter, the north half of the southwest quarter of section eleven (11), township one hundred fifty-five (155), range seventy-three (73), which deed was filed for record and duly recorded on said date in the office of the register of deeds of Pierce county.

Thereafter and on August 8, 1907, Jones deeded to the plaintiff, Louis Grebe, brother of Henry Grebe, certain of the lands above described, and Louis Grebe executed and delivered to Jones two promissory notes, one for the sum of $2,500 and the other for the sum of $1,500, which notes were secured by a mortgage on one of such quarter sections of land thus conveyed by Jones to Louis Grebe, and also upon another quarter owned by Louis Grebe and which constituted his homestead. A chattel mortgage of all the crops raised on this land was also executed and delivered to Jones by Louis Grebe. The mortgage upon the real estate was given to secure not only the note for $2,500, but also a $1,500 note, which was transferred by Jones to the Barton State Bank, which latter note is in no way involved in this action.

On the same date of the above transactions with Louis Grebe, Jones conveyed the remainder of the land, which had been deeded to him

by Henry Grebe, to the plaintiff John Grebe, and at the same time John Grebe and wife executed and delivered to Jones their promissory note for the sum of $2,600, and a mortgage securing payment of the same; also a mortgage upon the crops to be raised on the land mortgaged. Two days later and before maturity, the $2,500 note executed by Louis Grebe was indorsed and transferred by Jones to the First National Bank of Rugby, and Jones received credit therefor on the books of the bank, and subsequently checked out and used the money. In the following January this $2,500 note was renewed by Louis Grebe, giving to the First National Bank a new note for $2,614.65.

On the same date of such renewal by Louis Grebe, the $2,600 note given by John Grebe and wife to Jones was renewed by giving a new note for the balance then due, amounting to $955.30, together with a mortgage securing payment of the same. This $2,600 note had not been transferred to the bank, and no part of the same had been among the assets of the bank until January 27, 1908, the date such renewal note was executed, but such renewal note for $955.30 was made directly to the bank and placed among its assets, and Jones was thereupon credited with such amount on the books of the bank, and subsequently used the money. When this renewal note was made the original note was past due.

Jones signed bonds in two criminal actions against Henry Grebe, aggregating $7,500, and a bond for $5,000 in a criminal action for John Grebe, and his liability under such bonds continued until the dismissal of the actions against them on January 25, 1909, at which time they were dismissed for want of prosecution.

Bangs, Netcher, & Hamilton, for appellant.

Contemporaneous instruments and having relation to the same subject-matter must be taken as parts of one transaction and construed together, to show the true contract between the parties. Myrick v. Purcell, 95 Minn. 133, 103 N. W. 902, 5 Ann. Cas. 148; Sutton v. Beckwith, 68 Mich. 303, 13 Am. St. Rep. 344, 36 N. W. 79; McNamara v. Gargett, 68 Mich. 455, 13 Am. St. Rep. 355, 36 N. W. 218; Howell v. Howell, 29 N. C. (7 Ired. L.) 491, 47 Am. Dec. 335; Brackett v. Edgerton, 14 Minn. 174, Gil. 134, 100 Am. Dec. 211;

White v. Miller, 52 Minn. 367, 19 L.R.A. 673, 54 N. W. 737; 2 Century Dig. Contracts, § 746a.

All their negotiations, talk, or conversation prior and leading up to an agreement were merged in the two written instruments, and such instruments only, express their will and intention. Rev. Codes 1905, § 5333; Reeves v. Bruening, 13 N. D. 163, 100 N. W. 243; Mott v. Richtmyer, 57 N. Y. 59.

It is the duty of every contracting party to learn and know the contents of the contract before he signs and delivers it. 9 Cyc. 388; Little v. Little, 2 N. D. 175, 49 N. W. 736; Quimby v. Shearer, 56 Minn. 534, 58 N. W. 155; Albrecht v. Milwaukee & S. R. Co. 87 Wis. 105, 41 Am. St. Rep. 30, 58 N. W. 72; Deering v. Hoeft, 111 Wis. 339, 87 N. W. 298; Fivey v. Pennsylvania R. Co. 67 N. J. L. 627, 91 Am. St. Rep. 445, 52 Atl. 472, 12 Am. Neg. Rep. 313; Greenfield's Estate, 14 Pa. 496; Upton v. Tribilcock, 91 U. S. 45, 50, 23 L. ed. 203, 205.

Parol evidence of an agreement which has been reduced to writing is inadmissible. Atwood v. Cobb, 16 Pick. 227, 26 Am. Dec. 657; Waddle v. Owen, 43 Neb. 489, 61 N. W. 731; Blossom v. Griffin, 12 N. Y. 569, 67 Am. Dec. 75; Dudgeon v. Haggart, 17 Mich. 280; Goddard v. Foster, 17 Wall. 123, 21 L. ed. 589; Springsteen v. Samson, 32 N. Y. 706; Clark v. Woodruff, 83 N. Y. 522; Adair v. Adair, 5 Mich. 204, 71 Am. Dec. 779; Cooper v. Berry, 21 Ga. 526, 68 Am. Dec. 468; Sullivan v. McLenans, 2 Iowa, 437, 65 Am. Dec. 780; MacKinnon Boiler & Mach. Co. v. Central Michigan Land Co. 156 Mich. 11, 120 N. W. 26; Pack v. Thomas, 13 Smedes & M. 11, 51 Am. Dec. 135; Rev. Codes 1905, §§ 5342, 5343.

The burden of proof of a want of consideration sufficient to support an instrument lies with the party seeking to invalidate it or avoid it. Rev. Codes 1905, § 5326; Bray v. Comer, 82 Ala. 183, 1 So. 81; Gibbons v. Dunn, 46 Mich. 147, 9 N. W. 140; Jackson v. Wood, 88 Mo. 76; Roberts v. Derby, 68 Hun, 299, 23 N. Y. Supp. 34; Atlantic Delaine Co. v. James, 94 U. S. 207, 24 L. ed. 112; Allen v. Chicago, B. & Q. R. Co. 82 Neb. 726, 23 L.R.A.(N.S.) 278, 118 N. W. 655.

The evidence required to warrant cancelation of deed must be clear and convincing. 2 Pom. Eq. Jur. § 859; 3 Greenl. Ev. § 363; Armor v. Spaulding, 14 Colo. 302, 23 Pac. 790, and cases therein cited; Jones, Mortg. § 335; Holmes v. Fresh, 9 Mo. 201; Jones v. Brittan, 1 Woods,

667, Fed. Cas. No. 7,455; Jasper v. Hazen, 4 N. D. 6, 23 L.R.A. 62, 58 N. W. 454; Howland v. Blake, 97 U. S. 624, 24 L. ed. 1027.

The presumption is in favor of the written instrument. If the proofs are not clear and convincing against it, the instrument will be upheld. Kent v. Lasley, 24 Wis. 654; Satterfield v. Malone, 1 L.R.A. 35, 35 Fed. 445.

The intention of the parties must be found from the language of the instrument. Smyth v. Fogle, 150 Iowa, 161, 129 N. W. 735; Barkhausen v. Chicago, M. & St. P. R. Co. 142 Wis. 292, 124 N. W. 649, 125 N. W. 680; McAlpine v. Millen, 104 Minn. 289, 116 N. W. 583; Campau v. National Film Co. 159 Mich. 169, 123 N. W. 606; Krbel v. Krbel, 84 Neb. 160, 120 N. W. 935.

Matters not apparent on the face of the paper, such as fraud, duress, or failure of consideration, are equities which cannot avail against a holder in due course. Cristy v. Campau, 107 Mich. 172, 65 N. W. 12; First Nat. Bank v. Green, 43 N. Y. 298; Jamieson v. Heim, 43 Wash. 153, 86 Pac. 165; Buzzell v. Tobin, 201 Mass. 1, 86 N. E. 923; Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959; Fearing v. Clark, 16 Gray, 74, 77 Am. Dec. 395; Rea v. McDonald, 68 Minn. 187, 71 N. W. 11; Clark v. Skeen, 61 Kan. 526, 49 L.R.A. 190, 78 Am. St. Rep. 337, 60 Pac. 329; Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1081; Yates v. Spofford, 7 Idaho, 737, 97 Am. St. Rep. 267, 65 Pac. 501; Borgess Invest. Co. v. Vette, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754; Fitzgerald v. Barker, 96 Mo. 661, 9 Am. St. Rep. 375, 10 S. W. 45; Bedell v. Herring, 77 Cal. 572, 11 Am. St. Rep. 307, 20 Pac. 129; Nashville Trust Co. v. Smythe, 94 Tenn. 513, 27 L.R.A. 663, 45 Am. St. Rep. 748, 29 S. W. 903; Carpenter v. Longan, 16 Wall. 271, 21 L. ed. 314; Hern v. Nichols, 1 Salk. 289; Wilson v. Denton, 82 Tex. 531, 27 Am. St. Rep. 908, 18 S. W. 620; New Orleans Canal & Bkg. Co. v. Templeton, 20 La. Ann. 141, 96 Am. Dec. 385; Woodworth v. Huntoon, 40 Ill. 131, 89 Am. Dec. 340; Davis v. Bartlett, 12 Ohio St. 534, 80 Am. Dec. 375.

Fraud is no defense against a bona fide indorsee for value and before maturity. Bedell v. Herring, 11 Am. St. Rep. 307, and note, 77 Cal. 572, 20 Pac. 129.

The remedy of the maker of a promissory note which has been sold

by the payee to an innocent purchaser is an action for damages for the amount of the note and interest. Myrick v. Purcell, 95 Minn. 133, 103 N. W. 902, 5 Ann. Cas. 148; Citing Decker v. Mathews, 12 N. Y. 313; Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142; Farnham v. Benedict, 107 N. Y. 159, 13 N. E. 784; Fahey v. Esterley Mfg. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Canham v. Plano Mfg. Co. 3 N. D. 229, 55 N. W. 583.

A failure of consideration after a bona fide transfer does not affect the character of the purchaser, although he had full knowledge of the original consideration for which the note was given. 7 Cyc. 947; Splivallo v. Patten, 38 Cal. 138, 99 Am. Dec. 358; Rublee v. Davis, 33 Neb. 779, 29 Am. St. Rep. 509, 51 N. W. 135; Davis v. McCready, 17 N. Y. 230, 72 Am. Dec. 461; Miller v. Ottaway, 81 Mich. 196, 8 L.R.A. 428, 21 Am. St. Rep. 513, 45 N. W. 665; McNight v. Parsons, 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; Jennings v. Todd, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; Parker v. Sutton, 103 N. C. 191, 14 Am. St. Rep. 795, 9 S. E. 283; Hakes v. Thayer, 165 Mich. 476, 131 N. W. 174; United States Nat. Bank v. Floss, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751; American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99.

Proof that a full consideration was paid for the note on its transfer prima facie establishes the fact that transfer was in due course. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Stephens v. Olson, 62 Minn. 295, 64 N. W. 898; Fredin v. Richards, 61 Minn. 490, 63 N. W. 1031; Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. App. 182, 73 Pac. 873; Cox v. Cline, 139 Iowa, 129, 117 N. W. 48; Champion Empire Min. Co. v. Bird, 7 Colo. App. 523, 44 Pac. 764.

A mere suspicion of infirmity will not constitute notice. American Exch. Nat. Bank v. New York Belting & Packing Co. 148 N. Y. 698, 43 N. E. 168; Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 700; Jennings v. Todd, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; Second Nat. Bank v. Morgan, 165 Pa. 199, 44 Am. St. Rep. 652, 30 Atl. 957; Chemical Nat. Bank v. Kellogg, 183 N. Y. 92, 2 L.R.A. (N.S.) 299, 111 Am. St. Rep. 691, 75 N. E. 1104, 5 Ann. Cas. 158; Johnson v. Buffalo Center State Bank, 134 Iowa, 731, 112 N. W. 165; Davis v. Bartlett, 12 Ohio St. 534, 80 Am. Dec. 375; Johnson v. Way,

27 Ohio St. 374; Green v. Wilkie, 98 Iowa, 74, 36 L.R.A. 434, 60 Am. St. Rep. 184, 66 N. W. 1046; Commercial Bank v. Burgwyn, 110 N. C. 267, 17 L.R.A. 326, 14 S. E. 623; Hardman v. Cabot, 60 W. Va. 664, 7 L.R.A.(N.S.) 506, 55 S. E. 756, 9 Ann. Cas. 1030.

The conduct of the plaintiffs had the effect of deceiving not only the bank, and the examiner, but the stockholders, depositors, and creditors of the bank, and the plaintiffs are estopped to plead or show the matters of which they complain. Skordal v. Stanton, 89 Minn. 511, 95 N. W. 449; Findley v. Cowles, 93 Iowa, 389, 61 N. W. 998; Hurd v. Kelly, 78 N. Y. 588, 34 Am. Rep. 567.

Where the maker of a note or bond allows it to be treated as an asset of the bank for three years, and the public to deal with it on that assumption until the bank became insolvent, he is estopped to set up the claim of fraud. Best v. Thiel, 79 N. Y. 15; Longmire v. Fain, 89 Tenn. 393, 18 S. W. 70; New England F. Ins. Co. v. Haynes, 71 Vt. 306, 76 Am. St. Rep. 771, 45 Atl. 221; Lyons v. Benney, 230 Pa. 117, 34 L.R.A.(N.S.) 105, 79 Atl. 250; People's Bank v. Stroud, 223 Pa. 33, 72 Atl. 341; State Bank v. Kirk, 216 Pa. 452, 65 Atl. 932; Murphy v. Gumaer, 18 Colo. App. 183, 70 Pac. 800; Pauly v. O'Brien, 69 Fed. 460.

Guy C. H. Corliss, for respondent.

The transfer of the notes and mortgages by Jones to the bank of which he was cashier at the time was not only in bad faith as to the makers, but the knowledge of Jones that he was committing a fraud upon the makers was imputed to the bank. Holden v. New York & El. Bank, 72 N. Y. 286; Bolles, Bkg. pp. 416–422; Niblack v. Cosler, 74 Fed. 1000, 26 C. C. A. 16, 47 U. S. App. 637, 80 Fed. 596; Emerado Farmers' Elevator Co. v. Farmers' Bank, 20 N. D. 270, 29 L.R.A. (N.S.) 567, 127 N. W. 522; Black Hills Nat. Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071; First Nat. Bank v. New Milford, 36 Conn. 93; First Nat. Bank v. Dunbar, 118 Ill. 625, 9 N. E. 186; Daniels v. Empire State Sav. Bank, 92 Hun, 450, 38 N. Y. Supp. 580; Wiggins v. Stevens, 33 App. Div. 83, 53 N. Y. Supp. 90; National Bank v. Munger, 36 C. C. A. 659, 95 Fed. 87; First Nat. Bank v. Blake, 60 Fed. 78; First Nat. Bank v. Babbidge, 160 Mass. 563, 36 N. E. 462; Cook v. American Tubing & Webbing Co. 28 R. I. 41, 9 L.R.A.(N.S.) 193, 65 Atl. 641; Morris v. Georgia Loan & Sav. Bkg. Co. 109 Ga.

12, 46 L.R.A. 506, 34 S. E. 378; Citizens' Sav. Bank v. Walden, 21 Ky. L. Rep. 739, 52 S. W. 953; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; Millward-Cliff Cracker Co.'s Estate, 161 Pa. 157, 28 Atl. 1072; Zane, Banks & Bkg. §§ 106–163.

It matters not that the maker knew the papers were carried as assets of the bank. Westwater v. Lyons, 113 C. C. A. 617, 193 Fed. 817; Agricultural Bank v. Robinson, 24 Me. 274, 41 Am. Dec. 385.

Having taken these notes with notice that there was no consideration unless Jones actually paid out some money, the bank stands in exactly the same place as Jones. 8 Cyc. 32, 33; Rev. Codes, 1905, §§ 6330, 6360.

Where a note is given as security for bail bonds furnished by the payee, there is no consideration unless the payee sustains a loss. 7 Cyc. 706; Iowa College v. Hill, 12 Iowa, 462.

Fisk, J. (after stating the facts as above). There are, as the writer views it, three main propositions involved in this litigation: First, Was there a failure of consideration as to the notes and mortgages sought to be canceled? If so, then,

Second, Did the First National Bank of Rugby acquire title to such paper in due course? If not, then

Third, Are the plaintiffs estopped by their dealings with the bank from questioning the bank's or the receiver's title thereto?

These propositions will be considered in the order above mentioned.

Appellant's counsel strenuously contend that there was no failure of consideration for the notes in question, but, on the contrary, that they were given for a perfectly good and valuable consideration, and consequently enforceable as such, even in the hands of A. H. Jones, the payee. Their argument is based chiefly upon the hypothesis that Jones owned the three quarters of land covered by the mortgages, and sold the same to these plaintiffs, taking the said notes and mortgages in payment of the purchase price. They point to Exhibit 1, the contract, and to Exhibit 2, the warranty deed, both executed by the former owner of the land, Henry Grebe, and which deed purports on its face to be a deed of conveyance of such land to A. H. Jones, and which contract purports to fix the terms and method of payment of the agreed purchase price,

as conclusive evidence of Jones' ownership and right to make sales of this land to these plaintiffs.

Our first inquiry, therefore, will be directed to the true nature and legal effect of the transaction between Henry Grebe and A. H. Jones as disclosed by the record. The testimony of Grebe is positive and wholly undisputed as to the fact that a sale by him to Jones of such land was never contemplated by either Jones or himself, and such testimony is corroborated by that of his brothers, John and Louis, as well as by all the facts and surrounding circumstances disclosed, excepting the two exhibits to which we have above referred, which, of course, create the presumption that they are what they purport upon their face to be. It is a significant fact, entitled to considerable weight, that appellant failed to call Jones as a witness at the trial. He evidently relied upon these two Exhibits, 1 and 2, as not only the best, but the sole and only competent, testimony as to the nature of the transaction. In this we think he is in error. These actions are not based on those exhibits, nor were these plaintiffs, or either of them, parties thereto. Such exhibits are only incidentally and collaterally involved in this litigation, their only relevancy being to prove a link in appellant's chain of evidence tending to establish a consideration for the notes and mortgages executed to Jones by these respondents. In other words, they merely tend to show that Jones had title to these lands, and therefore had a right to sell and convey them to Louis and John Grebe; but their evidentiary force stops here, for they in no way tend to prove that Jones in fact did sell and convey such lands to Louis and John. And the undisputed evidence is that no such sale took place. On the contrary, it clearly appears from the testimony that Jones acted merely as a conduit through which the title passed from Henry to his brothers, Louis and John, for a purpose not clearly disclosed by the record, but which Jones induced the Grebes to believe was necessary, or at least advisable. All the Grebe brothers positively testified, however, that there was no intention by such transfers to devest Henry of his interest in this property, and such testimony is undisputed. Whether owing to Henry's serious trouble involving him in criminal proceedings, the purpose was to put the property beyond the reach of his creditors, which may be easily inferred from some of Henry's testimony, or whether it was deemed necessary in order to facilitate the giving of security to enable

him to procure bail, is not clearly made to appear, nor, as we view it, is it of vital importance. In either event Jones acquired no title which he sold or could sell to Louis and John Grebe. The fact, as testified to by Henry Grebe, to the effect that he was badly scared on account of the criminal charges, and did everything which Jones told him to do, seems to be amply borne out by the record. Indeed, we are forced to the belief, from a perusal of the evidence, that the Grebes, in dealing with Jones, were at a great disadvantage and wholly incapable of protecting their rights. They were simple-minded and inexperienced, and apparently placed implicit confidence in his honesty, blindly following his suggestions. He took advantage of their situation, and wickedly betrayed the trust they so foolishly placed in him. Had Jones retained these notes and mortgages, instead of disposing of them to the bank, and were these actions against him instead of the receiver of such bank, we believe no court would hesitate to award relief to the plaintiffs. In arriving at the foregoing conclusion we have not overlooked, but have duly considered, the elementary and well-settled rules invoked by appellant's able counsel to the effect that Exhibits 1 and 2, which were made at the same time and relate to the same transaction, must be construed together as one contract; also that all preliminary negotiations leading up to the making of a written contract are merged in such contract, and parol evidence is inadmissible to vary or change the terms thereof; also the rule governing the nature and degree of proof which should be exacted by the courts before canceling solemn written instruments. While these and other rules of a similar nature referred to in appellant's brief are no doubt correctly stated by counsel, we do not deem them controlling of the rights of the parties in the case at bar. There is an exception to such rules which is equally well recognized, and which counsel have evidently overlooked. Such exception was, no doubt, made for the express purpose of dealing with cases analogous to the case at bar, and is a very wise and salutary exception, designed to relieve innocent victims of fraud and deceit by permitting them to show that it was never intended that an instrument, which purports to be a contract between them, should ever have effect as a valid and binding agreement. It would, indeed, be strange, as well as a reproach upon the law, if, as appellant's counsel contend, the instruments, Exhibits 1 and 2, must be accepted as conclusive evidence of the fact that the trans-

action between Henry Grebe and A. H. Jones on July 19, 1907, was in truth and in fact what these instruments on their face indicate it to have been. The rule to which we refer is very clearly and concisely stated in 17 Cyc. 694, as follows: "The objection to parol evidence does not apply where it is offered, not for the purpose of contradicting or varying the effect of a written contract of admitted authority, but to disprove the legal existence or rebut the operation of the instrument, and in order to determine the validity of the writing the true character of the transaction may always be shown. So, also, evidence which is offered, not for the purpose of varying or contradicting the terms of a written instrument, but to show that it was never intended to be operative between the parties, and never in fact had any legal existence as a contract or grant, is admissible." Numerous authorities are cited in the notes supporting the text. At page 722 of the same treatise it is further stated: "It is generally considered that parol evidence is admissible where it is offered, not for the purpose of varying the terms of a written contract, but for the purpose of explaining and showing the true nature and character of the transaction evidenced thereby, especially where it is plain that the language used, taken in its literal sense, does not exhibit the real transaction, or where the writing is assailed on the ground of fraud. Applications of this principle are to be found in those cases where evidence has been admitted to show that, although a writing evidences upon its face an absolute transfer of property or an absolute promise to pay money, the real transaction consisted merely in the giving of security or indemnity, or that the grantee in a written instrument, such as a deed, assignment, bill of sale, or the like, which on its face passes the title to property, took the title subject to a trust." We might cite many adjudicated cases in support of the rule as stated in Cyc., but we deem it wholly unnecessary. Our conclusion on this point is that under the testimony it is entirely clear that Jones did not acquire title to these lands from Henry Grebe, and therefore had no right to sell, and did not sell, the same to Louis and John Grebe, but on the contrary, he received the title merely in trust for the sole purpose of transferring the same to Louis and John, which trust he executed by later executing and delivering deeds to them. Therefore, we must overrule appellant's contention that the mortgages and notes involved were

given as payment for the purchase price on the sale of such land by Jones to the Grebes.

But it is also contended by appellant that the promise by Jones to furnish bail constituted sufficient consideration for the giving of these notes and mortgages by Louis and John. Such contention is, we think, unsound. Plaintiffs did not give the notes as a consideration for the promise of Jones to furnish bail and pay expenses of the defenses, but they gave them merely to secure and indemnify him against any loss which he should suffer in the future by reason of his performing such acts. The notes were not to be paid as a consideration for his promise, but only on the contingency that he advanced moneys and suffered loss on account of furnishing such bail. Under these circumstances no consideration for the notes could arise until such time as Jones was entitled to be reimbursed for advances and loss, and under this record such contingency never arose. At no time, therefore, could Jones have recovered a single dollar on these notes and mortgages. In brief, the payment of anything thereon was conditional, and such condition never arose. The case of Tronson v. Colby University, 9 N. D. 563, 84 N. W. 474, cited by appellant's counsel, is not in point. It was there merely held that a promise is a good consideration for a promise; but as we have above stated, the Grebes did not give these notes for Jones's promise to do certain things, but they were given solely as security, and to indemnify Jones against a future contingent liability or loss. The case at bar is governed, we think, by the well-settled rule stated in 7 Cyc. 706. We quote: "And in general if a note is given merely as indemnity against a loss which may ensue to the payee from a contemplated act of the maker, and the act is not done, and the liability of loss not incurred, there will be no consideration for the note."

Having reached the conclusion that Jones, the payee, could not have enforced the payment of these notes for failure of consideration, we next come to the question as to whether the bank, through its receiver, stands in a more favorable position. In other words, was the bank a purchaser of this paper in due course?

The presumption in the first instance, of course, is as appellant's counsel contend, that the bank was a purchaser of the paper in due course, the notes being negotiable in form and duly indorsed by Jones. But such presumption was rebutted when it was shown that the title of

Jones was defective, and thereafter the burden shifted to the holder to prove that he acquired the title as a holder in due course. Rev. Codes 1905, § 6361. That the title of Jones was defective cannot be doubted, for under the express provisions of § 6357, Rev. Codes, the title of one who negotiates an instrument is defective "when . . . he negotiates it in breach of faith, or under such circumstances as amount to a fraud." That it was, under the circumstances, a breach of faith amounting to fraud for Jones to negotiate these notes must, we think, be conceded. On this point, see Citizens' State Bank v. Garceau, 22 N. D. 576, 134 N. W. 882.

There is not only an entire absence of evidence that the bank in purchasing this paper did not know that the title of Jones was defective, but it affirmatively appears that in the discounting of such paper Jones, as cashier, is the only person who acted for the bank. He turned over the notes, and gave, or caused himself to be given, credit therefor on the books of such bank. He was the bank in the transaction, and whatever was done by his assistant cashier was done purely in a clerical way, under the directions of Jones, and without the exercise of any independent judgment or discretion in the matter. This being true, the knowledge of Jones as to the infirmity in this paper was the knowledge of the bank. Emerado Farmers' Elevator Co. v. Farmers' Bank, 20 N. D. 270, 29 L.R.A.(N.S.) 567, 127 N. W. 522. See also cases cited in notes in 2 L.R.A.(N.S.) 993, and 29 L.R.A.(N.S.) 558. While there is a diversity of opinion among the courts as to whether the knowledge of the bank official who deals with himself will be imputed to the bank, the apparent weight of authority appears to support the views of this court in Emerado Farmers' Elevator Co. v. Farmers' Bank, supra.

The only remaining point which requires consideration is that of estoppel. It is urged by appellant's counsel that plaintiffs, by renewing the notes after the bank acquired them, are, by reason of such acts, estopped to urge any infirmity therein. Their reasoning is that such action on their part was an affirmance and ratification of Jones' act in selling such notes to the bank. We fail to discover any room for the application of the doctrine of estoppel here. It does not appear that, on account of such renewals, the bank parted with anything or in the least changed its position to its detriment. Moreover, it could not have been misled thereby as to the character of the notes, for, as we have seen,

knowledge of the true facts was imputed to it through Jones, its cashier, long prior thereto. Jones might, with equal force, have urged an estoppel on such ground had he retained the notes in his possession. Nor are we able to see any merit in the other alleged ground of estoppel; namely, that by permitting the notes to remain in the bank after such renewals and until the receiver was appointed, such conduct "had the effect of deceiving not only the bank and the examiner, but also the stockholders, depositors, and creditors of the bank." There might possibly be some merit in appellant's contention if the facts in the case at bar brought it within the rule announced in the cases cited by counsel. Such, however, is not the fact.

The rule invoked by counsel, and which the authorities cited by them tend to support, is to the effect that when a person, for the purpose of giving a bank a false credit, executes to it commercial paper which is placed among its assets for the purpose of deceiving the bank examiner or others, he is estopped from urging any infirmity in such paper after it has passed into the hands of a receiver of such bank. But as very correctly stated in the brief of respondent's counsel, "The Grebes in giving these notes *had no thought of lending any false credit to the bank.* The original notes all ran to Jones personally. They signed such papers as Jones asked them to sign, and had no real grasp of the fact that the notes were being carried by the bank as assets of the bank. Indeed, it does not even appear that they knew that the notes appeared on the books of the bank as assets thereof. Whether the renewal notes ran to the bank was a matter that did not attract their attention, and even if they had discovered this fact it would have meant nothing to these simple inexperienced men. To a plain, ignorant farmer, Jones was the bank, and any notice that might come to the Grebe Brothers from the bank relating to these notes would not carry to their minds the thought that they had been a party to a scheme to give the bank a false credit by allowing their notes to appear upon the books as assets of the bank. Even if they had, in a vague way, realized that Jones had sold the notes to the bank, it would not be fraudulent for them to not take any action to have these false appearances altered. In fact they would have been unable to do so even if they had tried. They did not give him the notes for the purpose of having them appear on the books of the bank as assets. They were fully justified in believing that Jones, who was the bank,

would, as between him and the bank, take care of these notes if it ever became his duty to do so. If, under the circumstances of this case, the doctrine of estoppel applies, then in every instance whenever a bank fails the defense of want of consideration as against the bank can never be urged as against the receiver of the bank."

Our conclusion, after due consideration of the questions presented, is that the findings and conclusions of the trial court are in all things correct. The judgment in each case is accordingly affirmed.

FARMERS NATIONAL BANK, a Corporation, v. GEO. FERGUSON, Wm. Ferguson, Allie D. Austin, E. F. Dunton, and B. R. Crabtree.

(148 N. W. 1049.)

Claim and delivery — undertaking by defendant — action on — entry of judgment in alternative — necessary to plead and prove — or that property cannot be returned — sureties on undertaking — rights must not be prejudiced.

1. In an action on an undertaking given by defendants in claim and delivery proceedings for the purpose of regaining possession of the property pursuant to the provisions of § 6922, Rev. Codes 1905, it is essential to a recovery as against the sureties on such undertaking, to both allege and prove either the due entry of a judgment in the alternative form as provided by § 7075, Rev. Codes, or facts showing that a return of the property was impossible owing to its irretrievable loss by destruction or other cause, thus establishing the fact that the sureties' substantial rights were in no way prejudiced by the failure to observe the above statute.

Proper practice — judgment should be entered in alternative in any event.

2. Even where it appears that for some reason the property cannot be redelivered, and consequently a judgment in the alternative granting such right of redelivery would confer upon the defeated party and his sureties on the undertaking but a mere empty and valueless privilege, it is the proper, if not the only safe, practice to conform with the Code provisions aforesaid in entering the judgment.

Note.—The general question of the effect upon a surety of judgment against his principal is the subject of a note in 40 L.R.A.(N.S.) 698.

Redelivery bond — action against sureties — money judgment — allegation of complaint — sufficiency.

3. In an action against the sureties on a redelivery undertaking given in claim and delivery proceedings, an allegation alleging the rendition of a mere money judgment in the prior action in which such undertaking was given, and concluding merely with the recital, "it being shown to the satisfaction of the court that a return of said property could not be had," is insufficient to warrant a recovery.

Evidence — money judgment — property sold at public auction — pleading mere conclusion.

4. The evidence upon which it is contended that the court was justified in entering a mere money judgment instead of a judgment in the alternative consists of an affidavit of one F., stating that the property had been sold at public auction, and giving as his mere conclusion that "a delivery to this plaintiff cannot now be had, and that plaintiff's only remedy is for a money judgment."

Held, wholly insufficient as against the sureties, for reasons stated in the opinion.

Claim and delivery — judgment — presumption in support of.

5. The case of Larson v. Hanson, 21 N. D. 411, is cited and followed, but certain expressions contained in the opinion in that case are commented upon and explained.

Action — dismissal on the merits — judgment — nonsuit — failure to allege and prove — new action.

6. The judgment appealed from, while purporting to dismiss the action on the merits and with prejudice, merely amounts to a nonsuit for failure of proper allegation and proof of facts essential to plaintiff's recovery, and the dismissal should therefore be without prejudice to the bringing of a new action.

The same is accordingly ordered to be thus modified.

Opinion filed May 11, 1914. On rehearing October 8, 1914.

Appeal from District Court of Dickey County, *Frank P. Allen*, J.

From a judgment in defendant's favor, plaintiff appeals.

Modified and affirmed.

Engerud, Holt, & Frame, for appellant (*Webb & Brouillard*, of counsel).

Since all evidence offered by appellant on the trial was received without objection, and respondents offered no evidence, it is clear and it follows that if appellant made out a prima facie case, the judgment of the lower court was erroneous. Larson v. Hanson, 21 N. D. 411, 131

N. W. 229; Boley v. Griswold, 87 U. S. 486, 22 L. ed. 375; Burton v. Platter, 4 C. C. A. 95, 10 U. S. App. 657, 53 Fed. 908; Selby v. McQuillan, 59 Neb. 158, 80 N. W. 504.

The lower court judgment fixes the fact as to the ability to return the property. It does not require the performance of an act which has been made to appear to it to be impossible of performance, and therefore it entered a money judgment for the value of the property. Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 638, 93 Pac. 661; Ulrich v. McConaughey, 63 Neb. 10, 88 N. W. 150; Eisenhart v. McGarry, 15 Colo. App. 1, 61 Pac. 56; McCarthy v. Strait, 7 Colo. App. 59, 42 Pac. 189; Clouston v. Gray, 48 Kan. 31, 28 Pac. 983; Pranke v. Herman, 76 Wis. 428, 45 N. W. 312; Findlay v. Knickerbocker Ice Co. 104 Wis. 375, 80 N. W. 436; Brown v. Johnson, 45 Cal. 76; Burke v. Koch, 75 Cal. 356, 17 Pac. 228; Erreca v. Meyer, 142 Cal. 308, 75 Pac. 826; Cathey v. Bowen, 70 Ark. 348, 68 S. W. 31; Gambrell v. Gambrell, 130 Ky. 714, 113 S. W. 885; Park v. Robinson, 15 S. D. 551, 91 N. W. 344; Burton v. Platter, 4 C. C. A. 95, 10 U. S. App. 657, 53 Fed. 901.

Such judgment is binding upon the sureties. In the absence of fraud or collusion the issues found are conclusive against the party and his sureties. Selby v. McQuillan, 59 Neb. 158, 80 N. W. 504; McCarthy v. Strait, 7 Colo. App. 59, 42 Pac. 189; Eisenhart v. McGarry, 15 Colo. App. 1, 61 Pac. 56; Clark v. Dreyer, 9 Colo. App. 453, 48 Pac. 818; O'Loughlin v. Carr, 9 Kan. App. 818, 60 Pac. 478; Mason v. Richards, 12 Iowa, 73; Pittsburgh Nat. Bank v. Hall, 107 Pa. 583; Donovan v. Ætna Indemnity Co. 10 Cal. App. 723, 103 Pac. 365.

W. S. Lauder and *James N. Austin,* for respondents.

The answer of defendants to the original complaint stands as their answer to an amended complaint thereafter filed by plaintiff. Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937.

A judgment in claim and delivery must be in the alternative for the return and possession of the property, or in case a return cannot be had, then for its proved value. This is the obligation of the sureties. A mere money judgment in the main action is insufficient to fix the liability of the sureties on the redelivery bond. New England Furniture & Carpet Co. v. Bryant, 64 Minn. 256, 66 N. W. 974; 34 Cyc. 1576; Gallarati v. Orser, 27 N. Y. 324; Jaggar v. Lalance & G. Mfg. Co. 8

Daly, 251; Cook v. Freudenthal, 80 N. Y. 202; Ashley v. Peterson, 25 Wis. 621; Hall v. Law Guarantee & T. Soc. 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643.

By taking a mere money judgment, the plaintiff released the sureties from their obligation to deliver the property. Gerlaugh v. T. J. Ryan & Son, 127 Iowa, 226, 103 N. W. 128; Colorado Springs Co. v. Hopkins, 5 Colo. 206; Lewin v. Stein, 7 Colo. App. 65, 42 Pac. 185; Vinyard v. Barnes, 124 Ill. 346, 16 N. E. 254; Citizens' State Bank v. Morse, 60 Kan. 526, 59 Pac. 115; Vallandingham v. Ray, 128 Ky. 506, 108 S. W. 896; Smallwood v. Norton, 20 Me. 83, 37 Am. Dec. 39; Cummings v. Badger Lumber Co. 130 Mo. App. 557, 109 S. W. 68; Boley v. Griswold, 20 Wall. 486, 22 L. ed. 375.

FISK, J. This is an action on a redelivery bond executed and delivered by the defendants in claim and delivery proceedings. The answering defendants, Austin, Dunton, and Crabtree, are sureties merely on such undertaking.

The facts, briefly stated, are as follows: In November, 1910, plaintiff commenced an action against the defendants George and William Ferguson for the recovery of the possession of certain personal property. In such action the provisional remedy of claim and delivery was invoked by plaintiff, and the property in controversy taken from defendants' possession. Thereafter the redelivery undertaking upon which this action is based, was executed and delivered by the defendants George and William Ferguson, as principals, and these defendants, Austin, Dunton, and Crabtree, as sureties, for the purpose of regaining possession of such property pursuant to § 6922, Rev. Codes 1905. The undertaking is conditioned as provided by the statute, "for the delivery of the said property to the plaintiff, if such delivery shall be adjudged, and if return be not made for the payment to plaintiff of such sum as may, for any cause, be recovered against the defendants in this action."

The complaint, in the case at bar, is in the usual form, except in ¶ 5 the following allegation appears: "That such proceedings were afterwards had that on the 1st day of September, 1911, judgment was rendered against the defendants George Ferguson and William Ferguson, that the plaintiff recover from and of said defendants, and each of them, the sum of $859.14, *it being shown to the satisfaction of the*

court that a return of said property could not be had." The only proof submitted by plaintiff at the trial consists of the undertaking sued upon and the record or judgment roll in the claim and delivery action. Such record includes the summons, complaint, affidavit, and notice in claim and delivery, undertaking in claim and delivery, sheriff's return, answer, amended complaint, affidavit of A. S. French, affidavit of T. L. Brouillard, statement of costs and disbursements, order for judgment and judgment. After plaintiff rested, defendants moved for a judgment of dismissal, which motion was granted, and judgment was thereafter rendered accordingly, from which this appeal is prosecuted. Was such action of the court erroneous?

We deem the decision in Larson v. Hanson, 21 N. D. 411, 131 N. W. 229, controlling in the case at bar. The two cases differ only in the fact that in the former there was no attempt whatever to allege or prove the exceptional facts authorizing the rendition of a judgment for money only in the claim and delivery action, while in the case at bar appellant contends that such exceptional facts were both alleged and proved. Is such contention correct? We think not, and we will briefly state our reasons for this conclusion. The only allegation in the complaint is that contained in the last clause of ¶ 5 above quoted. Manifestly, this is not the equivalent of an allegation of the fact that the property, for some reason, could not be restored to the plaintiff. These sureties did not obligate themselves to pay plaintiff the value of the property absolutely, but they merely bound themselves conditionally for such payment if a delivery thereof "be adjudged and if return be not made." A delivery of the property to plaintiff was not adjudged. Hence, they cannot be held liable on their undertaking in the absence of strict allegation and proof of facts showing that it would have been impossible to have returned the property to plaintiff if its return had been adjudged. In other words, it must, we think, as against these sureties, be clearly established that the exceptional form of judgment entered in the claim and delivery action in fact does not deprive them of any legal rights, or affect, in the least, their actual liability under the bond because of an utter inability, in any event, to restore possession to plaintiff of the property, and consequently they are in no way injured because of the judgment not being in the alternative form. Without such showing, we fail to see how the sureties' liability for money only

can be established. If correct in this, it logically follows that defendants are entitled to their day in court on this issue. But appellant's counsel evidently assume that defendants are concluded by the judgment in the claim and delivery action because, as alleged, it was "shown to the satisfaction of the court that a return of said property could not be had;" but a sufficient answer is that no adjudication to this effect was made, nor could be made in that action, for no such issue was or could be involved therein. New England Furniture & Carpet Co. v. Bryant, 64 Minn. 256, 66 N. W. 974; Fitzhugh v. Wiman, 9 N. Y. 559. Defendants were not parties to that action, and therefore are not bound by the judgment except as to those issues properly therein litigated. In addition to this, the record discloses that the only showing before the court that a delivery of the property could not be made, was an *ex parte* affidavit of one French, merely stating that the property had been sold at public auction, and giving as his mere conclusion that "a delivery to this plaintiff cannot now be had, and that plaintiff's only remedy is for a money judgment." Conceding the admissibility of such affidavit, it falls far short of establishing the *fact* necessary to authorize a money judgment. Even though sold at public auction, the property might be where it could be returned, as was the case in Smith v. Willoughby, 24 N. D. 1, 138 N. W. 7. But, in any event, such affidavit was not introduced in evidence for such purpose, but apparently found its way into the record in the case at bar because of its being attached to the judgment roll, the only purpose of introducing such roll apparently having been to prove the existence of the judgment in the former action. This, no doubt, accounts for the fact that no objection was offered to its introduction. But, even if the trial court had expressly found in the prior action, on proper evidence, that such property could not be delivered for any reason, still, notwithstanding the decisions of some courts to the contrary, we do not think such finding would be conclusive upon the sureties in this action. New England Furniture & Carpet Co. v. Bryant, supra, and cases cited.

The only safe and proper practice to pursue in entering a judgment in actions for the recovery of the possession of personal property, is that prescribed in the Code. If litigants would follow the plain provisions of § 7075, Rev. Codes, in causing judgments to be entered, much difficulty would be thereby obviated.

We note what appellant's counsel say in their brief regarding our holding in Larson v. Hanson, supra. While the writer is free to admit that certain portions of that opinion, and especially the last sentence on page 415 of the official report, seem to bear the construction contended for by appellant's counsel, the opinion as a whole does not permit of such construction. The opinion should be read in the light of the facts then before us. We were there dealing with a case wherein there was not even a pretense of allegation or proof of an inability to deliver the property by the defeated, to the successful party; and the question for decision merely was whether, as against the sureties on the undertaking sued upon, the same presumption in support of the regularity of the judgment in the claim and delivery action which applies to the defendants would also apply to such sureties. Anything there said which was unnecessary to a decision of the point involved was, of course, mere *obiter,* and we decline to be bound thereby. This also applies to the opinion on the second appeal of said case. See Larson v. Hanson, 26 N. D. 406, 51 L.R.A.(N.S.) 655, 144 N. W. 681.

We have examined all of the authorities cited by appellant from other courts, and find that nearly all of them deal merely with the question in so far as it pertains to the parties to the replevin action, and for this reason we do not deem them in point here. There are, it is true, a few cases cited which seem to hold contrary to our decision in Larson v. Hanson, but we decline to follow them, as we deem the rule established in the Larson Case the better and sounder rule, and it has the support of numerous well-considered authorities in New York and elsewhere.

We decide this case on the assumption that as to the defendants in the claim and delivery action, the judgment therein rendered as for default was in all respects regularly given and entered. Such, however, does not appear to be the fact. There was no default. The defendants had appeared and answered the original complaint, and when plaintiff was granted leave to amend its complaint, defendants were not obliged to serve another answer. The answer already served should have been treated as an answer to the amended pleading. In any event, defendants, having appeared generally, were entitled to notice of the application for judgment, which was apparently not given. These were, how-

ever, mere irregularities, and do not vitiate the judgment. We mention them merely in the interest of orderly practice.

While our conclusion results in an affirmance of the judgment, we think the dismissal should be without prejudice to the bringing of another action. The judgment of dismissal amounts merely to a nonsuit for a failure of necessary allegation and proof. It may be that these defects can be cured by plaintiff in another action.

As thus modified, the judgment is affirmed.

On Rehearing.

FISK, J. A rehearing was asked for and granted upon the point covered in the last paragraph of the syllabus and of the opinion, wherein we modified the judgment of dismissal so as to make it read, "without prejudice," instead of, "with prejudice," to the bringing of another action.

After duly considering the written arguments submitted on such rehearing by the respective counsel, we have concluded to recede from our former views, and to eliminate from the syllabus and from the opinion what is therein said upon such point. The question was not raised by appellant's counsel; and while this fact is not necessarily controlling, as we undoubtedly have the power, at our option, to notice errors appearing on the face of the judgment roll although not assigned (2 Enc. Pl. & Pr. 928; 2 Cyc. 984; Dufour v. Lang, 4 C. C. A. 663, 2 U. S. App. 477, 54 Fed. 913; Farrar v. Churchill, 135 U. S. 614, 34 L. ed. 249, 10 Sup. Ct. Rep. 771), still we have concluded, after a more careful examination of the record, that it is not so clear that error was committed as to warrant us in deciding the question at this time. We are not now prepared to say that in the former opinion we may not have mistakingly assumed that the dismissal amounted merely to a nonsuit at common law. In fact, while not so deciding at this time, we are inclined to the belief that the cause was fully submitted to the court for a decision on the merits within the meaning of § 6998, Rev. Codes 1905. However, we deem it advisable to reserve final decision of the point until it is properly raised.

FREIDRICH FEIL v. NORTHWEST GERMAN FARMERS MUTUAL INSURANCE COMPANY, a Corporation.

(149 N. W. 358.)

New practice act — evidence — specification of insufficiency — verdict — to sustain — rule is reasonable one — compliance with the statute.

1. Section 4, chap. 131, Laws 1913, known as the new practice act, requires that a specification of insufficiency of the evidence to sustain the verdict or decision of the court shall point out wherein the evidence is insufficient. Such statutory rule is a reasonable one, designed to inform the court and respondent's counsel of the particulars relied on as to the alleged insufficiency, and a substantial compliance therewith will be exacted. Appellant's specifications in this case examined, and *held* not a substantial compliance with such statute.

Judgment — appeal from — action on contract — court — jury waived — findings — special verdict — substantial support in evidence — will not be disturbed.

2. On an appeal from a judgment in an action on contract for the recovery of money only which was tried to the court, a jury having been waived, the findings are entitled to the weight of a special verdict, and will not be disturbed where, as in this case, they have substantial support in the testimony.

Opinion filed October 8, 1914.

Appeal from District Court of McIntosh County, *Allen,* J.

From a judgment in plaintiff's favor defendant appeals.

Affirmed.

Curtis & Curtis, for appellant.

The evidence of Feil and wife was given through an interpreter, and it was and is difficult to know the true meaning of evidence so secured. Haines v. People, 82 Ill. 430; People v. Barberi, 149 N. Y. 269, 52 Am. St. Rep. 717, 43 N. E. 635; The Oder, 8 Fed. 172.

Such testimony is also untrustworthy because of the inability to give the witness any adequate cross-examination. United States v. Lee Huen, 118 Fed. 463.

We have no test of the truth of human testimony except its conformity to our reason, knowledge, observation, and experience. Daggers v. Van Dyck, 37 N. J. Eq. 130.

The testimony of Feil and wife is so bold and striking in its contradictions, it would seem unsafe and unfair to give to such testimony any weight. Malin v. Malin, 1 Wend. 651.

Geo. M. Gannon and *W. S. Lauder,* for respondent.

This is an action at law—tried by court—jury waived—findings therefore have the same weight as a verdict by jury, and same will be so treated on appeal. James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952, and cases cited.

The claim that a verdict is without support in the evidence cannot be maintained when the explicit and consistent testimony of one witness sustains it, even though a number of witnesses testify to the contrary of the evidence of the one witness. Jackson v. Grand Forks, 24 N. D. 601, 45 L.R.A.(N.S.) 75, 140 N. W. 719; Clemens v. Royal Neighbors, 14 N. D. 116, 103 N. W. 402, 8 Ann. Cas. 1111; Houghton Implement Co. v. Vavrowski, 19 N. D. 594; Edwards v. Chicago, M. & St. P. R. Co. 21 S. D. 504, 110 N. W. 832; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; Walklin v. Horswill, 24 S. D. 191, 123 N. W. 668; Berry v. Chicago, M. & St. P. R. Co. 24 S. D. 611, 124 N. W. 859; Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011; Charles E. Bryant & Co. v. Arnold, 19 S. D. 106, 102 N. W. 303; Unzelmann v. Shelton, 19 S. D. 389, 103 N. W. 646; Comeau v. Hurley, 24 S. D. 275, 123 N. W. 715; Olson v. Day, 23 S. D. 150, 120 N. W. 883, 20 Ann. Cas. 516; Mosteller v. Holborn, 20 S. D. 545, 108 N. W. 13; Grant v. Powers Dry Goods Co. 23 S. D. 195, 121 N. W. 95.

It is well settled that where a fire insurance company, with full knowledge of facts which would render the policy void under the conditions of the application and policy, issues and delivers such policy and accepts the premium, it will be deemed to have waived such forfeiture, and will not be heard to urge the invalidity of the policy, in an action to recover loss thereunder. Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837, and cases cited; Stotlar v. German Alliance Ins. Co. 23 N. D. 346, 136 N. W. 792, and cases cited.

Fisk, J. Action to recover on a fire insurance policy. Such policy contains the usual stipulation that "this policy shall be void . . .

if the insured now has or shall hereafter obtain any other insurance on said property without the assent of the company," etc. There was other insurance on the property, and the defense is that the policy is void because such other insurance was not assented to by the defendant company. This issue was, by consent, tried to the court, a jury having been waived. Such trial resulted in findings and conclusions favorable to plaintiff, and judgment in accordance therewith was given and entered in his favor for the sum demanded in the complaint. From this judgment defendant has appealed to this court, urging as the only grounds for a reversal the following so-called specifications of error:

1. The evidence is insufficient to sustain the decision.
2. The decision is not sustained by the weight of the evidence.

It needs no argument to demonstrate that such specifications are wholly inadequate and unavailing. The controlling statute—§ 4, chap. 131, Laws 1913—expressly provides that "a specification of insufficiency of the evidence to sustain the verdict or decision of the court *shall point out wherein the evidence is insufficient.*" This is a reasonable requirement of the new practice act, and a substantial compliance therewith will be exacted by this court. The failure to thus comply with such plain statutory rule leads to an affirmance, there being no contention that any errors appear on the face of the judgment roll. Notwithstanding the conclusion thus reached, we have examined the merits sufficiently to satisfy us that the same result would necessarily follow, even if the practice pursued by appellant had complied strictly with the statute. Briefly stated, our reasons are the following:

The case is not here for trial *de novo,* it being properly a jury case. The findings are therefore entitled to the weight of a special verdict of a jury, and they will not be disturbed where they have substantial support in the testimony. That they have such support is clear. Indeed, counsel tacitly, if not expressly, admit this to be true by the following statement in their printed argument: "The appellant contends that the evidence is insufficient on all points to sustain the decision of the court, *the plaintiff's case relying entirely upon their own testimony, while they are contradicted by disinterested witnesses as to the facts.*"

Concededly, there was a square conflict in the testimony upon the crucial issue of fact, and the trial court, whose function it was to de-

termine the credibility of the witnesses and the weight to be given their testimony, found in favor of the plaintiff, and such finding ought not to be disturbed.

Judgment affirmed.

IN THE MATTER OF THE APPLICATION OF CHRISTIAN E. BRUCHMAN for a Writ of Habeas Corpus.

(148 N. W. 1052.)

Habeas corpus — extradition — hearing before governor — courts — extent of inquiry — sufficiency of complaint — jurisdiction.

1. Upon habeas corpus to review a proceeding to extradite an alleged fugitive from justice at the issuance of another state, and after a hearing and the issue of a warrant of arrest by the governor of the state to which the fugitive has fled, the courts, the papers being otherwise regular, will not inquire into the technical sufficiency of the complaint or affidavit, but whether they sufficiently charge the commission of a crime in the demanding state. They will not inquire or allow evidence to be introduced of the guilt or innocence of the defendant, nor whether, as a matter of fact, the crime has been committed at all in the case where a person is charged with having deserted or failed to support his wife and children, and where the proof of the commission of the crime must necessarily be the same as the proof of the guilt or innocence of the accused. All they will inquire into is whether at the time of the alleged offense, as set forth in the complaint, the defendant was actually within the jurisdiction of the demanding state.

Extradition — motives — offense charged — divorce case pending — service of process.

2. Nor will the motive which lies behind the extradition be generally inquired into, save as it is necessary to show that the requisition is for a purpose of subjecting the defendant to prosecution for the offense charged, and not merely to subserve private malice or to obtain service upon him for some other purpose; and though it is shown that a divorce proceeding is pending between the parties, and that the plaintiff has been unable to obtain personal service upon the defendant, such fact will not prevent the extradition of the defendant, where

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Note.—It seems to be the generally accepted rule, as shown by a review of the authorities in a note in 21 L.R.A.(N.S.) 939, that an accused who is held in an asylum state upon an extradition warrant can be heard upon the merits of a charge made against him in the demanding state.

the complaining witness specifically states in her affidavit that the application "is not made to secure his return to afford an opportunity to serve him with civil process or for any other similar purpose," and that she "does not desire to use said prsecution for the purpose of collecting a debt or for any other purpose, and will not directly or indirectly use the same for any such purpose."

Opinion filed October 8, 1914.

Original application for the issuance of a writ of habeas corpus. Writ quashed.

Statement by BRUCE, J.

A writ of habeas corpus was issued out of the supreme court in this case, and this hearing is on the return thereto. The affidavit of the district attorney of La Crosse county, Wisconsin, and the application for the writ, states, among other things, that "I further certify that said charge against the said fugitive, Christian E. Bruchman, is the offense of unlawfully and wilfully neglecting and refusing to provide for the support and maintenance of his wife and their two minor children, aged seven and five, leaving them in destitute and necessitous circumstances, committed at the city of La Crosse, in the county of La Crosse and state of Wisconsin, on the 19th day of August, 1913, and thence continuously to the date of the complaint, and that a trial had in the state of Wisconsin shall be under the provisions of § 4587c of the laws of the state of Wisconsin for the year 1913; that said offense and the punishment thereof is defined in said section aforesaid, and said section is as follows, to wit: 2. "Abandonment of Child or Wife; penalty; Section 4587c. Any person who shall without just cause, desert or wilfully neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances; or any person who shall, without lawful excuse, desert or wilfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate minor child or children under the age of sixteen years, in destitute or necessitous circumstances, shall be punished by fine not exceeding five hundred dollars, or imprisonment in the state prison, county jail, or in the county workhouse not exceeding two years, or both, in the discretion of the court."

In addition to this is the affidavit of the complaining witness, Mathilda

T. Bruchman, which is as follows: Mathilda T. Bruchman, being first duly sworn on oath, says that she is the complaining witness in the above-entitled action, a certified copy of which complaint therein being hereto annexed and made a part hereof; that application for requisition for said Christian E. Bruchman is made in good faith, and for the sole purpose of punishing him for the crime of unlawfully and wilfully neglecting and refusing to provide for the support and maintenance of his wife and their two minor children, aged five and seven, leaving them in destitute and necessitous circumstances, committed at the city of La Crosse, county of La Crosse, and state of Wisconsin, on the 19th day of August, 1913, and thence continuously to the date of the complaint, as appears more fully from said complaint, and not to secure his return to the state of Wisconsin to afford an opportunity to serve him with civil process, nor for any other similar purpose, and that she does not desire nor expect to use the said prosecution for the purpose of collecting a debt, or for any private purpose, and will not, directly or indirectly, use the same for any of said purposes. Deponent further says that said crime, as aforesaid, is contrary to the laws of the state of Wisconsin, and that said Christian E. Bruchman has fled from the justice of the state of Wisconsin, and from the jurisdiction thereof, and is, as deponent is informed and verily believes, in the city of Ambrose, state of North Dakota, and that said Christian E. Bruchman was, to deponent's knowledge, in the county of La Crosse and state of Wisconsin, on the 19th day of August, 1913, when and where the crime stated in the complaint was committed; and that on or about the 1st day of March, 1914, the said Christian E. Bruchman was located by means of correspondence at Ambrose, North Dakota; and this deponent further says that immediately after the commission of said crime, said Christian E. Bruchman did abscond and flee from the state of Wisconsin, and ever since has been and now is a fugitive from justice and therefrom; and that upon the criminal complaint hereinbefore mentioned, a criminal warrant was issued by the county court of said county of La Crosse and state of Wisconsin, aforesaid, for the arrest of the said fugitive, Christian E. Bruchman, a certified copy of which warrant is hereto annexed and made a part of this affidavit." The complaint in the criminal action which was brought in Wisconsin is as folllows: "Mathilda T. Bruchman, being duly

sworn, says that on the 19th day of August, in the year 1913, at the city of La Crosse, in said county of La Crosse and state of Wisconsin, Christian E. Bruchman did, and ever since has, unlawfully and feloniously and without just cause and without lawful excuse, wilfully neglected and refused to provide for the support of his wife and their two minor children, aged seven and five, they being left in destitute and in necessitous circumstances."

The governor of North Dakota, upon the application of the governor of Wisconsin, issued his warrant for the extradition of the said Christian E. Bruchman. Upon his arrest by the sheriff of Divide county for the purpose of delivering him to said county pursuant to such warrant, the said Bruchman made application for a writ of habeas corpus in the said county, in which county the said Bruchman resided. Upon the hearing, the Honorable K. E. Leighton, the judge of said district, refused to allow any testimony to be introduced tending to show that no crime, in fact, had been committed, and that hence the petitioner was not a fugitive from justice, since such proof would also tend to prove him innocent of the crime charged. The petitioner filed a new petition in the supreme court, and a writ was issued returnable October 2, 1914.

C. E. Brace, for relator.

The writ of habeas corpus is available to every person imprisoned or deprived of his liberty, and a warrant of the executive is subject to review by the courts. Rev. Codes 1905, § 1030; 8 Standard Enc. Proc. 857; People ex rel. Lawrence v. Brady, 56 N. Y. 182; Hyatt v. New York, 188 U. S. 691, 710, 47 L. ed. 657, 661, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311.

State courts have jurisdiction to determine the validity of interstate extradition proceedings, by habeas corpus. Re Manchester, 5 Cal. 238; Re Mohr, 73 Ala. 503, 49 Am. Rep. 63; Jones v. Leonard, 50 Iowa, 106, 32 Am. Rep. 116; Re Cook, 49 Fed. 839; Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291.

Courts may determine sufficiency of charge,—whether party is a fugitive from justice, whether warrant was issued by the governor, and its sufficiency. Re Tod, 12 S. D. 386, 47 L.R.A. 566, 76 Am. St.

Rep. 616, 81 N. W. 637, 12 Am. Crim. Rep. 303; Ex parte Hart, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249.

Governor's decision that person is a fugitive from justice is not conclusive. Ex parte Hart, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249; Jones v. Leonard, 50 Iowa, 106, 32 Am. Rep. 116; Re Mohr, 73 Ala. 512, 49 Am. Rep. 63.

The charge must be complete, and the complaint must show that it is pending before some proper tribunal. People ex rel. Lawrence v. Brady, 56 N. Y. 182; Forbes v. Hicks, 27 Neb. 111, 42 N. W. 898; Smith v. State, 21 Neb. 552, 32 N. W. 594.

Papers must show that prisoner was in the demanding state when the offense charged was committed. People ex rel. Ryan v. Conlin, 15 Misc. 303, 72 N. Y. S. R. 110, 36 N. Y. Supp. 890; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218; Hyatt v. New York, 188 U. S. 691, 710, 47 L. ed. 657, 661, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; Hartman v. Aveline, 63 Ind. 344; Wilcox v. Nolze, 34 Ohio St. 520; Re Mohr, 73 Ala. 512, 49 Am. Rep. 63; Jones v. Leonard, 50 Iowa, 106, 32 Am. Rep. 116; Strassheim v. Daily, 221 U. S. 280, 55 L. ed. 735, 31 Sup. Ct. Rep. 558; Re Mitchell, 4 N. Y. Crim. Rep. 596; Re Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; Tennessee v. Jackson, 1 L.R.A. 370, 36 Fed. 258; State v. Hall, 115 N. C. 811, 28 L.R.A. 289, 44 Am. St. Rep. 501, 20 S. E. 729, 10 Am. Crim. Rep. 297.

Dorr H. Carroll, for respondent.

Two matters are passed upon by the governor who issues the warrant: 1. Is the accused charged with a crime in the demanding state; and, 2. Is he a fugitive from justice? Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Bruce v. Rayner, 62 C. C. A. 501, 124 Fed. 481; Church, Habeas Corpus, 468.

The governor of a surrendering state has the right to fully inform himself on such subjects. Church, Habeas Corpus, 468, § 233; Re Cook, 49 Fed. 833; Ex parte Brown, 28 Fed. 653; Re Clark, 9 Wend. 212; State ex rel. Arnold v. Justus, 84 Minn. 237, 55 L.R.A. 325, 87 N. W. 770; State ex rel. Munsey v. Clough, 71 N. H. 594, 67 L.R.A. 946, 53 Atl. 1086; Katyuga v. Cosgrove, 67 N. J. L. 213, 50 Atl. 679; Hayes v. Palmer, 21 App. D. C. 450; People ex rel. Corkran v. Hyatt, 172 N. Y. 176, 60 L.R.A. 774, 92 Am. St. Rep. 706, 64 N. E. 825;

Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Re Voorhees, 32 N. J. L. 141; Wilcox v. Nolze, 34 Ohio St. 520; Hartman v. Aveline, 63 Ind. 344; Jones v. Leonard, 50 Iowa, 106, 32 Am. Rep. 116; Re Mohr, 73 Ala. 503, 49 Am. Rep. 63; Re Jackson, 2 Flipp. 183 Fed. Cas. No. 7,125; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968; Cooley, Const. Lim. 430; Koepke v. Hill, 87 Am. St. Rep. 172, note; State ex rel. Styles v. Beaverstad, 12 N. D. 527, 97 N. W. 548.

The intent of the complaining witness is usually immaterial. Re Van Sciever, 42 Neb. 772, 47 Am. St. Rep. 730, 60 N. W. 1037.

BRUCE, J. (after stating the facts as above). Counsel for petitioner insists that no crime is charged in the affidavit of Mathilda T. Bruchman, which was presented to the governor of North Dakota on the demand for the extradition. He also insists that the petitioner is not a fugitive from justice. He alleges: (1) That the affidavit does not state that the petitioner is a married man, and does not name or designate the party or parties alleged to have been neglected and for whom support was not provided; (2) that the affidavit does not purport to be made by anyone knowing the facts; (3) the affidavit does not allege as a positive fact that the petitioner is the father of the children alleged to have been neglected; (4) that the affidavit does not allege in particular that the parties neglected were left in destitute and necessitous circumstances; (5) that the affidavit does not state in what particular, or with any degree of precision at all, the specific facts with which the petitioner stands charged constituting the crime attempted to be alleged. He admits that to be a fugitive from justice in the sense of the act of Congress regulating the subject under consideration, it is not essential that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding prosecution anticipated or begun, but simply that "having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for its offense, he has left its jurisdiction, and is found within the territory of another. See Roberts v. Reilly, 116 U. S. 97, 29 L. ed. 549, 6 Sup. Ct. Rep. 291; Re Galbreath, 24 N. D. 582, 139 N. W. 1050. He insists, however, that the application

must actually charge an offense, and that it must be shown that the offense had actually been committed, even though such proof would involve the question of the guilt or innocence of the party charged. He maintains, in short, in the case at bar, that unless the defendant and petitioner had deserted his wife and children, no offense could possibly have existed and that this fact can be shown upon these proceedings. This court allowed evidence to be taken upon this matter, though of course, it did not commit itself on the proposition as to whether it would consider the same. Petitioner also alleges that after his coming to North Dakota, divorce proceedings were started by his wife, and that the only purpose of the requisition was to get him back into the state so that a personal service could he had upon him and a personal judgment for alimony could be obtained.

We do not think that there is any merit in the objection to the affidavit and complaint. The affidavit charges the defendant with refusing to provide for the support and maintenance of his wife and their two minor children, aged five and seven, leaving them in distitute and necessitous circumstances, committed at the city of La Crosse, county of La Crosse, and state of Wisconsin, on the 19th day of August, 1913, and thence continuously to the date of the complaint as appears more fully from said complaint, and which complaint it makes a part of the affidavit, and alleges that the application is not made to secure his return to the state of Wisconsin to afford an opportunity to serve him with civil process, nor for any other similar purpose, and that she does not desire to use the said prosecution for the purpose of collecting a debt, or for any other purpose, and will not, directly or indirectly, use the same for any such purpose. The criminal complaint that is attached is in the language of the Wisconsin statute, and charges the dedefendant with having "unlawfully and feloniously, and without just cause and without lawful excuse, wilfully neglected and refused to provide for the support and maintenance of his wife and their two minor children, aged seven and five, they being left in destitute and necessitous circumstances."

We believe that all the essentials of a criminal complaint are complied with. It would be a mere technicality to complain that when one is charged with deserting his wife and two minor children, aged seven and five respectively, he is not informed of the crime which is alleged

against him, and that it is necessary to his protection and to the proper administration of the criminal law that the names of the wife and children shall be alleged, and that the fact that he is a married man should also have been alleged. The time, indeed, has long gone by for any such kind of hair splitting. These matters are matters of proof, and we believe that the crime is sufficiently alleged in the complaint and in the affidavit. The rule, indeed, seems to be well established that as long as a crime is substantially charged and the papers are otherwise regular, the technical sufficiency of the complaint or information is not material. 21 Cyc. 329; State ex rel. O'Malley v. O'Connor, 38 Minn. 243, 36 N. W. 462; State ex rel. Smith v. Goss, 66 Minn. 291, 68 N. W. 1089. We have, in fact, no right to go behind the determination of the governor of North Dakota, and to interfere with his discretion in the premises generally.

The law on this subject has been well stated in 21 Cyc. 328, and is as follows: "Upon habeas corpus to review a proceeding to extradite a fugitive from justice at the instance of another state, the question of the identity of the party may be investigated, and it is also proper to inquire whether he is a fugitive from justice, as, for instance, whether he was in the demanding state at the time the offense was committed; and if it appears conclusively that he was not, he may be discharged; but generally if this does not appear, or if there is any evidence to the contrary, the decision of the executive cannot be reviewed. The question whether the act is a crime against the law of the demanding state is a proper subject of inquiry; but the court cannot try the question of the guilt or innocence of the accused. The motive behind the proceeding will not as a rule be inquired into, but the proceedings may be reviewed to see that no extradition is consummated upon a mere pretext or to subserve private malice. If the preliminary papers upon which the executive acted are presented to the court, they may be investigated to determine whether they are sufficient under the law to justify the warrant of extradition; but if they are not presented, the court, it has been held, can look only to the warrant itself. The technical sufficiency of the indictment or information in the demanding state is not material; and in the absence of proof to the contrary it will be assumed in the case of an indictment that it charges an offense against the law of the demanding state. Where the requisition is

based upon an affidavit, the validity of the affidavit cannot be impeached if it distinctly charges a crime; and the court must be clearly satisfied that error has been committed before it will interfere." 15 Am. & Eng. Enc. Law, 205, 206.

Nor do we believe that evidence should be admitted as to the commission of the crime in this case. The only reason why the courts have refused to allow evidence to be introduced as to the guilt or innocence of the party is that such facts should be properly tried in the demanding state, and in fact can be only properly tried in such jurisdiction, and the same considerations apply in full where the proof of the guilt or innocence and of the existence of the crime must be identically the same. Re White, 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54. The only thing, indeed, which we should consider is whether the extradition proceedings are fairly brought, that is to say, whether some ulterior purpose is intended to be effected thereby. The wife in her affidavit has absolutely repudiated any desire to obtain personal service upon the defendant and petitioner in any other action or proceeding, and we are quite sure that any such service, if had, would be nullified and set aside by the Wisconsin courts.

The writ is quashed.

SPALDING, Ch. J. did not participate.

T. L. BEISEKER v. JOHN SVENDSGAARD.

(149 N. W. 352.)

Foreclosure of mortgage by advertisement — power of court to enjoin — discretionary — disturbed for abuse.

1. The power of a court to enjoin the foreclosure of a mortgage by advertisement which is conferred by § 7454, Rev. Codes 1905, is discretionary and will be disturbed for abuse only.

Foreclosure by advertisement — application for injunction against — court may examine records and mortgage.

2. On application brought under § 7454, Rev. Codes 1905, for an injunction

to restrain the foreclosure of a mortgage by advertisement, the court may examine the mortgage which is sought to be foreclosed as it appears of record, when the date, book, and page is referred to, either in the advertisement or in the petition for an injunction.

Affidavits on such application — instalment mortgage — amounts not due or earned — court should enjoin — trial — facts.

3. Where the affidavits filed on a petition to enjoin the foreclosure of a mortgage by advertisement allege that a mortgage is sought to be foreclosed which includes future instalments of interest that have not yet been earned, the district court should enjoin such foreclosure so that a trial may be had and the exact facts be ascertained.

Extraneous and parol evidence — mortgage and note — consideration admissible to show by.

4. Extraneous and parol evidence is admissible to show the real nature and amount of the consideration of a note and mortgage, even though the same are written instruments.

Order refusing to enjoin — appealable.

5. An order refusing to enjoin the foreclosure of a mortgage by advertisement is appealable. (Laws of 1907, chap. 79.)

Opinion filed October 10, 1914.

Appeal from the District Court of Wells County, *Coffey*, J.

Action to enjoin the foreclosure of a mortgage by advertisement. Order denying injunction. Defendant appeals.

Reversed.

Statement by BRUCE, J.

This is an appeal from an order denying an application for an injunction to restrain the foreclosure of a mortgage by advertisement. The facts as disclosed by the affidavit filed with the application for the injunction are that on or about the 24th day of April, 1909, the defendant applied to the Farmers Trust Company, of which T. L. Beiseker is the president, for a loan of five thousand dollars ($5,000) and one thousand dollars ($1,000) respectively, with interest on the five thousand dollar mortgage at seven and a half (7½) per cent per annum due ten (10) years from date; that "for the convenience of said mortgagee, the said first mortgage for $5,000 was made due ten years from said date, with interest at 6 per cent, and the remaining

1½ per cent interest agreed upon on said $5,000 mortgage was figured at $75 per year, and that the total sum of same or $750 for the entire period was added to and incorporated in as the principal of the second mortgage of $1,000, making a total of $1,750; said $750 of same being payable in equal instalments of $75 per year."

The defeasance clause of said mortgage was to the effect that if the mortgagor should pay or cause to be paid "the sum of $1,793.75 and interest, according to the conditions of thirteen certain promissory notes bearing even date herewith, and also to pay all taxes which are now or may be hereafter assessed on said premises as they shall become due, then this deed to be null and void, but if default shall be made in the payment of said sum of money, or the interest, or the taxes, or any part thereof, at the time and in the manner hereinbefore or hereinafter specified for the payment thereof, the said parties of the first part in such case do hereby authorize and fully empower the said party of the second part . . . to sell the hereby granted premises, and convey the same to the purchaser in fee simple agreeably to the statute in such case made and provided, and out of the moneys arising from such sale to retain the principal and interest which shall then be due upon said land, etc. . . . and if default be made by said parties of the first part in any of the foregoing provisions, it shall be lawful for the said party of the second part . . . to declare the whole sum before specified to be due." The petition further alleged that the plaintiff and respondent was attempting to foreclose the second mortgage, claiming due thereon the sum of $3,228.72, inclusive of the entire $750 (the 1½ per cent additional interest on the first loan of $5,000) while there was really due on said mortgage the sum of $2,750, tender of which had been made to plaintiff and respondent; that on the said sum of $750 additional interest at 1½ per cent on the first loan but three payments of $75 each had been earned and had matured, but in said foreclosure plaintiff and respondent was wrongfully seeking to collect the sum of $478.72 in excess of the amount actually due thereon. It was further alleged that said judge declined to make an *ex parte* order on said application, but did make an order to show cause; that on the return day of said order to show cause, but under objection of defendant and appellant, the said judge received and considered an affidavit of R. A. Palmeter in

resistance of said application, and heard the arguments of counsel for plaintiff and respondent in resistance of said application, and, after a full discussion thereof, declined to make said order, but denied same.

Counsel for defendant and appellant urges: (1) That the court erred in refusing to make an *ex parte* order restraining the foreclosure of the mortgage; (2) that he erred in making an order to show cause; (3) that he erred in receiving and considering the affidavit of R. A. Palmeter in resistance of said application; and (4) that he erred in making the order denying the appellant's application for the injunction and order prayed for.

George H. Stillman, for appellant.

The proceedings to enjoin a mortgage foreclosure by advertisement are purely *ex parte,* and the statute providing this remedy does not contemplate a *trial* of the issue raised by the application and affidavits for injunction. North Dakota Rev. Codes 1905, § 7454; Scott v. District Ct. 15 N. D. 259, 107 N. W. 61.

The *satisfaction* to come to the court or judge upon such application is *not* an arbitrary satisfaction dependent upon whim or notion, but a *legal* satisfaction with the showing made. Bazal v. St. Stanislaus Church, 21 N. D. 602, 132 N. W. 212; Stevens v. Ross, 1 Cal. 94.

The power of the court, in such cases, is largely discretionary, and will be disturbed only on abuse of such discretion. State ex rel. Security Bank v. Buttz, 21 N. D. 540, 131 N. W. 241.

Edward P. Kelly and *R. A. Palmeter,* for respondent.

Section 7454 is intended to confer upon judges of the district courts certain authority to be exercised at their discretion, and such discretion is not reviewable excepting in cases of abuse. McCann v. Mortgage, Bank & Invest. Co. 3 N. D. 172, 54 N. W. 1026 and cases cited.

BRUCE, J. (after stating the facts as above). Counsel for appellant is hardly in a position to complain because of the action of the trial court in making an order to show cause and in receiving the affidavit of R. A. Palmeter in resistance to said application. We believe that it was the intention of the legislature that an injunction shall be granted if a defense is set forth in the petition, and that the matters in controversy and the truth of the defense shall be settled and determined

upon the trial of an action to foreclose, rather than upon affidavits on an order to show cause. In the case at bar, however, all that the affidavit furnished upon the order to show cause disclosed were the terms and conditions of the mortgage as given in that instrument. The affidavit of R. A. Palmeter did little more in fact than to identify the mortgage. It would have been perfectly competent for the court, in the first instance, to have examined the mortgage, as its date, book, and page were given both in the advertisement and in the petition for the injunction. We have held that the application by the mortgagor for an injunction is usually to be considered as an *ex parte* proceeding, and that counter affidavits are not allowed as a matter of right. McCann v. Mortgage, Bank & Invest. Co. 3 N. D. 172, 54 N. W. 1026; Commercial Nat. Bank v. Smith, 1 S. D. 28, 24 N. W. 1024. We have never held that the court is powerless to inform itself of the terms and conditions of the mortgage that is sought to be foreclosed.

We are satisfied, however, that the trial court erred in refusing to restrain the foreclosure of the mortgage. We realize that the power of the court to enjoin a foreclosure by advertisement which is conferred by § 7454, Rev. Codes 1905, is discretionary, and will be disturbed for abuse only. McCann v. Mortgage, Bank & Invest. Co. supra; James River Lodge v. Campbell, 6 S. D. 157, 60 N. W. 750; Nichols v. Tingstad, 10 N. D. 172, 86 N. W. 694; State ex rel. Security Bank v. Buttz, 21 N. D. 540, 131 N. W. 241. We also realize that the affidavit of the petitioner does not allege any fraud, deception, or mistake. The petition, however, seems to clearly state that the ten $75 notes were in the nature of interest, and should only become operative when the same became due as 1½ per cent items of interest on the first mortgage. If this was the case, it would seem that no consideration was earned for the additional seven notes of $75 each, but only for the three notes which had matured. It is well established that in spite of the fact that notes and mortgages are written instruments, extraneous evidence may be introduced to show the real nature of the consideration, and this notwithstanding the recitals of the mortgage itself. See 27 Cyc. 1055; United States Trust Co. v. Lanahan, 50 N. J. Eq. 796, 27 Atl. 1032; Ruloff v. Hazen, 124 Mich. 570, 83 N. W. 370; Lanahan v. Lawton, 50 N. J. Eq. 276, 23 Atl. 476; Babcock v. Lisk, 57 Ill. 327; Wimberly v. Worthan (1888) — Miss. —, 3 So. 459; Har-

wood v. Toms, 130 Mo. 225, 32 S. W. 666; McAteer v. McAteer, 31 S. C. 313, 9 S. E. 966; Jones v. New York Guaranty, & I. Co. 101 U. S. 622, 25 L. ed. 1030; Blair v. Carpenter, 75 Mich. 167, 42 N. W. 790; Bray v. Comer, 82 Ala. 183, 1 So. 77; Lefmann v. Brill, 73 C. C. A. 230, 142 Fed. 44; Sheats v. Scott, 133 Ala. 642, 32 So. 573; Smith v. Krueger, 71 N. J. Eq. 531, 63 Atl. 850.

We believe that a trial should be had so that the facts attending the transaction may be fully ascertained, and that the district court erred in refusing the injunction prayed for. All that we can here pass upon, however, are the allegations of the affidavit of the petitioner. Whether in fact the additional 1½ per cent was interest at all, we do not decide. We merely say that the affidavit of petitioner alleges it to be such.

It has been urged that the order which is complained of is not appealable. This would have been true under the holding of this court in the case of Tracy v. Scott, 13 N. D. 577, 101 N. W. 905, and prior to the passage of chap. 79 of the Laws of 1907. It is true that the act of 1907 is somewhat indefinite, and a technical objection can be made that on such appeal there is no adverse party (the proceedings being intended to be *ex parte* under the prior decisions of this court), and that there being no opportunity to file counter affidavits as a matter of right (see McCann v. Mortgage, Bank & Invest. Co. 3 N. D. 172, 54 N. W. 1026), the mortgagee would be more or less at a disadvantage, and that the transaction could hardly be said to be an action or proceeding. The act of 1907, however, in express words provides for an appeal in such cases, and if the mortgagee is at a disadvantage, it is a disadvantage in a proceeding, that is to say, a foreclosure by advertisement, to which he has no natural right and which is governed by the statute merely. The statute, under certain conditions, avoids the necessity of foreclosure by action. It may place around that privilege any limitations that it desires. Although, too, nothing is said as to who shall be made the respondent on such an appeal, or to whom notice of appeal shall be given, it is quite clear that it was the intention of the legislature that the ordinary practice should be followed, and that the mortgagee should be considered the real party in interest.

The judgment of the District Court is reversed.

PEARLE E. SEVERTSON v. H. PEOPLES.

(148 N. W. 1054.)

Deed of conveyance — action to cancel — acknowledgment of deed — husband and wife — homestead — extent or value — lots must be contiguous — allegations and proof.

1. Plaintiff seeks to have canceled a certain deed executed and delivered by her and her husband to defendant of eleven lots in block 7, and seven lots in block 4 of the village of New Rockford, alleging that at the time such deed was executed and delivered she and her husband and children were living upon the lots in block 7 and claiming the same as their homestead. She contends that the deed is null and void *in toto* for the reason, among others, that she never acknowledged the execution of such deed. She failed to allege or prove the extent or value of the property thus claimed as a homestead, or that the various lots are contiguous.

Held, that the court cannot grant her relief without proper pleading and proof showing the extent and value of the homestead, and that the lots are contiguous; and the cause is ordered remanded to the district court to enable her to supply the above-mentioned deficiencies.

Deed — cancelation — record — homestead as limited and defined by statute.

2. A court of equity will cancel a deed under the circumstances disclosed in the record, only in so far as it affects the homestead as limited and defined by the statute.

Deed must be acknowledged — execution alone insufficient.

3. Under § 5052, Rev. Codes 1905, it is just as essential that the deed conveying the homestead be acknowledged as that it be executed. Without both execution and acknowledgment the homestead is not conveyed.

Certificate of acknowledgment — regular upon its face — presumed to state the truth — evidence to overthrow must be clear and convincing — burden of proof.

4. A certificate of acknowledgment, regular on its face, is presumed to state the truth, and proof to overthrow such certificate must be very strong and convincing, and the burden of overthrowing the same is upon the party attacking the truth of such certificate.

Acknowledgment — what constitutes — admission to officer — authenticity.

5. To constitute an acknowledgment the grantor must appear before the officer for the purpose of acknowledging the instrument, and such grantor must, in some manner with a view to giving it authenticity, make an admission to the officer of the fact that he had executed such instrument.

Grantor not appearing before officer — execution of deed not acknowledged — admissibility of evidence to show innocent purchaser — without notice.

6. Where, in fact, the grantor has never appeared before the officer and acknowledged the execution of the instrument, evidence showing such fact is admissible even as against an innocent purchaser for value and without notice.

On Rehearing.

Homestead law — deed of homestead — must be executed and acknowledged by both husband and wife — area — value.

7. Our homestead law (§ 5052, Rev. Codes 1905), providing that the homestead cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife, was designed merely to protect the homestead as limited in both area and value in other sections of the act.

Deed by husband — lands including homestead — valid as to excess of value over homestead exemption.

8. A deed of conveyance by the husband, without his wife joining, of lands including the homestead, is valid as to the excess in extent or value of the land above the homestead exemption.

Grantee of lands embracing homestead — equity — judgment creditors — vendor — equal rights.

9. The grantee under a deed conveying land embracing the homestead has, in equity, rights equal to those of judgment creditors of the vendor to resort to the excess in area or value of such lands over the homestead allowance.

Legislature — remedy — court of equity.

10. Where the legislature has failed to provide a remedy for determining such excess, a court of equity will invent a suitable remedy.

Statutes from other states — construed by courts of such states before adoption here — presumption that construction was adopted.

11. In construing a statute which was borrowed from another state and which had been construed by the courts of that state prior to its adoption here, it will be presumed that our legislature also borrowed such construction along with the statute as a part thereof.

Homestead — appraisement and allotment — procedure — execution creditors.

12. Certain procedure is suggested for the guidance of the trial court in the appraisal and allotment of the homestead, which suggested procedure is analogous to the statutory procedure governing in cases of homestead claims as against execution creditors.

Opinion filed April 22, 1914. On rehearing October 14, 1914.

Appeal from District Court, Eddy County, *J. A. Coffey*, J.

From a judgment in plaintiff's favor, defendant appeals.

Judgment vacated and cause remanded for a new trial.

Maddux & Rinker, for appellant.

The complaint is insufficient in that it fails to join the husband as a party.

He was the record owner of the land,—was head of family.

He is a necessary party unless he has declared another homestead for their joint benefit. Code, §§ 4076, 5049, 5067; Poole v. Gerrard, 6 Cal. 71, 65 Am. Dec. 481; Kraemer v. Revalk, 8 Cal. 74; Foogman v. Patterson, 9 N. D. 254, 83 N. W. 15; Martin v. Platt, 64 Mich. 629, 31 N. W. 552; Guiod v. Guiod, 14 Cal. 507, 76 Am. Dec. 440; Gee v. Moore, 14 Cal. 474; Brennan v. Wallace, 25 Cal. 114; Marks v. Marsh, 9 Cal. 96 and cases cited.

Findings constitute a statement of ultimate facts, and must be based upon competent evidence. A report of what the evidence is, is not a finding of fact. Norris v. Jackson, 9 Wall. 127, 19 L. ed. 609; Mitchell v. Brawley, 140 Ind. 216, 39 N. E. 497; Hays v. Hostetter, 125 Ind. 60, 25 N. E. 134; 8 Enc. Pl. & Pr. 933, notes and citations; Holt v. Agnew, 67 Ala. 360; 13 Enc. Ev. p. 212, and cases cited; Hookway v. Thompson, 56 Wash. 57, 105 Pac. 153.

A married woman is presumed to know the contents of an instrument which she executes, and cannot contest its validity on that ground, unless fraud is shown. Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573; McCardia v. Billings, 10 N. D. 373, 88 Am. St. Rep. 729, 87 N. W. 1008; Code § 5002 and citations; 1 Am. & Eng. Enc. Law, pp. 488, 523.

An acknowledgment cannot be impeached by parol, unless the same is both false and fraudulent. McCardia v. Billings, 10 N. D. 373, 88 Am. St. Rep. 729, 87 N. W. 1008; Laws 1911, chap. 99, p. 180.

The burden is upon the party who seeks to have a deed or mortgage of property declared invalid, on the ground of the homestead character of the property. Grosholz v. Newman, 21 Wall. 481, 22 L. ed. 471; Apprate v. Faure, 121 Cal. 466, 53 Pac. 917; McClendon v. Equitable Mortg. Co. 122 Ala. 384, 25 So. 30; Foogman v. Patterson, 9 N. D. 254, 83 N. W. 15; Fitzhugh v. Connor, 32 Tex. Civ. App. 277, 74 S. W. 83; Beecher v. Baldy, 7 Mich. 488; Kilmer v. Garlick,

185 Ill. 406, 56 N. E. 1103; Swan v. Stephens, 99 Mass. 7; Goodloe v. Dean, 81 Ala. 479, 8 So. 197; Worsham v. Freeman, 34 Ark. 55; Webb v. Davis, 37 Ark. 551; Pritchett v. Davis, 101 Ga. 236, 65 Am. St. Rep. 298, 28 So. 666; Helfenstein v. Cave, 6 Iowa, 374; Robertson v. Robertson, 14 Ky. L. Rep. 505, 20 S. W. 543; Griffin v. Sutherland, 14 Barb. 456; Fulton v. Roberts, 113 N. C. 421, 18 S. E. 510; Doran v. O'Neal, — Tenn. —, 37 S. W. 563; Re Delaney, 37 Cal. 176; Hoffman v. Buschman, 95 Mich. 538, 55 N. W. 458; Meyer Bros. Drug Co. v. Bybee, 179 Mo. 354, 78 S. W. 579.

No presumption of homestead character prevails from the actual occupancy of the premises by claimant and family, where there is a statute requiring some formal act of selection. Foogman v. Patterson, 9 N. D. 254, 83 N. W. 15; 6 Enc. Ev. p. 519 and citations; Hawthorne v. Smith, 3 Nev. 189, 93 Am. Dec. 397; 10 Pl. & Pr. p. 86, note 1.

Where the statute provides the manner in which a homestead exemption may be declared and claimed, it is mandatory upon the claimant to follow it strictly, or the right is waived. The value, and extent or area must be shown, alleged, and proved. Rev. Codes 1905, § 5067, subsec. 4; Shoemaker v. Gardner, 19 Mich. 96; Martin v. Platt, 64 Mich. 629, 31 N. W. 352; Swan v. Stephens, 99 Mass. 7.

There must be a finding that plaintiff is the head of a family. This fact cannot be presumed. Rev. Codes 1905, § 5070.

Fraud is alleged upon information and belief. Motion to strike out was denied. This was error. 9 Enc. Pl. & Pr. 694, and cases cited; Rev. Codes 1905, §§ 5288, 5290, 5291; Robon v. Walker, 74 Ga. 823.

The court cannot determine the homestead or its character without due proof. Linn County Bank v. Hopkins, 47 Kan. 580, 27 Am. St. Rep. 309, 28 Pac. 606; Randal v. Elder, 12 Kan. 257, and cases cited; Kresin v. Mau, 15 Minn. 116, Gil. 87.

The actions of a person executing a deed are as much an acknowledgment to a notary, as words spoken would be. 1 Am. & Eng. Enc. Law, 525, 526, note 1.

The very act of executing a deed to property constitutes an abandonment thereof. Butler v. Nelson, 72 Iowa, 732, 32 N. W. 399; 6 Enc. Ev. 548 and cases cited; Doran v. O'Neal, — Tenn. —, 37 S. W. 563.

C. S. Buck, for respondent.

The homestead interest is purely statutory, unknown to common law. In conveying, the homestead must be strictly followed. The deed of the homestead of a married person must be executed and acknowledged by both husband and wife. Rev. Codes 1905, §§ 5052, 5065; Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684; 21 Cyc. 458, 559.

The wife has the right to bring action to have homestead rights protected and adjudged. Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684; Adams v. Beale, 19 Iowa, 61; Eve v. Cross, 76 Ga. 695; Boling v. Clark, 83 Iowa, 481, 50 N. W. 57; McKee v. Wilcox, 11 Mich. 358, 83 Am. Dec. 743; Andrews v. Melton, 51 Ala. 400; Comstock v. Comstock, 27 Mich. 97; 21 Cyc. 635; Ness v. Jones, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706; McClure v. Braniff, 75 Iowa, 38, 39 N. W. 171; Goodwin v. Goodwin, 113 Iowa, 319, 85 N. W. 31; Houston & T. C. R. Co. v. Knapp, 51 Tex. 592; Rev. Codes 1905, §§ 5052, 5066; 10 Enc. Pl. & Pr. 59, note 2, p. 83, note 3 and cases; Bolton v. Oberne, 79 Iowa, 278, 44 N. W. 546; 1 Cyc. 512; Fisher v. Meister, 24 Mich. 453.

A deed, unacknowledged, purporting to convey property other than the homestead but with the homestead, is void as to the whole. Edwards v. Simms, 8 Ariz. 261, 71 Pac. 902; Cook v. McChristian, 4 Cal. 23; Goodrich v. Brown, 63 Iowa, 247, 18 N. W. 893; Richards v. Chace, 2 Gray, 383; Dye v. Mann, 10 Mich. 291; Sammon v. Wood, 107 Mich. 506, 65 N. W. 529; Delisha v. Minneapolis, St. P. R. & D. Electric Traction Co. 110 Minn. 518, 27 L.R.A.(N.S.) 963, 126 N. W. 276; Kaiser v. Klein, 29 S. D. 464, 137 N. W. 52; Goodwin v. Goodwin, 113 Iowa, 319, 85 N. W. 31; Karsten v. Winkelman, 209 Ill. 547, 71 N. E. 45.

A deed of a tract of land, including a homestead, will be void entirely, where the homestead, on account of impossibility of location, cannot be severed from the entire tract. Sammon v. Wood, 107 Mich. 506, 65 N. W. 529; Goodykoontz v. Olsen, 54 Iowa, 174, 6 N. W. 263; Ryan v. Carr, 46 Mo. 483; Den ex dem. Robinson v. Barfield, 6 N. C. (2 Murph.) 391; Grove v. Todd, 41 Md. 633, 20 Am. Rep. 76; Pearce v. Patton, 7 B. Mon. 162, 45 Am. Dec. 61; Alabama L. Ins.

& T. Co. v. Boykin, 38 Ala. 510; Armijo v. New Mexico Town Co. 3 N. M. 244, 5 Pac. 709.

No technical duress need be established. Clement v. Buckley Mercantile Co. 172 Mich. 243, 137 N. W. 657.

Fisk, J. This appeal comes here for trial *de novo* under the provisions of § 7229, Rev. Codes 1905. The action was brought to cancel and have adjudged to be null and void a certain deed executed and delivered on April 28, 1910, by this plaintiff and her husband, Ernest S. Severtson, to the defendant, and to enjoin defendant from asserting any title to the lands described in the complaint under such deed. In her complaint plaintiff alleges the fact of her signing the deed aforesaid purporting to convey to the defendant the property in controversy; that such property, on the date the deed was executed, constituted the homestead of herself, husband, and children, and that such deed was signed by her "while she was under coercion, intimidation, and duress, and undue influence practised, caused, and brought about by the defendant, who at said time claimed to be acting under authority of the Bank of New Rockford, North Dakota; that plaintiff's husband, at the time of signing of said deed, was, and for many years prior thereto had been, an officer of said Bank of New Rockford; that the defendant, or his agent, prepared said deed without consulting plaintiff and without her knowledge, and plaintiff was induced to sign said deed by reason of the wrongful and fraudulent representation made by defendant to plaintiff that her said husband had embezzled, dissipated, and misappropriated the funds of the said Bank of New Rockford, and with such intention so represented and threatened that unless plaintiff immediately signed and executed said deed, defendant and said Bank of New Rockford would immediately cause her said husband to be arrested and imprisoned on a charge of embezzlement and misappropriating the funds of said Bank of New Rockford; that defendant as the officer and agent of said bank had theretofore made such charges against and to her said husband, and had threatened her said husband with arrest and imprisonment; that she was at that time informed of such representations, threats, and charges; that plaintiff then and there believing that the defendant and said Bank of New Rockford would immediately cause the arrest and imprisonment of her

husband, and to prevent such arrest and imprisonment, and for no other purpose or consideration whatever, signed said deed at the time it was presented; that plaintiff never consented, either jointly with her husband or otherwise, to the execution and delivery of said deed, or to the conveyance by her said husband, or to the conveyance of her said homestead; and that such a deed is void, and of all facts herein alleged said defendant has at all times had full knowledge and notice." She also alleges in substance and effect that she did not sign such instrument in the presence of the subscribing witnesses, nor in the presence of R. F. Rinker, the notary public who assumed to take her acknowledgment. She also alleges that at the time of signing such deed no real estate whatever was described therein.

The answer puts in issue all the allegations of the complaint relative to fraud, undue influence, and coercion, and alleges affirmatively that plaintiff's husband was owner of the premises in controversy, and that she joined with her husband in executing the deed to the defendant voluntarily and in the ordinary course of business, which deed was duly witnessed and properly acknowledged, and that the defendant, ever since the acknowledgment thereof, has been and now is the owner in fee simple of all the real property described therein, and the defendant prays that his title may be quieted.

At the conclusion of the trial in the district court, that court made findings of fact and conclusions of law favorable to the plaintiff, and judgment was given canceling, as null and void, the deed aforesaid "as to the homestead interest of said Pearl E. Severtson and Ernest S. Severtson, her husband, in said premises as defined by law, *which said homestead interest is to be ascertained as provided by law,* and that said deed be decreed to convey no interest or estate in, or lien or encumbrance upon, said homestead interest in said property."

We are unable to understand just what was intended by the district court to be adjudicated by the judgment as thus entered. It is apparent that the intention was not to declare such deed null and void *in toto,* but merely as to the "homestead interest" of plaintiff and her husband in such premises "as defined by law." The court did not therein assume to ascertain and adjudge what such homestead interest was at the date the deed was executed and delivered, or at all; for the language of the judgment, "which said homestead interest in said

premises is to be ascertained as provided by law," clearly shows that the court contemplated that the ascertainment of such homestead interest should be left to a later time, and was to be arrived at in some manner provided by law. There is neither proof nor finding that all the real property described in the deed, or any particular portion thereof, constituted the homestead of the plaintiff and her husband. What the extent or value of such homestead was on April 28, 1910, is nowhere alleged in the complaint or disclosed by the evidence. It is true the court found that plaintiff and her husband and children were living on the premises described in the complaint, which consist of eleven lots in block 7, and seven lots in block 4 of the village of New Rockford, and that they occupied such premises as a homestead from the 28th day of April, 1910, until the date of the trial, and for several years prior thereto. But as the court did not decide that all of these lots or any particular lots included in the deed constituted plaintiff's homestead, the judgment adjudicates nothing, except, perhaps, that plaintiff has an unascertained homestead right in all or a portion of such property, and that the deed, to the extent of such right when ascertained, is null and void.

The action being one to cancel the deed in so far as it involves the homestead of the plaintiff, it was, we think, clearly incumbent upon plaintiff, in order to entitle her to the relief prayed for in her complaint, to both allege and prove the extent and value of such homestead, or at least, to allege and prove that it does not exceed 2 acres, and that its value does not exceed $5,000. Manifestly, the court cannot, in the absence of such allegation and proof, adjudge such deed to be void. It can cancel such deed only in so far as it affects plaintiff's homestead, especially in view of the fact as disclosed by the evidence, that the fee title to these lots was in her husband at the time of the execution of such deed.

The Re Delaney, 37 Cal. 176, is a case somewhat analogous on principle to the case at bar. In that case one Mary Delaney petitioned the probate court to set aside certain land to her because it was a homestead at the time of her husband's death. She furnished no proof to show what lands in fact constituted the homestead at the time of her husband's death, and the court, in denying her petition, said: "She asks, in her petition, that all the lands embraced in the declaration be

set off to her, but she neither alleges nor proves what was, in fact, the homestead at the time of her husband's death. Such proof is indispensable; and one essential fact to be established in making such proof is the value, as limiting the extent of the right. She was no better entitled to the whole lands described in her declaration—in disregard of their value—than she was in the absence of proof that they constituted the homestead in fact." In California the homestead was not limited in extent but merely as to value, but in North Dakota it is limited as to both (§ 5049, Rev. Codes 1905), and it was therefore, we think, incumbent upon plaintiff to establish by proof that her homestead came within the limits thus prescribed, both as to extent and value.

See also Foogman v. Patterson, 9 N. D. 254, 83 N. W. 15, wherein Chief Justice Bartholomew, speaking for the court, among other things, said:

"While the party may select his homestead from any portion of a tract much larger than the law allows for a homestead, it necessarily follows that no homestead can be identified until the selection is made." And again: "It is 'the homestead as created, defined, and limited by law' that is absolutely exempt. We have already seen what that means. A mere floating homestead right, unattached to any land in a manner that can identify the land as a homestead, cannot create an absolute exemption in land that may subsequently be designated and identified as a homestead."

In this connection it is proper to state that if the property claimed by plaintiff to be the homestead is contiguous, and does not exceed in extent and value the amount allowed as exempt under the statute, it would not be necessary for her or her husband to make any selection of such homestead, the property not being embraced in a larger tract owned by the parties or either of them.

The rule is well settled that the deed will not be adjudged to be void *in toto* where it covers not only the homestead, but other lands. It will, in such case, be declared void merely as to the homestead. 21 Cyc. 551 and cases cited; 15 Am. & Eng. Enc. Law, 2 ed. 684; Mason v. Truitt, 257 Ill. 18, 100 N. E. 202; Gillespie v. Fulton Oil & Gas Co. 236 Ill. 188, 86 N. E. 219; Jones v. Losekamp, 19 Wyo. 83, 114 Pac. 673; Lamb v. Cooper, 150 Iowa, 18, 129 N. W. 323; Wilson v.

Wilson, 83 Neb. 562, 120 N. W. 147; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817.

If correct in our views above expressed, this court is as powerless under the record to adjudicate the rights of the parties as was the trial court, and it necessarily follows that there was a mistrial. We think the proper course to pursue is to vacate the so-called judgment appealed from, and remand the cause to the district court for further proceedings. We do not think the action should be dismissed, for on another trial it may be shown that plaintiff has rights which should be protected. She has thus far failed, it is true, to establish such rights by proper pleading and proof; but it is within the power of the trial court to permit her to supply these deficiencies.

In view of our conclusion to remand the cause for further proceedings, it will not be necessary for us to pass upon the many questions raised in the briefs, some of which may not arise on another appeal.

However, in view of another trial, we deem it proper to call attention to the fact that in the complaint plaintiff alleges that she and her family lived and made their home upon the lots in block 7, merely. Under such allegation we fail to see how it can be found or adjudged that her homestead embraced not only these lots, but also those in block 4. Furthermore, it nowhere appears that the lots in these two blocks are contiguous, and if they are not, the homestead cannot embrace all of them. See § 5050, Rev. Codes 1905; also Foogman v. Patterson, 9 N. D. 254, 83 N. W. 15.

We also suggest that in view of the importance of the question as to whether plaintiff in fact acknowledged the deed in question, the evidence bearing on such issue should be as full and as explicit as possible. The record before us on this point is not entirely satisfactory. While we are inclined to the view that the finding on this point has sufficient support in the testimony, yet, being set out in the narrative, the testimony on the direct examination of the witness Rinker, the officer whose certificate of acknowledgment is annexed to the deed, is somewhat ambiguous and susceptible of more than one construction.

We might here also add that appellant's contention that plaintiff's admission in court, in the presence of the notary, that she signed the deed, is a sufficient acknowledgment thereof, is untenable. It is, no doubt, a correct statement of the law that an acknowledgment of a

deed, so as to render it admissible in evidence, may be made at any time prior to its offer at the trial; but to constitute an acknowledgment the grantor must appear before the officer for the purpose of acknowledging the instrument, and such grantor must, in some manner, with a view to giving it authenticity, make an admission to the officer of the fact that he had executed such instrument. Breitling v. Chester, 88 Tex. 586, 32 S. W. 527. See also Riddle v. Keller, 61 N. J. Eq. 513, 48 Atl. 818.

In Breitling v. Chester, the Texas court said: "In order to call into exercise the authority of the officer to make the certificate, the grantor must appear before him for the purpose of acknowledging the instrument, and his admission that he had executed it must be made with a view to give it authenticity." In that case the admission was made by the grantor while her deposition was being taken, and the certificate based thereon was held a nullity.

Section 5052 of the Revised Codes cannot be misunderstood. It provides: "The homestead of a married person cannot be conveyed or encumbered, unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." Under this statute it is just as essential that the instrument be acknowledged as that it be executed. Without both execution and acknowledgment the homestead is not conveyed.

That the purported acknowledgment may be impeached for fraud is, we think, well settled. American Sav. & L. Asso. v. Burghardt, 19 Mont. 323, 61 Am. St. Rep. 507, 48 Pac. 391, and cases cited; American Freehold Land Mortg. Co. v. Thornton, 54 Am. St. Rep. 148, and valuable note (108 Ala. 258, 19 So. 529).

Even in those states wherein the taking of an acknowledgment is deemed a judicial, rather than a ministerial, act, the certificate of the officer may be impeached by proof that it is entirely false, and that there was no appearance before the officer, and no authorization to him to certify the acknowledgment. Grider v. American Freehold Land Mortg. Co. 99 Ala. 281, 42 Am. St. Rep. 58, 12 So. 775; Donahue v. Mills, 41 Ark. 421; Phillips v. Bishop, 31 Neb. 853, 48 N. W. 1106; Williamson v. Carskadden, 36 Ohio St. 664; Michener v. Cavender, 38 Pa. 334, 80 Am. Dec. 486; Pickens v. Knisely, 29 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. 932.

The rule is well settled that a certificate of acknowledgment, regular on its face, is presumed to state the truth, and the proof to overthrow such certificate must be very strong and convincing (Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573, and authorities therein cited), and the burden is on plaintiff to overcome such presumption; but, as stated in 1 Cyc. 622, the rule is that "where, in fact, the grantor has never appeared before the officer and acknowledged the instrument, evidence to show that the certificate, though regular on its face, is a forgery or an entire fabrication of the officer, is admissible even as against an innocent purchaser for value and without notice." Citing numerous authorities.

For the foregoing reasons the judgment appealed from is reversed and the cause remanded for a new trial.

BURKE, J., being disqualified, did not participate.

On Rehearing.

FISK, J. Appellant's counsel filed a petition praying for a rehearing upon several grounds therein set forth. After considering such petition, we granted it upon the sole question whether the cause should be remanded for a new trial, as we ordered, or the action dismissed. The respective counsel have submitted written arguments on such rehearing, covering practically all of the points involved in the first opinion. Owing, however, to the importance of the questions, as well as the insistence of counsel for both parties of the correctness of their respective views, we have carefully reconsidered some of the more perplexing questions in the case, and, while we are forced to admit that they are not free from doubt, we have concluded to adhere to the views first expressed, and will, as briefly as possible, here supplement our former opinion by setting forth additional reasons for the faith that is in us, and also endeavor to point out more clearly to the trial court and to counsel what we deem the proper practice to be pursued on such new trial.

Counsel for respondent, while not presenting a petition asking for a rehearing upon any of the points decided against his client, vigorously challenges the correctness of the court's decision in some particulars

which deserve consideration. He makes an ingenious and quite plausible argument in support of his contention that the area and value of the homestead of plaintiff and family are wholly immaterial in a case like the one at bar where the rights of creditors are in no way involved, and he cites and relies upon certain authorities as controlling, and especially the cases of Meisner v. Hill, 92 Neb. 435, 138 N. W. 583; Anderson v. Schertz, 94 Neb. 390, 143 N. W. 238; and Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684. The last case was a controversy between the widow and certain heirs, and it was held that the rights of the widow are superior to the rights of the heirs as to the entire homestead, regardless of its value, where, as prescribed in § 6392 (now § 8090, Rev. Codes 1905), the value thereof exceeds the sum of $5,000, *and such homestead cannot be divided without material injury.* The learned judge who wrote the opinion very properly held that under such circumstances "the rights of the widow and the minor children to the family homestead are very properly recognized as superior to those of the heirs. If the homestead cannot be divided without material injury, the family home must be preserved intact as against the heirs, whose right to inheritance is inferior in degree, and should be postponed to the right of the decedent's family to their home, even though the homestead exceeds $5,000 in value." Indeed, in the light of such express statute to that effect, the court could not have held otherwise. Effect was merely given to the plain language of the statute. This statute is manifestly just and humane. It does not take away the heir's right of inheritance, but merely postpones the enjoyment of such right in the exceptional cases referred to. It is important, however, to note that the legislative policy, in dealing with the homestead as between the widow and the heirs in all cases not coming within such exception, is to restrict the homestead estate, in both area and value, to the limits prescribed in § 5049, Rev. Codes 1905, governing the extent and value of the homestead exemption. In view of such express legislative policy limiting and restricting the homestead as to both area and value, not only in favor of creditors, but also of heirs, how can it be seriously contended that no such restrictions or limitations were contemplated in favor of vendees? Respondent's contention, in effect, is that in enacting § 5052, providing that "the homestead of a married person cannot be conveyed or encumbered, unless

the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife," the legislature used the word "homestead" in its broad and popular sense, and without any intention of restricting its meaning in accordance with the restrictions employed in the other sections of the statute, both with reference to exemptions and to the rights of heirs to inherit. The necessary result of such a holding would be that if A, who owns a section of land worth $50,000 with a dwelling thereon worth $10,000 upon which he and his family resides, as their home, gives to B for a cash consideration of $60,000 a deed thereto, without his wife joining, such deed is void *in toto* and will, at the suit of A or his wife, be declared to convey nothing to B. We are unwilling to impute to the legislature any such intent. Why such discrimination against the vendee and in favor of heirs possessing no contract rights? The vendee B under such circumstances stands, it would seem, in as equitable a position as A's creditors. He, no doubt, could become a judgment creditor of A by rescinding the contract of purchase and prosecuting an action against him for the recovery of the cash purchase price paid (De Kalb v. Hingston, 104 Iowa, 23) 73 N. W. 350), in which event nothing would be exempt in excess of the area and value of the homestead as fixed in § 5049. A could also in any other way become a debtor of B without his wife's knowledge or sanction, and as against the claims of B in this form A's wife, of course, could not assert a homestead claim in excess of the limit aforesaid. The Nebraska court in Swift v. Dewey, 20 Neb. 107, 29 N. W. 254, in speaking of the rights of mortgagees under similar circumstances, said: "The right of the defendants, Dewey & Stone, to proceed against the property of the plaintiff, Barnabas E. Swift, were the same as those of a judgment creditor, neither greater nor less." We are firmly persuaded that, in providing that the homestead of a married person cannot be conveyed or encumbered unless the deed or mortgage is executed and acknowledged by both husband and wife, the legislature used the word "homestead" in its restricted meaning as given to it in the other sections of the act, with reference both to creditors and to heirs.

The cases of Meisner v. Hill and Anderson v. Schertz, supra, so confidently relied upon by respondent's counsel, are recent cases from the Nebraska court, and in view of the fact that our statute on homesteads is very similar to the Nebraska statute, these cases deserve special con-

sideration. Before noticing them, however, a few words relative to the history of our homestead statute may be profitable. Pursuant to the mandate contained in § 208 of the state Constitution commanding the enactment of "wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law," the legislature in 1891 enacted chapter 67 of the laws of that year, repealing all laws in conflict therewith, and especially §§ 1 to 9 and 15 to 19 inclusive of chapter 38, Territorial Code 1877. Chapter 67 is practically the same as the Nebraska statute, and no doubt was borrowed therefrom. The commission in revising the Codes in 1895 changed the phraseology of some of the sections, and incorporated therein certain new sections, among which is § 3628, Rev. Codes 1895 (now § 5073, Rev. Codes 1905). This section, among other things, provides "that the real property which is subjected to the homestead estate by the county court, and in which such estate is ascertained and set off by such court, must not exceed in value or area the value or area prescribed in § 5049," which section limits and defines the homestead exemption as we have observed. The Nebraska statute has no corresponding section, which fact, no doubt, accounts for the litigation which arose in the Nebraska courts over the question of the respective rights of the widow and the heirs of the decedent with reference to homesteads exceeding a stated area or value. Under a statute like ours such cases as Meisner v. Hill and like cases therein mentioned would not have arisen. The case of Meisner v. Hill is, however, an authority of more or less weight in respondent's favor, as it deals with a question of statutory construction analogous to that in the case at bar, the only distinction being such as may exist between the rights of heirs to inherit and the rights of vendees to claim, under their deeds of purchase, the excess in area or value of the homestead over a stated limit for exemption purposes. This, as we view it, is, however, a very substantial distinction. But even if such decision were directly in point, we should decline to follow it. At the date our statute was borrowed, the construction placed upon the Nebraska statute by its supreme court was well settled contrary to the later decisions, and the well-recognized rule, of course, is that it will be presumed that we borrowed the construction along with the statute and as a part thereof.

Furthermore, and with due deference to the Nebraska court as constituted at the time these two cases were decided, we cannot agree with the rule there announced upon the point we are now considering, and we believe the better rule is stated in the earlier cases in that court. Meisner v. Hill was decided by a bare majority of the court, three of the judges dissenting, and in the other case, three judges of the court did not sit, two of whom dissented in the former case. In brief, we concur in the reasoning of Judge Fawcett in his dissent in the Meisner Case. We also believe the Nebraska court in Swift v. Dewey, supra, announced a sound rule of law to the effect that the rights of a grantee under his deed are the same as the rights of creditors to resort to the property in excess of the homestead exemption. If correct in these views, respondent's principal contentions must be overruled. That we are correct seems to be the voice of a large majority of the courts. 21 Cyc. 551, and cases cited. See also the recent cases of Mason v. Truitt, 257 Ill. 18, 100 N. E. 202; Gillespie v. Fulton Oil & Gas Co. 236 Ill. 188, 86 N. E. 219; Wilson v. Wilson, 83 Neb. 562, 120 N. W. 147, (s. c.) 85 Neb. 167, 122 N. W. 856; Benton v. Collins, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242; Thompson, Homestead & Exemption, §§ 476 to 480, inclusive.

Appellant's counsel vigorously contends that the action should be dismissed instead of remanded for a new trial, while respondent's counsel contend just as vigorously that a new trial should not be ordered generally, but only upon certain issues, asserting that the spirit of the so-called Newman law demands this.

While plaintiff has failed to prove sufficient facts to warrant the relief prayed for, we adhere to our former opinion that her action should not for that reason be dismissed, but the cause should be remanded for a new trial to enable her to supply the lacking proof. The contention of respondent has been duly considered in connection with the statute (§ 7229, Rev. Codes 1905) providing for trials *de novo* in this court in equity cases. That statute, among other things, provides that "the supreme court shall try anew the question of fact specified in the statement or in the entire case, and shall finally dispose of the same whenever justice can be done without a new trial, and either affirm or modify the judgment or direct a new judgment to be entered in the district court; the supreme court may, however, if it deem such

course necessary to the accomplishment of justice, order a new trial of the action."

We think the above statute also contemplates that there shall first be an adjudication by the district court of the issues in the case. As we said in the former opinion, nothing was adjudicated by the so-called judgment appealed from, and we think it consistent with proper practice under such statute to remand the cause to the end that the district court may hear such further testimony as it may deem necessary, and render a judgment adjudicating the rights of the parties.

Further, we deem it necessary to the accomplishment of justice that a new trial on all issues should be had, to the end, among other things, that upon the vital issue as to whether plaintiff in fact acknowledged the execution of the deed in question, the testimony may, if possible, be more fully and clearly brought out. The testimony on this point is very meager and unsatisfactory.

In the event the court finds that plaintiff did not acknowledge the deed in question, and further that the homestead claimed by plaintiff exceeds the extent and value of the homestead exemption prescribed by law, it will be necessary to segregate such homestead from the remainder of the property, and this brings us to the question of procedure.

The plaintiff having invoked the equity powers and jurisdiction of the district court, that court has power to and should administer full equitable relief to the parties. The fact that no statutory procedure is laid down for the guidance of the court in determining the extent and value of the homestead, and for otherwise determining and adjusting the rights of the parties, is not an insuperable obstacle in the way of administering such equitable relief as the facts warrant. The court has a right to and will invent a suitable remedy in the premises, and we suggest that a suitable remedy to be pursued may be along the lines mapped out in the statute in analogous cases relative to the manner of ascertaining, appraising, and setting apart the homestead, as against execution creditors, found in § 5055 and succeeding sections of the Revised Codes of 1905. The court may hear testimony and determine the necessary facts, or it may appoint appraisers or referees to do so, and report to the court. In the event the homestead is found to exceed the limit as to value, and is incapable of being divided with-

out material injury, a sale thereof should be ordered as provided in § 5061, and the proceeds to the extent of $5,000 should be disposed of as provided in § 5062, and the remainder thereof paid to the defendant. But in case such homestead is capable of being divided, the court should find and designate the homestead boundaries, and quiet defendant's title as to the remainder of the property. On the other hand, if it be found that the entire property described in the complaint and deed constitutes the homestead, plaintiff should have judgment for the relief prayed for in her complaint.

In view of the fact that the fee to this property appears to be in the plaintiff's husband, we suggest that it would, at least, be good practice to cause him to be brought in as a party to the action. This may be done under § 6824, Rev. Codes 1905. If this is not done, we suggest that in the event it is found necessary to order a sale of the homestead, the proceeds of such sale, to the extent of $5,000, should be deposited in court, and paid out only on the joint receipt of both the plaintiff and her husband, as provided in § 5062, aforesaid.

The costs in both courts will abide the final result of the litigation.

All concur, except BURKE, J., who did not participate.

STATE OF NORTH DAKOTA ex rel. E. B. BAKER v. MOUNTRAIL COUNTY, NORTH DAKOTA.

(149 N. W. 120.)

Original writ — quo warranto — application for — Indian reservation — jurisdiction — state — political and governmental functions.

1. On an application to this court for an original writ in the nature of quo warranto, commanding the respondent (Mountrail county) to show cause by what authority it assumes to exercise jurisdiction and governmental control over certain territory embraced in what is known as the Fort Berthold Indian Reservation, certain acts of Congress relating to the subject, and especially § 4, subdivision 2 of the enabling act, and the compact with the United

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Note.—As to who may maintain quo warranto to test validity of organization of a political subdivision of a state, see note in 21 L.R.A.(N.S.) 685.

States embraced in subdivision 2, § 203 of our state Constitution, are construed and held to vest in the state all jurisdiction not expressly reserved in the Congress of the United States over the lands in question, and that Congress relinquished to the state the right to exercise political and governmental functions over such territory.

County organization — constitutionality of act — defect in title — estoppel.

2. The territory now embraced in Mountrail county was segregated from Ward county, and duly organized as a political subdivision of the state, at the general election in 1908. Ward county was organized under chap. 50, Laws of 1891, and, conceding for the purposes of the case that such act was unconstitutional on account of a defect in its title, it is held that by the long time which has elapsed the relator is now estopped to question the due organization of such county, and he is likewise estopped from questioning the legality of the organization of Mountrail county.

Opinion filed October 22, 1914.

Original application for the issuance of a writ in the nature of quo warranto.

Application denied.

B. A. Dickinson, Ryder, N. D. (*Bradford & Nash,* of counsel), Minot, N. D., for relator.

F. F. Wyckoff, State's Attorney of Mountrail County, Stanley, N. D., *Palda, Aaker, & Greene,* Minot, N. D., for respondent.

Fisk, J. This is an application in the name of the state on the relation of E. B. Baker, but by the consent and on the motion of the attorney general for leave to file an information in the nature of quo warranto, invoking the original jurisdiction of this court to issue its writ commanding the county of Mountrail to show cause by what warrant or authority it exercises governmental functions in that certain territory lying north and east of the Missouri river in this state, and known as Fort Berthold Indian Reservation. On the filing of such application an order was issued by the chief justice, requiring respondent, the county of Mountrail, to show cause why such application should not be granted. On the return day both the relator and the respondent appeared by their respective counsel, whereupon written objections to the granting of such application were presented and filed, the grounds thereof being as follows:

"1st. That the application and petition is that of a private relator, and to him the remedy by quo warranto is not available.

"2d. Because it appears from the face of the petition, and also from the records of the office of the secretary of state of North Dakota, and the records of the office of the governor of said state, of which records this court is asked to take judicial notice in so far as they relate to the subject-matter of this inquiry, that neither the relator herein, nor the state on the relation of its attorney general, is or would be entitled to the relief prayed for in the petition upon which this court's order to show cause was issued, for the following reasons:

"1. Because it appears therefrom that this court is asked to exercise its prerogative authority, not for the defense or protection of the interests of the state at large, but, on the contrary, for the purpose of compelling the state to suspend the exercise of its power and authority over persons and property within its boundaries and subject to its jurisdiction.

"2. That the relator and the public are estopped to deny the due organization of the county of Mountrail and the establishment of its boundaries, including the territory said to have been a part of an Indian reservation, the boundaries of such county having been established by the vote of the electors at a general election held six years prior to the filing of this petition, during which period the exercise of its power and authority by the respondent county has been acquiesced in by all of the people within its boundaries as so established.

"3. That it does not appear that the present organization of said county, and its exercise of authority over the territory within the boundaries established by such election, works hardship or oppression upon the property interests or personal rights of any citizen of this state.

"4. It is manifest that if the relief sought be granted, it will operate to exempt persons residing within the territory formerly comprising a part of an Indian reservation, but now a part of the domain subject to the jurisdiction of this state and its government, from taxation for the support of the state government, and exempt its inhabitants and property from the control and authority of the agencies established by the government, and would relieve and exempt the inhabitants of such territory from responsibility as citizens of this state and from par-

ticipation in the administration of its affairs, and from the protection of its laws."

Oral arguments were presented on behalf of the relator and the respondent upon the merits of the controversy, and it was stipulated that the court might dispose of such merits in passing upon the application; and as we interpret the statements of the distinguished counselor who argued the case for respondent, he concedes that it is a proper case for the exercise by this court of its original jurisdiction, and he expressly waives any points of objection to the practice pursued by counsel for relator, and invokes the judgment of the court upon the merits of the controversy. In view of this concession and request from respondent's counsel, and it appearing that it is a proper case for the exercise of our original jurisdiction, we shall proceed at once to a consideration of the merits.

Relator's chief contention, as we understand it, is that the lands embraced within the territory known as the Fort Berthold Indian Reservation are not and could not, under the law, be included within the limits of any county or political subdivision of the state, solely because of the fact that such lands were reserved, and set apart by the government for the use and benefit of certain Indians. Such contention, if sound, is very far reaching, as it not only affects the county organization of Mountrail but of Ward county also, from which Mountrail was segregated; and it calls in question, therefore, the validity of the organizations of these political subdivisions, and, no doubt, this is true as to other counties of the state. Manifestly, therefore, the case presents questions of the gravest moment, and we regret that we are unable to devote to it the time which its importance deserves. The limited time at our disposal in this, as in most all applications for the exercise of our original jurisdiction, owing to exigencies requiring almost immediate decision to the end that the same may be of any beneficial effect to the litigants, of necessity compels us to do little more than briefly state our conclusions.

We deem as wholly unsound the basic proposition advanced by relator's counsel, that these reservation lands are not and never were susceptible of incorporation within the limits of and as a part and portion of the territory of an organized county of the state. The fundamental fallacy of such contention lies, we think, in the erroneous assumption

that the government of the United States has never relinquished to the state its former exclusive and unlimited jurisdiction over such lands. While it still retains a limited or qualified jurisdiction for certain purposes over such lands, the Congress of the United States relinquished to the territory of Dakota by the organic act, and to the state of North Dakota by the enabling act, all jurisdiction and governmental authority over these lands and the inhabitants residing thereon not thus specially reserved to itself. Relator relies upon certain provisions contained in the second subdivision of § 4 of the enabling act, and in subdivision 2, § 203, of our state Constitution, which is the compact between this state and the United States whereby title is expressly reserved in the government to the unappropriated public lands lying within the boundaries of the state, and to all lands therein owned or held by any Indian or Indian tribe, and also providing "that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.*"

That Congress did not intend by such provision of the enabling act to reserve an exclusive jurisdiction over Indian lands is well settled by the highest court in our land, Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107; also by this court in State ex rel. Tompton v. Denoyer, 6 N. D. 586, 72 N. W. 1014, the opinion in which was written by Mr. Justice Bartholomew, and contains an exhaustive review of many authorities, both state and Federal. To attempt to add anything to what is there said would be presumptuous on the writer's part. We will content ourselves by quoting briefly therefrom. After reviewing the authorities and quoting at length from the unanimous opinion in Draper v. United States, supra, Judge Bartholomew says: "These authorities establish firmly the proposition that the jurisdiction reserved by the enabling act was not an exclusive jurisdiction. It did not take Indian lands out of the jurisdiction of the state where located, in the sense that the lands in another state are excluded. The United States retained all jurisdiction necessary for the disposition of the land and the title thereto; all jurisdiction necessary to enable it to carry out all treaty and contract stipulations with the Indians; all jurisdiction necessary to enable it to protect and

civilize its unfortunate wards. But the state had jurisdiction to tax the property of its citizens within the reservation, to enter thereon for the purpose of enforcing, by levy and sale, the collection of such tax. It had jurisdiction to punish its citizens for crime committed one against the other thereon. And the principle of these decisions logically and necessarily leads further, and gives the state the right to extend to its citizens lawfully upon such Indian lands all the privileges and immunities of the laws of the state, where the same in no manner conflict with the reserved jurisdiction of the United States."

Relator's counsel also rely upon § 1839, U. S. Rev. Stat. 1874, Comp. Stat. 1913, § 3464, and certain agreements entered into December 14, 1886, with the tribal Indians occupying this reservation; but it is apparent that these are of no controlling importance, as they were entirely ignored in the authorities above cited. Indeed, relator's counsel inferentially admit the weakness of their latter contention by directing our attention to the cases of Yellow Stone County v. Northern P. R. Co. 10 Mont. 414, 25 Pac. 1058, and Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216, which they concede tend to support respondent's views. See also Stevens v. Thatcher, 91 Me. 70, 39 Atl. 282, and State ex rel. Crawford v. Norris, 37 Neb. 299, 55 N. W. 1086.

In conclusion, we entertain no doubt upon the proposition that the state rightfully exercises political and governmental jurisdiction and control over such lands vested in it by the Congress of the United States, sufficient to authorize it to include such territory within its political subdivisions for political and governmental purposes. We must therefore overrule relator's first contention.

But relator's counsel, under point 2 of their brief, challenge the right of the state and of Mountrail county to exercise governmental functions in such reservation, on the ground, to use the language of counsel, "that this reservation has never been attached to any county legally by any constitutional legislative enactment." They call attention to the fact that the act by which Ward county was attempted to be created, being chap. 50, Laws of 1891, is unconstitutional because the title thereof is in substance and effect the same as the title of the act which was held unconstitutional in Richard v. Stark County, 8 N. D. 392, 79 N. W. 863, and recognized as such in Schaffner v. Young,

10 N. D. 245, 86 N. W. 733. And they argue therefrom that Ward county had no legal existence as a political subdivision of the state in 1908, the date on which Mountrail county was segregated from Ward and organized as a county by itself. Conceding that chap. 50, Laws of 1891, is unconstitutional, it by no means follows that at this late day such *de facto* county organization will be interfered with by the courts. The very serious results which would necessarily follow from such a holding far outweigh any considerations of the relator, or supposed benefits which he might obtain through the relief which he seeks in this proceeding. On the plainest principles of justice the relator, as well as all persons similarly situated, are and ought to be forever estopped to question the legality of the organization of Ward county. For nearly a quarter of a century such *de facto* county has been recognized by everyone as a political subdivision of the state, and to upset such organization now would result in the most disastrous consequences imaginable. The same is true as to the organization of Mountrail county. Furthermore, this court in State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360, adjudged that such county was duly organized. That the relator is precluded by his laches at this time from questioning the organization of these counties is well settled by this court in the cases of State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385, and State ex rel. Madderson v. Nohle, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141. See also the authorities therein cited.

We conclude, therefore, that the petition of the relator for the foregoing reasons should be denied, and it is so ordered.

STATE OF NORTH DAKOTA v. ROBERT APPLEGATE, Sometimes Known as "BOB" APPLEGATE.

(149 N. W. 356.)

Criminal action — jury — deliberations of — continuous up to complete verdict — common nuisance — bottles of beer offered in evidence — taken by jury — used by jury — prejudice — presumption of — verdict — set aside.

The deliberations of a jury in a criminal action are presumed to continue not

only up to the time that their verdict is signed and agreed upon, but long enough to allow their polling, if a poll is desired, and prejudice will be presumed to the defendant where it is shown that three bottles of beer which were introduced in evidence in a prosecution for maintaining a common nuisance under the liquor laws of North Dakota, and which were taken by the jury into their room, were found empty at the time that such jury reported that they had arrived at a verdict; and where such prejudice has not been overcome by competent evidence, a reversal will be ordered, even though the taking of the exhibits into the jury room was not objected to by counsel for defendant.

Opinion filed October 22, 1914.

Appeal from the District Court of Divide County, *Leighton,* J.

Prosecution for maintaining a common nuisance under the liquor laws of North Dakota. Defendant convicted. Defendant appeals.

Reversed.

C. E. Brace, for appellant.

Reception by the jury of evidence out of court will, if influential in determining the verdict, require the granting of a new trial. Prejudice will be presumed. 17 Am. & Eng. Enc. Law, 2d ed. 1237; 12 Enc. Pl. & Pr. 584.

Jurors are not allowed to make private experiments for the purpose of determining controverted and essential points. Their sole guide is what properly came before them in the course of the trial. Falls City v. Sperry, 68 Neb. 420, 94 N. W. 529, 4 Ann. Cas. 272; Winslow v. Morrill, 68 Me. 362; Bowler v. Washington, 62 Me. 302; Eastwood v. People, 3 Park. Crim. Rep. 25; Flanders v. Mullin, 73 Vt. 276, 50 Atl. 1055; Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co. 57 Fed. 898; People v. Conkling, 111 Cal. 627, 44 Pac. 314; Wilson v. United States, 53 C. C. A. 652, 116 Fed. 484; Heffron v. Gallupe, 55 Me. 568; Thompson v. Mallet, 2 Bay, 94.

The making of outside experiments for the purpose of determining the truth or weight of evidence is ground for a new trial. 12 Enc. Pl. & Pr. 590; Pierce v. Brennan, 83 Minn. 422, 86 N. W. 417; Wilson v. United States, 53 C. C. A. 652, 116 Fed. 484.

Drinking of intoxicating liquors by the jury to test their intoxicating qualities, if done without consent of defendant on trial, is ground for

new trial. Galloway v. State, 42 Tex. Crim. Rep. 380, 57 S. W. 658; State v. Reilly, 108 Iowa, 735, 78 N. W. 680.

Such acts on the part of the jury while deliberating over the case constitute misconduct, and a new trial will be granted. State v. Robidou, 20 N. D. 518, 128 N. W. 1124, Ann. Cas. 1912D, 1015; State v. Reilly and Galloway v. State, supra.

Geo. P. Homnes, State's Attorney, for respondent.

An affidavit must be based upon known facts, and not upon mere belief. Territory v. Burgess, 8 Mont. 57, 1 L.R.A. 808, 19 Pac. 558.

Upon motion for new trial on the ground of misconduct of the jury, the supreme court will not reverse the findings of the lower court on questions of fact raised upon such motion and decided by the lower court, except for manifest abuse of discretion. State v. Salverson, 87 Minn. 40, 91 N. W. 1, 12 Am. Crim. Rep. 644; Hewitt v. Pioneer-Press Co. 23 Minn. 178, 23 Am. Rep. 680; State v. Floyd, 61 Minn. 467, 63 N. W. 1096.

If the jury obtain evidence out of court, relating to a matter not in dispute, this does not constitute misconduct or warrant a new trial. Siemsen v. Oakland, S. L. & H. Electric R. Co. 134 Cal. 494, 66 Pac. 672; Perry v. Cottingham, 63 Iowa, 41, 18 N. W. 680; State v. McDonald, 16 S. D. 78, 91 N. W. 447; State v. Andre, 14 S. D. 215, 84 N. W. 783; State v. Robidou, 20 N. D. 518, 128 N. W. 1124, Ann. Cas. 1912D, 1015.

The presumption is that a jury does its sworn duty. If misconduct is claimed, it must be specific and supported by positive and competent proof. 1 Hayne, New Trial & App. § 67, pp. 319, 320; Cranmer v. Kohn, 11 S. D. 245, 76 N. W. 937.

Where exhibits are taken to the jury room without objection by the defendant, he must, upon motion for new trial on ground of misconduct, make it clearly appear that he has been prejudiced and not accorded a fair trial. Siemsen v. Oakland, S. L. & H. Electric R. Co. 134 Cal. 494, 66 Pac. 672; People v. Rowell, 133 Cal. 39, 65 Pac. 127; 1 Hayne, New Trial & App. § 67, p. 321.

Irregularity or misconduct on the part of the jury must be shown to have influenced the verdict to the prejudice of defendant. State v. Robidou, 20 N. D. 518, 128 N. W. 1124, Ann. Cas. 1912D, 1015; 1 Hayne, New Trial & App. § 70, p. 353; Wilson v. Abrahams, 1 Hill,

207; People v. Sansome, 98 Cal. 235, 33 Pac. 202; Jones v. People, 6 Colo. 452, 45 Am. Rep. 526; May v. People, 8 Colo. 210, 6 Pac. 816; Underwood v. Old Colony Street R. Co. 31 R. I. 253, 76 Atl. 766, Ann. Cas. 1912A, 1318.

BRUCE, J. Defendant in this case was convicted of the crime of keeping and maintaining a common nuisance under the liquor laws of this state. During the trial of the action the state offered in evidence three bottles which it claimed contained beer and which it also claimed were purchased from the defendant as charged in the information. The case comes up on the judgment roll alone, so we do not know what the evidence was, but the record shows a plea of not guilty which put to issue all of the material allegations of the complaint, and both under the plea and the charge of the court it was necessary for the state to prove, and for the jury to find, that the contents of the bottles were actually beer.

When the jury retired to deliberate on the verdict, the court sent to the jury room with the jury the three bottles with their contents, but it did not caution the jury not to open the said bottles or to experiment with them. No objection, however, seems to have been made by the defendant to the court's action in this respect. When the bailiff was notified by the jurymen that they had arrived at their verdict, and when he opened the door of the jury room to obtain the same, he found the three bottles empty. His affidavit is as follows: "John Weeding, being first duly sworn on his oath, says that he was one of the bailiffs in regular attendance upon the special January, 1914, term of said district court, and that as such he was duly sworn as a bailiff to take charge of the jury impaneled and sworn to try the above-entitled action, upon their retirement for the consideration of their verdict; that, upon the retirement of said jury to the jury room, there was taken with said jury to the said jury room, among the exhibits introduced in evidence in said action, three bottles, commonly known as quart bottles, alleged by the state to contain an intoxicating liquor commonly known as beer, and that the said three bottles were left by the bailiffs in charge of said jury, in the jury room with the said jury during their deliberations upon their verdict. That upon his being notified by the said jury that they had arrived at their verdict, and upon the opening of the

said jury room by the bailiff in charge of said jury, said affiant as one of said bailiffs discovered that the said three bottles had been opened by some of said jurymen, during their deliberations upon their verdict, and that he verily believes from his knowledge of the facts and from the statement made to him by the said jurymen thereafter, that the said contents of the said exhibits were drunk by certain of the jurymen impaneled and sworn to try said action during deliberations of the said jury upon their verdict, and while in their jury room for that purpose; and affiant further avers that the said bottles taken to the said jury room as aforesaid, and emptied of their contents as aforesaid, were taken empty into open court by the bailiffs in attendance upon said jury and when the said jury returned into open court to render their verdict."

If the jury drank the contents of the bottles in order to test its qualities as an intoxicant they clearly violated the law, as they had no right to try any such experiment. Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co. (C. C.) 57 Fed. 898; People v. Conkling, 111 Cal. 627, 44 Pac. 314. Even if they drank it from a spirit of bravado, prejudice will be presumed.

There is no merit in the contention of counsel for the state that in this case there was no proof that the contents of the bottles were drunk during the deliberations of the jury or before they had signed their verdict. The affidavit of the bailiff clearly shows that it was drunk before the jury notified him that they had arrived at a verdict, and their deliberations in the eyes of the law must be presumed to have continued not only up to such time, but up to the time that their verdict was returned in open court, and in fact until after the jury had been polled if a poll had been demanded. Up to this time, indeed, any juryman might have withdrawn his signature and repudiated his action. It is not even necessary to decide the case on the ground that the jury wrongfully experimented with the evidence. Both parties have a right to the cool, dispassionate, and unbiased judgment of each juror, and the rule seems to be well established that prejudice will be presumed if liquor is drunk after the jury has retired to consider the case. State v. Baldy, 17 Iowa, 39; Berry v. Berry, 31 Iowa, 415; State v. Reilly, 108 Iowa, 735, 78 N. W. 680; State v. Bullard, 16 N. H. 139; People v. Douglass, 4 Cow. 36, 15 Am. Dec. 332; Rose v. Smith, 4 Cow. 17,

15 Am. Dec. 331; Gamble v. State, 44 Fla. 429, 60 L.R.A. 547, 103 Am. St. Rep. 150, 33 So. 471, 1 Ann. Cas. 285, 12 Am. Crim. Rep. 638; Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; Davis v. State, 35 Ind. 496, 9 Am. Rep. 760; Leighton v. Sargent, 31 N. H. 119, 64 Am. Dec. 328; Ryan v. Harrow, 27 Iowa, 494, 1 Am. Rep. 302; Dolan v. State, 40 Ark. 454; Creek v. State, 24 Ind. 151; State v. Bruce, 48 Iowa, 530, 30 Am. Rep. 403; State v. Madigan, 57 Minn. 425, 59 N. W. 490; State v. Greer, 22 W. Va. 800.

We realize that some authorities hold that prejudice will not be presumed, but must be affirmatively shown. See 12 Cyc. 726. We refuse to follow these cases, however, as it is very difficult for us to see how the defendant can generally, and especially where the misconduct takes place solely within the jury room, furnish the required proof. The rule is well established that a juryman will not be allowed to impeach his own verdict. Counsel for the defendant in the case at bar produced all the evidence that it was possible for him to obtain and to introduce. It would have been competent, it is true, for the state, the verdict having been once attacked, to have produced evidence in support thereof, even though it came from the jurymen themselves, but this it failed to do. The presumption of prejudice, therefore, prevails, as there is no proof to overcome it.

The judgment of the District Court is reversed and the cause is remanded for further proceedings according to law.

JOHN J. COYLE v. L. M. DUE.

(149 N. W. 122.)

Judgment of dismissal with prejudice — action of partition — proposed settlement of case by oral agreement — agreement repudiated — not bar to subsequent action to quiet title — deed — mortgage.

1. A judgment of dismissal "with prejudice to the starting of another action on the cause of action set forth in the complaint," which is rendered in an action of partition, and which action of partition is based upon the theory that the defendant will stand by and recognize an oral agreement to settle a dispute by granting a joint interest in a tract of land, is not, after a repudiation of such

oral agreement on the trial of the first action, a bar to a subsequent action to quiet title and determine adverse claims, such subsequent action being based upon the original controversy which the oral agreement might, if recognized, have settled and disposed of, and which is, to all intents and purposes, an action to have a deed declared to be a mortgage, to obtain a finding that such mortgage has been paid, and to quiet the title of the said land from the cloud thereon.

Estoppel — causes of action must be identical in both cases.

2. To constitute an estoppel by judgment, the causes of action in the former and subsequent actions must be identical.

Identity of causes — test — same necessary facts — res judicata.

3. The true test of the identity of the causes of action for the purpose of determining *res judicata* is the identity of the facts essential to their maintenance.

Same question determined in former action — certainty of — judgment in former case not conclusive.

4. When it is not certain that the same question was determined in favor of the party in another who relies upon the judgment therein as conclusive on such question, the judgment is not final on that point.

Receipt in settlement — not conclusive — open to explanation — presumptions deemed conclusive — written instruments — facts recited in — truth of.

5. A receipt which is worded, "Received of A full settlement of contract made by A for SW¼ SW¼ Sec 22" (and other described real estate), is open to explanation and proof, and is not conclusive under the terms of § 7316, Rev. Codes, 1905, which provides that "the following presumptions, and no others, are deemed conclusive. . . . (2) The truth of the facts from a recital in a written instrument" as such instrument or receipt recites no facts, and the nature and kind of settlement is nowhere stated.

Opinion filed September 14, 1914. On petition for rehearing, October 23, 1914.

Appeal from the District Court of Ward County, *Leighton*, J.

Action to quiet title and determine adverse claims. Judgment for Plaintiff. Defendant appeals.

Affirmed.

Statement by BRUCE, J.

As we view the evidence in this case, and as the trial court undoubtedly found (the findings are not specific and do not go into details),

John J. Coyle, the plaintiff and respondent, on or about October 1, 1908, desired to purchase a quarter section of land in Williams county, known as the Rooney land, but lacked the money requisite for the purpose. He therefore went to the defendant and appellant, who was the president of the Scandinavian American Bank of Minot, North Dakota, and gave the banker his promissory note for $250, bearing interest at the rate of 12 per cent per annum and a mortgage upon another farm belonging to the plaintiff, near Minot, and entered into a written agreement to the effect that "it is agreed upon by above-mentioned parties that L. M. Due has the option of taking one-half interest in the N. E. quarter of 9–155–97, which is brought this date from the original homesteader, B. W. Rooney, for the consideration of $200, and subject to a first mtg. only of $650 at 10% per annum, or taking the note of said J. J. Coyle for $250 secured by good collaterals if said L. M. Due does not upon inspection find said land good and level or desirable, L. M. Due has at this date furnished the purchase price for said land, $200, and if above mentioned land is to the satisfaction of said L. M. Due, he must at once return to said J. J. Coyle Quit Claim Deed of the SW of the SW Sec 22 N half of the NW quarter of Sec 27 and the SE of the NW quarter of 27, all in 152–84, which mentioned deed has been turned over to said L. M. Due as a guaranty that mentioned land is as described by said J. J. Coyle. It is further agreed upon that mentioned quitclaim deed, Minot, N. D. Oct. 1, 1908, shall be returned to said Coyle upon receipt of $250 if said L. M. Due does not prefer one-half interest in said land." The said sum of $200 was paid to Coyle by the said Due, and, with the said loan and with $234 derived from other sources, plaintiff and respondent then purchased the said Rooney tract, and took title thereto jointly in the names of both himself and the said Due. Thereafter the said Due inspected the land, and notified Coyle that he did not desire the half interest, and would expect the said Coyle to pay the said note of $250. In April, 1909, the respondent Coyle, being about to leave the state on an extended visit, executed and delivered to the said Due a quitclaim deed to the said land in order to assist the said Due in making a trade of the said land so that he could get his money out of it and as additional security for the said $200 loan. Later, and in August, 1909, Due, without the respondent's knowledge,

traded the so-called Rooney land for three residence lots in Eastwood Park Addition to the city of Minot, taking title to the said lots in the name of himself alone, the Rooney land at the time of said transfer being worth $2,000 and being encumbered for $650. Later, and on October 27, 1910, Due sold one of these lots (lot 10, block 7) to a relative of his wife for the sum of $175, the lot at the time being worth some $800. Prior to such sale, however, and on June 30, 1910, and at which time the respondent Coyle first learned of the trade and sale aforesaid, and during which interim the appellant for and on account of the Scandinavian Bank of Minot had repeatedly demanded payment from the respondent of the $250 note, the said respondent told the appellant that he wanted to pay him the $250, and wanted a quitclaim deed of the farm near Minot, and Due told him that it would be all right, and that if Coyle would pay him $100 he would give him back all of his papers, and as soon as a lawsuit which was pending with a third party in relation to the lots traded for was over he would deed him a half interest in the said lots, and that Coyle said, "That sounds all right to me," and thereupon paid the $100, and was given the $250 note and a release of the mortgage on the farm south of Minot, and in turn gave to Due the following receipt:

June 30, 1910. Received of L. M. Due full settlement of contract made by L. M. Due, for S. W. ¼ S. W. ¼ 22, N. ½ N. W. ¼, S. E. ¼ N. W. ¼ 27–152–84, N. E. ¼ 9–155–97.

John J. Coyle.

Later, and on October 16, 1911, the appellant having, after the settlement of the lawsuits aforesaid, refused to deed to the respondent the half interest in the said lots, the respondent commenced an action in partition against the appellant for a division of the said lots. On the trial of this action the defendant Due repudiated and denied the oral agreement of June 30, 1910, and denied any interest or estate of respondent in the real estate in controversy, and thereupon the respondent moved the court for an order dismissing the action, and it was "ordered, adjudged, and decreed . . . that the above be and the same hereby is dismissed, with prejudice to the starting of another action on the same cause of action set forth in the complaint." Later

the plaintiff and respondent herein commenced the present action which is a statutory action to determine adverse claims and to quiet title. In this action judgment was entered for the plaintiff, and the defendant has appealed to and asked for a trial *de novo* in this court.

Halvorson & Wysong, for appellant.

This cause is *res judicata.* The former action between the same parties and over the same subject-matter settled the identical questions and facts involved in this action. Lyon v. Perin & G. Mfg. Co. 125 U. S. 698, 31 L. ed. 839, 8 Sup. Ct. Rep. 1024; Hughes v. United States, 4 Wall. 237, 18 L. ed. 305; Tankersly v. Pettis, 71 Ala. 179; Story, Eq. Pl. 793; Adams v. Cameron, 40 Mich. 506; Thompson v. Clay, 3 T. B. Mon. 359, 16 Am. Dec. 108; Pelton v. Mott, 11 Vt. 148, 34 Am. Dec. 678; Stickney v. Goudy, 132 Ill. 213, 23 N. E. 1034; Kelsey v. Murphy, 26 Pa. 78; Foote v. Gibbs, 1 Gray, 412; Thurston v. Thurston, 99 Mass. 39; Durant v. Essex Co. 7 Wall. 107, 19 L. ed. 154; Bigelow v. Winsor, 1 Gray, 301; Martin v. Evans, 85 Md. 8, 36 L.R.A. 218, 60 Am. St. Rep. 292, 36 Atl. 258.

When the decree of dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complaint, and constitutes a bar to further litigation of the same matter between the same parties. Tankersly v. Pettis, 71 Ala. 179; Story, Eq. Pl. 793; Adams v. Cameron, 40 Mich. 506; Thompson v. Clay, 3 T. B. Mon. 359, 16 Am. Dec. 108; Pelton v. Mott, 11 Vt. 148, 34 Am. Dec. 678; Stickney v. Goudy, 132 Ill. 213, 23 N. E. 1034; Kelsey v. Murphy, 26 Pa. 78; Foote v. Gibbs, 1 Gray, 412; Thurston v. Thurston, 99 Mass. 39; 6 Enc. Pl. & Pr. 993.

Matters once determined by a court of competent jurisdiction can never be questioned. McNeely v. Hyde, 46 La. Ann. 1083, 15 So. 167.

This is true also of bills in chancery. Oxford's Case, 2 Smith Lead. Cas. p. 667, note; Wilcox v. Balger, 6 Ohio, 406; Taylor v. Yarbrough, 13 Gratt, 183; Scully v. Chicago, B. & Q. R. Co. 46 Iowa, 528; Adams v. Cameron, 40 Mich. 506; Cochran v. Couper, 2 Del. Ch. 27; Thompson v. Clay, 3 T. B. Mon. 359, 16 Am. Dec. 108; United States v. Arredondo, 6 Pet. 729, 8 L. ed. 561; Waugh v. Chauncey, 13 Cal. 12.

Geo. A. McGee, and *Coyle & Herigstad,* for respondent.

In order for a second action to be *res judicata,* parties must be the same, facts must be same, points and questions raised and determined same, and the identity of the facts must clearly appear. This case is not *res judicata.* Woodward v. Northern P. R. Co. 16 N. D. 38, 111 N. W. 627; Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314; Linton v. National L. Ins. Co. 44 C. C. A. 54, 104 Fed. 584; Lake County v. Platt, 25 C C. A. 87, 49 U. S. App. 216, 79 Fed. 567; Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co. 5 C. C. A. 249, 12 U. S. App. 320, 55 Fed. 690; Russell v. Place, 94 U. S. 606, 24 L. ed. 214; Ætna L. Ins. Co. v. Hamilton County, 54 C. C. A. 468, 117 Fed. 82; Nesbit v. Independent Dist. 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; West v. Hennessey, 58 Minn. 133, 59 N. W. 984; Linne v. Stout, 44 Minn. 110, 46 N. W. 319; Stitt v. Rat Portage Lumber Co. 101 Minn. 93, 111 N. W. 948; Rossman v. Tilleny, 80 Minn. 160, 81 Am. St. Rep. 247, 83 N. W. 42; Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Gilman v. Gilby Twp. 8 N. D. 627, 73 Am. St. Rep. 791, 80 N. W. 889; Wells-Stone Mercantile Co. v. Aultman, M. & Co. 9 N. D. 520, 84 N. W. 375.

At law an absolute deed and a separate defeasance or agreement to recovery, executed at the same time as security for a debt, amount to a mortgage only. 1 Jones, Mortg. p. 178; Rogers v. Jones, 92 Cal. 80, 28 Pac. 97; Butman v. James, 34 Minn. 547, 27 N. W. 66; Brinkman v. Jones, 44 Wis. 498; Clark v. Landon, 90 Mich. 83, 51 N. W. 357; Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792; McClory v. Ricks, 11 N. D. 38, 88 N. W. 1042; 31 Cyc. 1445, 1446; Gower v. Andrew, 59 Cal. 119, 43 Am. Rep. 242; Russell v. Bradley, 47 Kan. 438, 28 Pac. 176; Largey v. Bartlett, 18 Mont. 265, 44 Pac. 962; Morrison v. Hunter, 74 Neb. 559, 105 N. W. 88; Lockhart v. Rollins, 2 Idaho, 540, 21 Pac. 413, 16 Mor. Min. Rep. 16; Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30; Kimball v. Ranney, 122 Mich. 160, 46 L.R.A. 403, 80 Am. St. Rep. 548, 80 N. W. 992; Dodge v. Black, 21 Ky. L. Rep. 992, 53 S. W. 1039.

BRUCE, J. (after stating the facts as above). The first question to be determined is whether a judgment of dismissal "with prejudice

to the starting of another action on the cause of action *set forth in the complaint,*" which is rendered in an action of partition, and which action is based upon the theory that the defendant will stand by and recognize an oral agreement to settle a dispute by granting a joint interest in a tract of land, is a bar to a subsequent action after a repudiation of such oral agreement on the trial of the first action, and which subsequent action is based upon the original controversy which the oral agreement might, if recognized, have settled and disposed of, and which is in all intents and purposes an action to have a quitclaim deed declared to be a mortgage, to obtain a finding that such mortgage has been paid, and to quiet the title of the said land from the cloud thereof.

We are of the opinion that there was no legal bar to the present action, and that the dismissal of the former action was in no wise *res judicata.* The causes of action were not the same. To constitute an estoppel by judgment, the cause of action in the former and subsequent proceeding must be identical. Stitt v. Rat Portage Lumber Co. 101 Minn. 93, 111 N. W. 948. "The test of the identity of causes of action for the purpose of determining the question of *res judicata* is the identity of the facts essential to their maintenance." Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314; Wells-Stone Mercantile Co. v. Ultman, M. & Co. 9 N. D. 520, 84 N. W. 375; Linne v. Stout, 44 Minn. 110, 46 N. W. 319; Bigley v. Jones, 114 Pa. 510, 7 Atl. 54. "When it is not certain that the same question was determined in favor of the party in another action who relies on the judgment therein as conclusive as to such question, the judgment is not final on the point." Fahey v. Easterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580. Applying these tests, it is clear to us that no estoppel by judgment has been proved.

It is quite clear to us indeed that the Code of North Dakota, in providing specifically for an action of partition in §§ 7400–7452, Rev. Codes 1905, and for the action to determine adverse claims and quiet title in §§ 7519–7537, Rev. Codes 1905, recognizes the existence of the two distinct causes of action. The common-law conception and distinction is clearly stated in 21 Am. & Eng. Enc. Law, 2d ed. p. 1147, and is as follows: "At common law, neither the title nor the right to

possession of land can be determined in an action for partition. It follows that the plaintiff in partition, in the absence of a statute authorizing the trial of questions of disputed title, must have a clear and *undisputed* title to an undivided share of the land of which partition is sought. *If the applicant is not in the actual or constructive possession of the premises to be partitioned, and they are held adversely and his title is disputed,* he cannot maintain the action." Cave v. Holford, 3 Ves. Jr. 650; Holder v. Holder, 40 App. Div. 255, 59 N. Y. Supp. 207; Church's Appeal (1888) 10 Sadler (Pa.) 230, 13 Atl. 756; Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216; Deloney v. Walker, 9 Port. (Ala.) 497; Ross v. Cobb, 48 Ill. 111; Nash v. Simpson, 78 Me. 142, 3 Atl. 53; Hassam v. Day, 39 Miss. 392, 77 Am. Dec. 684; Therasson v. White, 52 How. Pr. 62; Wilkin v. Wilkin, 1 Johns, Ch. 111; Garrett v. White, 38 N. C. (3 Ired. Eq.) 131; Cannon v. Lomax, 29 S. C. 369, 1 L. R. A. 637, 13 Am. St. Rep. 739, 7 S. E. 529; Bruton v. Rutland, 3 Humph. 435; Groves v. Groves, 3 Sneed, 187; Straughan v. Wright, 4 Rand. (Va.) 493; Stuart v. Coalter, 4 Rand. (Va.) 74, 15 Am. Dec. 731; Bonham v. Weymouth, 39 Minn. 92, 38 N. W. 805.

It is not even necessary for us to determine whether the complaint in the action of partition should or could have been amended so as to put in issue the question of title, or whether that question was raised by the answer without any such amendment. All that it is necessary to say is that no such amendment was made or requested; that the complaint was clearly one in partition and in partition alone, and that the judgment merely "ordered, adjudged, and decreed that the cause is and the same is hereby dismissed, with prejudice to the starting of another action *on the cause of action set forth in the complaint.*"

The nature of the judgment, in short, distinguishes the case at bar from the cases of Oliver v. Montgomery, 39 Iowa, 601; Telford v. Barney, 1 G. Greene, 575; Senter v. De Bernal, 38 Cal. 637; De Uprey v. De Uprey, 27 Cal. 333, 87 Am. Dec. 81; Hancock v. Lopez, 53 Cal. 362; McArthur v. Clark, 86 Minn. 165, 91 Am. St. Rep. 333, 90 N. W. 369; which otherwise might be authority for a holding contrary to that herein made. All that we desire to say here is that the complaint which we are here passing upon was specifically a complaint in partition, and that the prejudice of the judgment of dis-

missal was in terms limited to the cause of action set forth in that complaint and to that cause of action alone.

It may also be true that accepting judgment in an action of partition, and having a share in the land set apart to one, may forever estop such a person from claiming a greater interest in the land (Davis v. Durgin, 64 N. H. 51; Telford v. Barney, 1 G. Greene, 575; Wright v. Marsh, 2 G. Greene, 94; Bigley v. Watson, 98 Tenn. 353, 38 L.R.A. 679, 39 S. W. 525); but no such showing has been made in the case before us. The judgment of dismissal of the partition suit was not, we believe, a bar to the present action. Bigley v. Jones, 114 Pa. 510, 7 Atl. 54.

The next and only remaining question to be determined is whether the payment of the sum of $100 which was made on the 30th day of June, 1910, and the signing by the plaintiff and respondent on such day of the memorandum or receipt, "June 30th. Received of L. M. Due full settlement of contract made by L. M. Due for S. W. ¼ S. W. ¼ 22, N. ½ N. W. ¼, S. E. ¼ N. W. ¼ 27–152–84, N. E. ¼ 9–155–97," and the return to the said Coyle of his note for $250, and the cancelation of the mortgage on his piece of land near Minot, amounted to a relinquishment by the said Coyle of all of his right and interest in the said Rooney tract.

On the latter point the trial court found the issues for the plaintiff and appellant, and we do not feel justified in overruling his conclusions. The question is one of credibility merely. We realize that counsel for appellant are strenuous in their assertion of the falsity of the testimony of the respondent, and explain any and all weakness or vacillation in the testimony of the appellant by asserting that "the result of the entire cross-examination . . . warrants us in the presumption that such manner of cross-examining this witness was not pursued because opposing counsel lacked confidence in Due's integrity, but rather because counsel lacked confidence in the integrity of his cause, and sought, by this forceful manner, to cover up some of its innate weakness, as Lord Bacon said of Piso, that when Piso attempted to answer Cicero, the more to give pretext by sheer force of grimace to strength of argument and fecundity of thought, Piso did fetch one eyebrow to the top of his forehead and did bend the other down to his chin." We cannot, however, see anything unfair in the cross-examina-

tion but are of the opinion that much of its severity, if severity there was, was due to the natural desire to obtain answers which should be direct and responsive to the questions which were asked. The quotation from Lord Bacon, indeed, is suggestive of the main difficulty which confronts this court in all trials *de novo* under the so-called Newman act. The grimaces of counsel and the contortions of their eyelids do not appear upon the printed record, nor do we have any means of judging of the veracity of witnesses by examining their demeanor upon the witness stand. The trial judge alone has the opportunity to observe these things, and where, as in the case at bar, the judgment is sustained by clear and probable evidence, and it is a question merely of believing one man or the other, we must perforce yield to the judgment of the presiding judge, who alone is competent in the matter. If, indeed, it were not for the receipt mentioned, there would be no question of the right of the respondent to recover in this action, for that the transaction was and still is a mortgage transaction is admitted by the appellant himself. He testifies in effect as follows: "I was holding the Rooney land and the land south of the town as security for the repayment of Coyle's indebtedness . . . and I traded the property that I held as security for the repayment of moneys due me, the property that I got in that trade also stood as security for the repayment of moneys Coyle owed me. . . . I testified this morning that the Rooney land was security for the repayment of Mr. Coyle's indebtedness to me. I was agent for Mr. Coyle. . . . By the quitclaim deed Mr. Coyle left with me when he went home, that deed was only left there to assist me in making the trade so I could get my money on it and pay Mr. Coyle the money upon it." Q. "Well, now, we are at the point where you traded for the three lots in Eastwood Park that you described, and you still have the lots as security for the repayment of the indebtedness, is that a fact?" Ans. "Yes, sir. Mr. Coyle never gave me a quitclaim deed on the lots. I felt that I was trustee for Mr. Coyle of that property, and held it until the amount paid me was paid." Q. "And that relation still continues, does it?" Ans. "I don't know. *I still want the money I put in this property.* After that I am satisfied to turn it back to Mr. Coyle. He has still got the money." Q. "So that you only hold this property for

the repayment of moneys you got in it?" Ans. *"Well, yes as well as to get my money back."*

Nor do we think that the receipt was in any way conclusive. We, of course, are aware of § 7316 of the Code, which provides that "the following presumptions, and no others, are deemed conclusive: . . . 2. The truth of the facts from a recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to a recital of a consideration." The section of the statute, however, is not applicable to the receipt in question. There is in it no recital of facts. It simply states that something has been received in full settlement, but does not state what that full settlement is. Coyle insists that the full settlement was the return of his papers on the Ward county land and the recognition of the half interest in the lots. Due, on the other hand, claims that the receipt by him of the $100 and the giving up of the note for $250 constituted the settlement. It is quite clear that in the receipt itself there is no recital of facts which is conclusive upon anyone.

The judgment of the District Court is in all things affirmed. The appellant will pay the costs and disbursements of this appeal.

Goss, J., being disqualified, did not participate.

On Petition for Rehearing.

BRUCE, J. Counsel for appellant takes exception to the last paragraph of the court's statement of facts in this case and wherein it says that *"thereupon* respondent moved the court for an order dismissing the action, and it was ordered," etc. He expresses the belief that the court construed the word "thereupon" as meaning "immediately, at once, or without delay," and that as a matter of fact the motion for dismissal was not made until after the taking of evidence before the referee and the arguments to the referee, though it was made before the final decision of the trial judge.

We did not intend to so limit the word, though perhaps our statement of fact would bear out that interpretation. The fact that the motion was not made until after the taking of the testimony and the argument to the referee does not alter our conclusions in this case. We have, indeed,

carefully examined the petition for a rehearing, and must still adhere to our former opinion.

The petition for a rehearing is denied.

CHRIS G. FUERST v. CARL SEMMLER.

(149 N. W. 115.)

Statutory contest — county auditor — contestee and appellant — precluded from raising questions of irregularity — election precincts.

1. In a statutory contest involving the nomination at the last primary of a Republican candidate for the office of county auditor of Mercer county, *held*, for reasons stated in the opinion, that the contestee and appellant who was such county auditor is precluded from urging irregularities connected with such election in certain precincts.

Election precinct officers — irregular conduct of — will not as a rule vitiate the vote — knowledge of officer — fraud — expression of will of voters.

2. Irregularities in the conduct of an election by election officers over whom an elector has no control will not ordinarily vitiate the vote of such election where it appears that he had no knowledge of such irregularity, and voted in good faith; and especially is this true where, as in this case, no fraud is shown or alleged, and there appears to have been a full, free, and fair expression of the will of the electors.

Ballot — regular upon its face — indorsed with official stamp and initials of inspector — must be counted — initials put on by one of the judges.

3. A ballot which is in all respects regular upon its face, and is indorsed by the official stamp as required by law, and also contains the initials of the inspector, must be counted, although such initials were not indorsed by the inspector but by one of the judges of the election at the inspector's request.

Note.—As to effect of irregularities to render an election invalid, see cases in note in 16 L.R.A. 754.

As to official marks on ballot, the inclination of the courts seems to be to hold that failure by the officials to comply strictly with the provisions of the law in reference to the preparation of the ballot for the voter will not render the ballot void, unless the statute so requires it, or unless a count of the ballots notwithstanding such failure will interefere with some of the fundamental principles of a pure and secret ballot. For a full review of the authorities on this question, see note in 47 L.R.A. 806.

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Statute — official ballots — authentication — mandatory — substantial compliance with law — mistakes not fatal to validity of vote.

4. While the provisions of the statute requiring the official ballots to be authenticated in a certain manner is mandatory, it does not follow that a failure to strictly and literally observe its requirements is fatal to the validity of the votes cast. Where a substantial compliance with such statute is in good faith observed, the votes should be counted.

Opinion filed October 26, 1914.

Appeal from District Court, Mercer County, *Nuchols*, J.

From a judgment in plaintiff's favor, defendant appeals.

Affirmed.

B. W. Shaw, W. H. Stutsman (of counsel), Mandan, N. D., *H. L. Berry*, Stanton, N. D., for appellant.

Hanley & Sullivan, Mandan, N. D., for respondent.

FISK, J. This is the statutory contest involving the nomination of a candidate of the Republican party for the office of county auditor of Mercer county. The contestant and respondent and the contestee and appellant were the only candidates at the primaries for such nomination, their names appearing upon the Republican primary ballot. The canvassing board found and certified that the appellant received 428 votes and the respondent 425 votes for such nomination; and a certificate was accordingly issued to appellant, certifying that he had been duly chosen as the candidate of the Republican party for such office. Thereupon respondent instituted this contest, claiming he was duly nominated as such candidate, and he made application for a recount of the ballots cast at such primary election. A recount was accordingly had in the district court, and at the conclusion of the trial that court made findings of fact and conclusions of law favorable to the contestant and respondent, the court finding that contestant received 423 and appellant 421 legal votes. Judgment was entered pursuant to such finding and conclusions, from which judgment this appeal is prosecuted.

The correctness of the findings of fact thus made by the trial court is not questioned, but appellant challenges the correctness of the court's conclusions based upon the 6th and 12th findings of fact. The correct-

ness of these conclusions of law is the only matter for our consideration.

The 6th finding of fact is as follows: "That the board of county commissioners of said Mercer county is composed of three members; that at a regular meeting of said board of county commissioners, commencing on the 4th day of May, 1914, the said board of county commissioners designated polling places in the several voting precincts of said county, and appointed inspectors of election for the several voting precincts of said county; that in voting precinct No. 3 of said county, Hans Johnson was appointed inspector of elections for the primary election, and that in voting precinct No. 15 of said county R. N. Harmsen was appointed inspector of elections for said primary election; that schoolhouse on section eleven (11), in township one hundred forty-four (144), range eighty-six (86) was designated as the voting place in said precinct No. 3, and that "Hazen" was appointed as the voting place in said precinct No. 15; that on the 20th day of May, 1914, the board of county commissioners of said county were in session pursuant to adjournment, and on motion, the board went out viewing roads and bridge sites, and on the 22d day of May, 1914, two members of the board of county commissioners, the chairman of said board being absent, returned to the county seat of said county, elected one of the members as chairman pro tem and proceeded to hold a purported meeting of said board of county commissioners, and at said purported meeting purported to vacate or discontinue voting precinct No. 15 and attach the same to voting precinct No. 3, and selected the place of voting in said precinct No. 3 as the village of Hazen, and designated Hans Johnson, the same person who had theretofore been designated as inspector of precinct No. 3, to be inspector of precinct No. 3 as enlarged and increased by the action of said county commissioners at said purported meeting; that the proceedings of the said two county commissioners purporting to act as the board of county commissioners were, by the auditor, written in the book in which the minutes of the proceedings of the board of county commissioners of said county are kept, and the proceedings by said two county commissioners were published in the official newspapers of the said county of Mercer over the signature of the defendant, as county auditor of said county, as the official proceedings of the board of county commissioners

of said county; that the proceedings of the said two county commissioners as written in the minute book aforesaid were not signed by the county auditor or the chairman of the board of county commissioners; that the chairman of the said board of county commissioners inadvertently omitted to sign the record of said proceedings. That the defendant, as county auditor of said county, sent no ballot box to R. N. Harmsen and sent no ballots or other election supplies to said R. N. Harmsen, but sent a ballot box to said Hans Johnson, and sent to said Hans Johnson two stamps of the kind to be used by inspectors of election precincts, one of which purported to be for election precinct No. 3 and the other for election precinct No. 15, and sent to the said Hans Johnson ballots and other election supplies purporting to be for two election precincts, *viz.:* Nos. 3 and 15; that no election was held in what had heretofore been known and designated as election precinct No. 15; that the electors of what had heretofore been known as election precinct No. 15, as well as the electors of precinct No. 3, voted at the village of Hazen in precinct No. 3; that the said Hans Johnson acted as inspector of elections at the polling place in the village of Hazen in said precinct No. 3; that upon the ballots delivered to the electors residing in what had heretofore been known as precinct No. 3, upon the back thereof, was placed a stamp containing the words, "Official Ballot Mercer County, North Dakota, Precinct No. 3," signed by said inspector with his name or initials; that to the electors residing in the territory heretofore known and designated as precinct No. 15, said inspectors delivered ballots, upon the back of which was stamped the words, "Official Ballot Mercer County, North Dakota, Precinct No. 15," and on which said inspector signed his name or initials; that the ballots cast by persons residing in the territory heretofore known as precinct No. 15 and the ballots cast by the electors residing in territory heretofore known as precinct No. 3 were, by said inspector, deposited in one and the same ballot box; that in returning the said ballots to the county judge of said county of Mercer, said inspector of elections placed in separate packages the ballots cast by the electors residing in territory heretofore known as precinct No. 15, and the ballots cast by the electors residing in territory heretofore known as precinct No. 3; that all of the persons who cast ballots at said primary election in the said village of Hazen in said county were electors either

in the territory heretofore known as said precinct No. 15, or in the territory heretofore known as precinct No. 3; that no claim is made by the defendant that any of the said ballots so cast were fraudulent, or that any person not residing in the territory heretofore known as precinct No. 15 or in the territory heretofore known as precinct No. 3, cast a ballot at said voting place in said village of Hazen; that the canvassing board of said county found and certified that in the territory embraced within said precinct heretofore known as precinct No. 15 and said precinct heretofore known as precinct No. 3, the plaintiff received fifty-one votes and the defendant received thirty votes; that the territory heretofore known as precinct 15, fourteen votes were counted for plaintiff and four votes for defendant, and in the territory heretofore known as precinct 3, thirty-seven votes were counted for plaintiff and twenty-six votes were counted for defendant."

The conclusion of law based on such finding is in the following language: "Upon the sixth finding of fact the court concludes as a matter of law that in the territory embraced in precincts known as precincts Nos. 3 and 15, the plaintiff received fifty-one (51) legal votes and the defendant received thirty (30) legal votes, and that such votes were properly so counted respectively for the plaintiff and defendant."

Appellant's contention with reference to such conclusion of law is, in the language of counsel's brief, as follows:

"First. That the purported meeting of the board of county commissioners of Mercer county was neither a regular nor a special meeting, in fact no official meeting, that at such meeting the commissioners had no right or authority to change the polling places nor the voting precincts of said county.

"Second. That, even conceding that such meeting was a legal one, the commissioners had no authority to consolidate precincts 3 and 15, and that their act in so doing was *ultra vires.*

"Third. Conceding that such meeting was a regular or special meeting called as provided by law, the call designating the object of such meeting, and that the commissioners had the authority to consolidate precincts 3 and 15 and designate the same as precinct 3, the official stamp of precinct 3 was not used on the ballots cast by the electors residing in 15, but the inspector and judges of election board presiding

at such precinct 3 placed on the ballots cast by the electors of 15, the stamp that was intended for the original precinct 15, and that such ballots therefore had no official stamp on them and were void."

Replying to such contentions, respondent's counsel direct our attention to § 1 of the primary election law, being chap. 109, Laws 1907, which section reads: "It is the intention of this act to reform the methods by which political parties shall make nominations of candidates for all public offices by popular vote. It shall be liberally construed so that the real will of the electors may not be defeated by any informality or failure to comply with all provisions of law in respect to either the giving of any notice or the conducting of the primary or certify the results thereof." And they argue in effect that conceding all that is contended by appellant's counsel with reference to alleged irregularities of the board of county commissioners, and also conceding that such board exceeded its powers in attempting to consolidate precincts numbered 3 and 15, and further conceding all that is claimed with reference to irregularities in conducting the primary election in such precincts, the conclusion of the trial court was correct because, first, this appellant, who was county auditor, knowingly acquiesced in or was in a way instrumental in causing such irregularities to occur to such a degree as to now estop him from urging the same as a ground for vitiating such primary election in such precincts; and, second, the acts constituting the irregularities complained of were done under color of right, and the electors in good faith and without any claim of fraud exercised their right of franchise, and their will ought not to be frustrated by the official act of the election officers over whom they had no control.

We are in full accord with the views of the trial court and of respondent's counsel upon this point. Time will not permit of an extended statement of our reasons for this holding, nor do we deem such extended statement necessary. Suffice it to say that appellant, as county auditor, and *ex officio* clerk of the board of county commissioners, was, in a sense at least, a party to the proceedings of which he now complains. He was present at all meetings of the board, kept the minutes of its various proceedings, and caused them to be published over his signature in the official newspapers of the county. He sent no election supplies to the former inspector for precinct No. 15, and

interpreted the second resolution of the board to mean that he should send but one ballot box to the inspector of the combined precincts and two sets of election supplies, and that the election officers should use but one ballot box, but should use both sets of election supplies. In brief, his conduct in sending out supplies to these precincts could be interpreted in but one way, that is, this is that the election officers should conduct the election in the precise manner in which it was conducted, with the single exception as to the action of such election officers in handing out certain ballots with the inspector's initials placed thereon by one of the judges instead of by such inspector. It is not questioned that such election officers in conducting the election in good faith followed the procedure thus mapped out for them, and the voters in good faith acquiesced therein. Nor is it claimed that such procedure, although irregular, resulted in the least in preventing a full, fair, and honest expression of the will of the Republican voters. In view of these facts we must hold that appellant is now precluded from urging such irregularities as a ground for annulling the election in these precincts. In reaching this conclusion, we do not overlook the fact that appellant, as county auditor, had no voice on the board of commissioners, nor do we wish to impute to him or to the board any bad faith whatever. He, as well as the members of the board, no doubt, acted in the best of good faith in all they did in the premises, but nevertheless their action had the necessary and natural effect of inducing the local election officers to conduct the election in the manner in which it was conducted, and we merely hold that because of this, they are and ought to be precluded from questioning the regularity of the election in so far as their acts were the inducing cause of any irregularities. Appellant was the active instrument or channel through which the acts of the board were interpreted to the local election officers, and he will not be heard now to say that the procedure was void and consequently the electors in such precincts must lose their votes. For the above reasons we find it unnecessary to decide whether or not the action of the commissioners was valid.

The same conclusion may be reached by another method of reasoning. From appellant's conduct in sending out two sets of election supplies it is fair to assume that he interpreted the action of the board as consolidating these precincts for the purpose merely of conducting

this election in both at one place and through one set of election officers. While this, of course, would be irregular, and was not contemplated by the legislature in enacting § 607, Rev. Codes 1905, which authorizes the holding of elections and having the polling places in certain cities, towns, or villages adjoining but outside of the election precinct, still an election thus held, in the absence of fraud or bad faith affecting the result, ought not for such reason to be declared a nullity, thus disfranchising the voters. The appellant apparently thus construed the resolution of the board, and the local officers followed his construction by keeping the election supplies separate and using those for precinct 15 for the electors of that precinct, and those for precinct 3 for the electors therein, also making separate returns for each precinct. That such irregularity in conducting the primary will not, under the facts showing good faith and a fair election, vitiate the votes cast thereat is amply supported by the authorities. Stemper v. Higgins, 38 Minn. 222, 37 N. W. 95; Brattland v. Calkins, 67 Minn. 119, 69 N. W. 699; Hankey v. Bowman, 82 Minn. 328, 84 N. W. 1003; State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955; Perry v. Hackney, 11 N. D. 148, 90 N. W. 484; Whitcomb v. Chase, 83 Neb. 360, 119 N. W. 673, 17 Ann. Cas. 1088; Kerlin v. Devils Lake, 25 N. D. 207, 141 N. W. 756.

In the case of Stemper v. Higgins, 38 Minn. 222, 37 N. W. 95, an election was held in a precinct established by the proper authorities. The precinct as established contained an organized village. Under the law of Minnesota as it existed at that time, the organized village was in an election district separate from the township; but at the election as held the election officers of the village acted as officers for the electors in the village, and the officers as appointed by the proper authorities acted as the election officers for the electors outside of the village. The court held that the village was not a separate election precinct, and that these officers acting as such in the village had no authority under the law to do so. The court continues:

But it does not necessarily follow that the vote of the village—163 ballots—should be rejected. This is a matter that concerns not merely the contestants, but as well the people in their choice of public officers. So likely are defects to occur in election proceedings, and of so great importance is it that the real purposes of the election be not defeated

by such common occurrences, that the courts have always been slow to declare an election ineffectual, unless the law departed from has been deemed to be of such a fundamental character that its nonobservance might involve or lead to greater evils than the avoiding of a popular election. If the case be not of such a character, it may be said upon authority that the vote of a precinct should not be thrown out, there being no reason to impute fraud, unless it appear that the irregularity affected or cast uncertainty upon the result of the election. Taylor v. Taylor, 10 Minn. 107, Gil. 81, and cases cited; People ex rel. Williams v. Cicott, 16 Mich. 283, 323, 97 Am. Dec. 141; Farrington v. Turner, 53 Mich. 27, 51 Am. Rep. 88, 18 N. W. 544; Steele v. Calhoun, 61 Miss. 556; People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451.

No other defect is suggested concerning this election than that it was held in the village apart from the election in the township, and was presided over by the village officers, who were the proper officers of election in all *village* elections. We may assume, therefore, that it was fairly conducted, with due regard to statutory requirements, except in the particulars just mentioned. It is not claimed that any person voted who had not the right to vote, nor that any voter was prevented or refrained from voting, nor that the true result of the election was not correctly returned. It is altogether probable that the people of the village, and the village officers, supposed this to be a separate district, and that the election should be conducted just as it was conducted. It was found by the court below that the village and the township were separate voting precincts at the time of this election, "and for a long time had been." The case affords no reason to doubt that the electors of the village and the officers presiding over the election had so understood the law, and acted in perfect good faith, nor that the result of the election was unaffected by the irregularity. Under these circumstances, we consider that the vote of the village should not be rejected, and that it was properly allowed. See authorities last cited, and particularly Farrington v. Turner, and People v. Cook.

Nor do we find any merit in appellant's contention that certain ballots were stamped by the wrong precinct number, and should therefore not be counted. They were stamped by the official stamp furnished for each precinct. In other words, the ballots delivered to electors in

the so-called 15th precinct were stamped with the stamp furnished for the precinct, and *vice versa* as to precinct No. 3. This was strictly proper on the theory that the alleged consolidation of the two precincts was void. If such consolidation was valid, it was a mere irregularity which would not vitiate the election. Miller v. Schallern, 8 N. D. 395, 79 N. W. 865, is not in point. That was a case where no initials whatever were placed on the ballots, and they were in no way thus authenticated as official ballots. Although the statute requiring such authentication of the ballots is mandatory, a literal compliance therewith is not exacted. A substantial compliance was observed, and this is all that was required. While, no doubt, it was the elector's duty to see that his ballot was authenticated in substantial conformity to the statute, it would be an exceedingly harsh and needless rule that would require that he should, at the peril of having his vote not counted, see that the statute had been literally observed by the election officers. Such is not the law as we view it. Bingham v. Broadwell, 73 Neb. 605, 103 N. W. 323, is directly in point, and we think states the law correctly. That court had previously held in Orr v. Bailey, 59 Neb. 128, 80 N. W. 495, and Mauck v. Brown, 59 Neb. 382, 81 N. W. 313, to the rule announced by this court in Miller v. Schallern, supra, to the effect that the statute requiring authentication of the ballot in a certain manner is mandatory. Among other things, the Nebraska court says: That "a voter who has complied with the statute by obtaining from the election board a ballot indorsed in writing, with the names of two members of the board, both of whom are ostensibly and, as he honestly supposes, are real judges, will not be deprived of his vote by the mere fact that one of such names is that of the clerk of the election. . . .

It was held by this court in Orr v. Bailey, supra, and again in Mauck v. Brown, 59 Neb. 382, 81 N. W. 313, and is generally held in other jurisdictions, that the statutory requirements of indorsement is mandatory; and the subject is not regarded as open for discussion here, but there is opportunity for inquiry, whether it was not *substantially obeyed.*"

The court further says: "At the threshold of such a discussion as this, the courts are met by two propositions, neither of which can be ignored or evaded. One is the constitutional enactment (§ 22, art. 1).

'All elections shall be free, and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise;' and the other, inherent in the idea of representative government, is that the free and uncorrupted will of the voter shall be given effect. In other words, that there shall be a 'free ballot and a fair count.' These principles pervade and dominate the whole field of inquiry, and affect the decision of every litigated question. All statutes and parts of statutes irreconcilably in conflict with or derogatory of either of them are nugatory, but none is presumed to have been intended so to be. The object of the so-called Australian election laws is not, as some judicial decisions seem to indicate, to limit or obstruct the free exercise of the elective franchise, or to restrict the free expression of the will of the voters, but to promote both these things by removing opportunities for imposition, intimidation, and corruption; and, being remedial in their nature, they are to be liberally construed for the accomplishment of the latter end, and no other."

And after approving the decision of the lower court, holding said ballots good, the court says: "We think the ruling was right. . . . To hold otherwise would be to put by judicial construction an insuperable obstacle between the voters and the polls. It would be to require the electors, at their peril, to make inquiry, and decide correctly and without deliberation, a question upon which three district judges were unable to agree after hearing elaborate arguments at the end of 40 consecutive days of investigation, and about which the members of this court may finally differ. If the statute attempts the imposition of such an obligation, it is unquestionably void. We do not think that it does so."

And after showing that the voters themselves had done all that they could reasonably be expected to do under the circumstances, the court says:

"They verified their ballots and the indorsements upon them as well as they were able to do 'at a glance,' to use the phrase of former decisions of this and other courts, and, having folded them as directed, handed them to a sworn official for further verification and deposit. If after all this they can be deprived of their votes because one member of the election board, whose name is indorsed on the ballots, was

the so-called 15th precinct were stamped with the stamp furnished for the precinct, and *vice versa* as to precinct No. 3. This was strictly proper on the theory that the alleged consolidation of the two precincts was void. If such consolidation was valid, it was a mere irregularity which would not vitiate the election. Miller v. Schallern, 8 N. D. 395, 79 N. W. 865, is not in point. That was a case where no initials whatever were placed on the ballots, and they were in no way thus authenticated as official ballots. Although the statute requiring such authentication of the ballots is mandatory, a literal compliance therewith is not exacted. A substantial compliance was observed, and this is all that was required. While, no doubt, it was the elector's duty to see that his ballot was authenticated in substantial conformity to the statute, it would be an exceedingly harsh and needless rule that would require that he should, at the peril of having his vote not counted, see that the statute had been literally observed by the election officers. Such is not the law as we view it. Bingham v. Broadwell, 73 Neb. 605, 103 N. W. 323, is directly in point, and we think states the law correctly. That court had previously held in Orr v. Bailey, 59 Neb. 128, 80 N. W. 495, and Mauck v. Brown, 59 Neb. 382, 81 N. W. 313, to the rule announced by this court in Miller v. Schallern, supra, to the effect that the statute requiring authentication of the ballot in a certain manner is mandatory. Among other things, the Nebraska court says: That "a voter who has complied with the statute by obtaining from the election board a ballot indorsed in writing, with the names of two members of the board, both of whom are ostensibly and, as he honestly supposes, are real judges, will not be deprived of his vote by the mere fact that one of such names is that of the clerk of the election. . . .

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a clerk, instead of a judge, the validity and result of elections would in all cases be in the discretion of the boards."

See also Parvin v. Wimberg, 130 Ind. 562, 15 L.R.A. 775, 30 Am. St. Rep. 254, 30 N. E. 790; McCrary, Elections, § 93; and Coulehan v. White, 95 Md. 703, 53 Atl. 786.

We conclude that appellant's first specification of error is without merit, and must therefore be overruled.

The second, and only remaining specification challenges the trial court's conclusion of law, based on its finding of fact No. 12, to the effect that five certain ballots cast in precinct No. 13 upon the back of which the inspector's initials had been indorsed by one of the judges of election, were properly counted. The finding is to the effect that such ballots were thus indorsed by one of the judges of the election *at the request and by the authority of the inspector.* There is no warrant in the finding for the assertion by appellant's counsel that the inspector was absent when his initials were thus indorsed by one of the judges. For all that appears the inspector may have been present and such indorsement made at his request and to expedite the official business; but as we view it this is not very material. In any event such indorsements were made by one having authority to authenticate the official ballots, and the sole complaint is that he should have indorsed his, instead of the inspector's, initials. It must be conceded, we think, that the object of the statute, which was the prevention of fraudulent voting, was accomplished as effectively in the one case as in the other; but counsel argue that the statute is mandatory and requires a strict and literal compliance with its terms. While the statute is no doubt mandatory in so far as it requires authentication in the mode provided in § 640, Rev. Codes 1905, we cannot believe the legislature in enacting § 648, providing that "in the canvass of the votes, any ballot which is not indorsed as provided in this chapter by the official stamp and initials shall be void, and shall not be counted," intended to visit such consequences where, as in the case at bar, a substantial compliance with the prior section had been observed. To attribute to the legislature such an absurd intent is equivalent to attributing to it an intent to lay a trap for the unsuspecting and good-faith voter, which he is almost certain to be caught in, and whereby his vote may, at the behest of dishonest or careless election officials,

be held for naught. The object sought to be attained by such statute does not require or justify us in giving it any such strict and literal construction. See State ex rel. Braley v. Gay, 59 Minn. 6, 50 Am. St. Rep. 389, 60 N. W. 676, which was cited with approval by this court in Perry v. Hackney, 11 N. D. 148, 90 N. W. 483. We have examined the authorities cited by appellant, some of which appear to support his last contention. To the extent that they do so we must decline to follow them for reasons above stated. The courts, as well as judges of the same court, are in hopeless conflict in their views on this question, as may be seen by an examination of them. Among others, see McGrane v. Nez Perce, 18 Idaho, 714, 32 L.R.A.(N.S.) 730, 112 Pac. 312, Ann. Cas. 1912A, 165, and the numerous cases collected in the note at pp. 171–175; Slenker v. Engel, 250 Ill. 499, 95 N. E. 618, and Choisser v. York, 211 Ill. 56, 71 N. E. 940.

We believe the better reasoned cases support our conclusions.

Judgment affirmed.

SPALDING, Ch. J. I concur in the result, but am not prepared to concur in the holding under No. 1 of the syllabus.

ST. ANTHONY & DAKOTA ELEVATOR COMPANY v. F. MARTINEAU.

(149 N. W. 355.)

The respondent moves to dismiss this appeal. The court after trial prepared findings and order for judgment in July, 1912, which were not filed until January 7, 1913, or after the term in office of trial judge had expired. Judgment was entered thereon by the clerk. Defendant caused a statement of the case to be settled, and thereon moved for a new trial, which motion was granted by order of October 14, 1913. Plaintiff has appealed therefrom, the record on appeal reaching this court February 11, 1914. Respondent, who was granted a new trial by the order appealed, now moves to dismiss appellant's appeal, alleging that the findings and order for judgment were filed too late and are void, and that no trial has been had and therefore the appeal must involve but a moot question.

Findings — order — not void or voidable — motion to dismiss.

Held, the findings and order were but voidable under direct attack, and will not be held as void on this motion. The motion to dismiss the appeal is accordingly denied.

Opinion filed November 7, 1914.

William Bateson, of Rolla, and *Middaugh, Cuthbert, Smythe, & Hunt,* of Devils Lake, attorneys for the motion.

H. E. Plymat, of Rolla, and *Mercer, Swan & Stinchfield,* of Minneapolis, Minn., attorneys in opposition to the motion.

Goss, J. The questions presented arise on respondent's motion to dismiss plaintiff's appeal. The history of the case needs to be stated to explain the holding. This is a jury action which by stipulation of counsel was tried to the court, Honorable John F. Cowan, judge. Decision was made by written findings, conclusions, and order for judgment dated July 25, 1912, but not filed by the clerk until January 7, 1913, as appears from the indorsement of filing thereon and the recitals of the judgment entered. On January 6, 1913, the term of office of judge presiding on the trial expired, and he was succeeded by the present judge of that district. On the face of the record the findings, conclusions, and order, although dated in July, 1912, were not filed until after such expiration of the term of the trial judge. The judgment awarded was in favor of the plaintiff, this appellant. Judgment pursuant to said order therefor was entered February 5, 1913, and notice of entry thereof was forthwith served. Defendant, this respondent, as preparatory to an appeal by himself, caused a statement of the case to be settled June 18, upon which he moved for a new trial, which motion was granted by order of October 14, 1913. From this order granting a new trial, plaintiff seasonably perfected his appeal to this court, the record reaching the clerk February 11, 1914. On May 22, thereafter, respondent procured from this court an order to show cause why plaintiff and appellant's appeal should be dismissed, and hearing was had thereon. The grounds urged for dismissal are that because the findings, conclusions, and order for judgment were filed after the trial judge had ceased to be such an official, the same "were and are wholly void and of no effect, and should be vacated and

set aside, and the judgment entered thereon is void and should be vacated, and said action should be retried again in the district court, pursuant to the order," granting a new trial. "Said motion will be based upon all the records and proceedings already had on said action and transmitted to this court," together with other affidavits mentioned. In brief, the movant asserts that on this motion should be determined the validity of the findings, conclusions, and order for judgment made by the district court in this action and undeniably a proper subject for review on an appeal from the judgment, and (2) in case it should be thus determined on this motion that the judgment so entered and the order upon which the same is based be void, the appeal should thereby be held for naught and dismissed as involving but a moot question, in that the result of the appeal can avail nothing to the appellant, the plaintiff.

The perfected appeal with the record in this court beyond question confers jurisdiction on this court to decide any and all questions involved under said appeal. And jurisdiction is so conferred to entertain and determine any motion for dismissal of the appeal. We shall assume that jurisdiction is thus conferred to authorize action upon the motion.

There is an insurmountable obstacle to the granting the motion. It is defendant's basic assumption that the judgment entered upon the findings, conclusions, and order purporting to have been filed with the clerk January 7, 1913, "were and are wholly void and of no effect." While the mandatory statutes require findings, conclusions, and order to be filed as construed in Crane v. First Nat. Bank, 26 N. D. 268, 144 N. W. 96, when the judgment is directly attacked in the trial court because so filed too late, it has not been held that the judgment so entered and thus attacked is void, or that findings, conclusions, and order for judgment filed too late, but signed by the judge and during his term of office, are void. It was intimated in Crane v. First Nat. Bank, that it was only because the statute necessarily had to be construed as mandatory that the findings, conclusions, and order for judgment entered thereon when directly attacked would be held voidable, necessitating the same to be set aside. Farther than this it was and now is unnecessary to go. No doubt as is held in Kemp v. Cook, 18 Md. 130; 79 Am. Dec. 681, acquiescence in a voidable judgment may

make the same conclusive as to the party acquiescing. Whether this movant and respondent in the appeal pending, under the state of the record, can urge the invalidity of said former judgment and on the grounds urged in this motion, is not decided; nor is it necessary to here pass upon whether he may have estopped himself to ever thus urge its invalidity. Should the order granting a new trial be affirmed on said appeal, these questions would not be reached even if proper to raise. And whatever would be here said on these questions would likewise be unnecessary to the decision of this motion to dismiss. Nothing involved in the appeal is passed upon in this decision. The motion is denied.

BRUCE, J. I concur in the result.

S. L. DIMOND v. THOMAS ELY, Jerry Donovan, and John A. Nelson.

(149 N. W. 349.)

Statutory contest — county seat — election to establish — prior judgment in mandamus — res judicata.

1. In a statutory contest of an election held to permanently locate the county seat of B. county, respondents plead and relied upon a judgment entered in a prior proceeding in mandamus holding the election in certain precincts null and void, as *res judicata* of such issue. *Held*, for reasons stated in the opinion, that the trial court properly sustained such defense.

Jurisdiction of court — judgment entered — affirmance by supreme court — finality.

2. *Held*, for reasons stated in the opinion, that the court had jurisdiction in the mandamus case to enter the judgment which was therein entered, and such judgment, having been in all things affirmed by this court, is a finality as to the issues thereby adjudicated.

Opinion filed September 21, 1914. On petition for rehearing November 11, 1914.

Appeal from District Court, Burke County; *C. W. Buttz*, Special J.

From a judgment in respondents' favor, plaintiff appeals.

Affirmed.

Cowan & Adamson and *H. S. Blood,* for appellant.

The judgment in the mandamus proceeding is not *res judicata* to this action. The question of the ultimate right or title to the county seat was not triable in the mandamus proceeding. State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; State ex rel. Sunderall v. McKenzie, 10 N. D. 132, 86 N. W. 231; People ex rel. Noyes v. Board of Canvassers, 126 N. Y. 392, 27 N. E. 792.

Only such questions as affect the prima facie title of the relator can be tried by mandamus proceeding. Chandler v. Starling, 19 N. D. 144, 121 N. W. 198; High, Extr. Legal Rem. § 49; State ex rel. Mead v. Dunn, Minor (Ala.) 46, 12 Am. Dec. 25; State ex rel. Davis v. Willis, 19 N. D. 209, 124 N. W. 706.

The order in the mandamus proceeding was a final determination of the matters and issues involved, and the trial court was without jurisdiction to make findings and conclusions, either before or especially after appeal from such order had been taken. Moore v. Booker, 4 N. D. 543, 62 N. W. 607; 2 Enc. Pl. & Pr. 327; 2 Spelling, New Tr. & App. Pr. § 559; Rev. Codes, 1905, § 7222; Ensminger v. Powers, 108 U. S. 305, 27 L. ed. 737, 2 Sup. Ct. Rep. 643.

Where election officers and electors do their best under the circumstances to hold a valid election, and act in good faith and without any corrupt or fraudulent motive, the election is valid. Kerlin v. Devils Lake, 25 N. D. 207, 141 N. W. 756; Rev. Codes 1905, §§ 671, 2334.

Geo. R. Robins and *Geo. A. Bangs,* for respondents.

A fact or question actually and directly in issue in a former suit and which was there judicially passed upon and determined by a domestic court of competent jurisdiction is conclusively settled by the judgment therein, as to the same parties or privies in future action. 23 Cyc. 1215, 1216; Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co. 5 C. C. A. 249, 12 U. S. App. 320, 55 Fed. 690; Merriam v. Whittemore, 5 Gray, 316; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; State ex rel. Davis v. Willis, 19 N. D. 209, 124 N. W. 706.

The dismissal of the writ upon its merits is *res judicata* as to all is-

sues tried and determined therein. Merrill, Mandamus, § 315, p. 379; State ex rel. Morgan v. Hard, 25 Minn. 460; Santa Cruz Gap Turnp. Joint Stock Co. v. Santa Clara County, 62 Cal. 40; State ex rel. Cook v. Ottinger, 43 Ohio St. 461, 3 N. E. 298; Block v. Bourbon County, 99 U. S. 686, 692, 25 L. ed. 491, 493; Louis v. Brown Twp. 109 U. S. 162, 165, 27 L. ed. 892, 893, 3 Sup. Ct. Rep. 92; Holt County v. National L. Ins. Co. 25 C. C. A. 469, 49 U. S. App. 376, 80 Fed. 686; Kaufer v. Ford, 100 Minn. 49, 110 N. W. 364; State ex rel. Hudson v. Trammel, 106 Mo. 510, 17 S. W. 502; 19 Am. & Eng. Enc. Law, 2d ed. 723; 26 Cyc. 485; 12 Enc. Pl. & Pr. 504; Visher v. Smith, 92 Cal. 60, 28 Pac. 94; Weed v. Mirick, 62 Mich. 414, 29 N. W. 78; Smeaton v. Austin, 82 Wis. 76, 51 N. W. 1090; Ashton v. Rochester, 133 N. Y. 187, 28 Am. St. Rep. 619, 30 N. E. 965, 31 N. E. 334.

An estoppel by judgment or decree extends to all matters upon which it must have been founded. The judgment is a conclusion, and if necessarily drawn from certain premises, such premises are as conclusive as the judgment itself. 24 Am. & Eng. Enc. Law, 2d ed. 766; Shelby v. Creighton, 65 Neb. 485, 101 Am. St. Rep. 630, 91 N. W. 369; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733; Harshman v. County Court (United States ex rel. Harshman v. County Court) 122 U. S. 306, 30 L. ed. 1152, 7 Sup. Ct. Rep. 1171; Perkins v. Walker, 19 Vt. 144; Hayes v. Shattuck, 21 Cal. 51; Tuska v. O'Brien, 68 N. Y. 446; School Dist. v. Stocker, 42 N. J. L. 115; Blake v. Ohio River R. Co. 47 W. Va. 520, 35 S. E. 953; Bond v. Markstrum, 102 Mich. 11, 60 N. W. 282; Hinsdale County v. Mineral County, 38 Colo. 433, 88 Pac. 436; Martin v. Roney, 41 Ohio St. 141; Miller v. Union Switch & Signal Co. 59 Hun, 624, 37 N. Y. S. R. 110, 13 N. Y. Supp. 711; People ex rel. Central P. R. Co. v. San Francisco, 27 Cal. 655; Moore v. Moore, 12 Ky. L. Rep. 324, 14 S. W. 339; Manley v. Park, 62 Kan. 553, 64 Pac. 28; Stroup v. Pepper, 69 Kan. 241, 76 Pac. 825; Stocker v. Nemaha County, 72 Neb. 255, 100 N. W. 308; Reich v. Cochran, 151 N. Y. 122, 37 L.R.A. 805, 56 Am. St. Rep. 607, 45 N. E. 367; Pray v. Hegeman, 98 N. Y. 351.

The judgment in the mandamus proceeding was binding upon the relators therein, and also as to all in privity with relators, including the contestant. State ex rel. Davis v. Willis, 19 N. D. 209, 124 N. W. 706; Freeman Judgm. § 178; 23 Cyc. 1406; Giblin v. North Wis-

consin Lumber Co. 131 Wis. 261, 120 Am. St. Rep. 1040, 111 N. W. 499; Locke v. Com. 113 Ky. 864, 69 S. W. 763; Cole v. Com. 30 Ky. L. Rep. 385, 98 S. W. 1002; Lyman v. Faris, 53 Iowa, 498, 5 N. W. 621; Cannon v. Nelson, 83 Iowa, 242, 48 N. W. 1033; Silvers v. Traverse, 82 Iowa, 52, 11 L.R.A. 804, 47 N. W. 888; McConkie v. Remley, 119 Iowa, 512, 93 N. W. 505; Detroit v. Ellis, 103 Mich. 612, 27 L.R.A. 211, 61 N. W. 886; Elson v. Comstock, 150 Ill. 303, 37 N. E. 207; McClesky v. State, 4 Tex. Civ. App. 322, 23 S. W. 518; Harmon v. Auditor, 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161; Sabin v. Sherman, 28 Kan. 289; Clark v. Wolf, 29 Iowa, 197; Terry v. Waterbury, 35 Conn. 526; State ex rel. Brown v. Chester & L. N. G. R. Co. 13 S. C. 290; Gaskill v. Dudley, 6 Met. 546, 39 Am. Dec. 750; Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18.

It is the duty of the county commissioners to establish polling places. Such duty cannot be coerced or controlled by mandamus. State ex rel. Tompton v. Denoyer, 6 N. D. 586, 72 N. W. 1014; Elvick v. Groves, 17 N. D. 561, 118 N. W. 228.

Fisk, J. This is a contest of an election involving the permanent location of the county seat of Burke county. The question of the permanent location of the county seat for such county was submitted to the electors thereof at the 1910 general election, and according to the abstract of votes prepared by the canvassing board, Bowbells received 783 votes, Lignite 440 votes, and 95 votes divided between other of the candidates for such county seat. The trial in the district court resulted in findings of fact and conclusions of law favorable to the contestees and respondents, and judgment was entered dismissing such contest, from which judgment this appeal is prosecuted.

The canvassing board declined to canvass the returns from certain precincts in the county upon the alleged ground that the election therein was null and void because not held at the voting places designated by the commissioners. It is claimed that if the returns from all the precincts had been received and canvassed, Lignite would have received a majority of all votes cast upon that proposition, and it is contestant's contention that the canvassing board wrongfully and illegally refused to canvass all of such returns. In order to secure what they deemed

their legal rights, the friends of Lignite, in due time, instituted mandamus proceedings to coerce the canvass of the omitted precincts. Such proceeding was tried in the district court, resulting in a judgment in defendants' favor, adjudging the election in such precincts void upon the ground that the votes were not cast at the duly established polling places therein. From such judgment an appeal was taken to this court, resulting in an affirmance of the judgment below. State ex rel. Johnson v. Ely, 23 N. D. 619, 137 N. W. 834. The judgment thus entered on the remittitur from this court in such mandamus proceedings is pleaded by respondent in this contest action, and is relied upon as *res judicata* of all issues tried and decided in that proceeding, and it is respondents' contention here that the following issues were properly raised and adjudicated in such mandamus proceeding:

1. That the election held in the omitted precincts was illegal, null, and void, and of no effect, and that the votes attempted to be cast thereat were illegal, null, and void."

2. "That Bowbells received a majority of the legal votes and was duly elected the county seat of Burke county."

3. "That it would be an abuse of discretion to require the canvassing board to canvass the illegal votes cast in the omitted precincts;" and,

4. "Costs and disbursements to the respondents."

At the trial of this contest action in the district court, contestants offered certain proof in the form of exhibits in support of the allegations in the notice of contest, which exhibits consist of the returns from the precincts omitted by the canvassing board. Such offers were rejected upon the ground "that the matters and things sought to be established by the exhibits are now *res judicata* and finally decided by the judgment of this court, controlling in this case, which judgment was rendered in the case of State ex rel. Johnson v. Ely, and which judgment has been entered in this court upon the findings of fact and conclusions of law and order therefor, made by his Honor, Judge Templeton, acting by the written request of the then judge of this district."

For a more detailed statement of the facts, see State ex rel. Johnson v. Ely, supra. Counsel are agreed that but two questions are involved on this appeal. These questions are stated by appellant as follows: "1. Was the objection to the offered proof that the mandamus action

was *res judicata* of this contest well taken? 2. If not, was the proof offered sufficient to establish prima facie contestant's case?"

Respondents' counsel states the propositions somewhat differently, but in substance they are the same as above. The chief controversy between counsel involves the question as to the legal effect, if any, of the decision in the mandamus case upon the issues in this contest action. It is vigorously and with much plausibility asserted by appellant's counsel that the prior decision in the mandamus proceeding is not *res judicata* of the issues herein, for three reasons, the substance of which are, (a) that the right or title to the county seat or the question of its location was not properly triable by mandamus, the statutory contest affording the exclusive remedy; (b) it was not the duty of the court in the mandamus case to go back of the returns to investigate and adjudicate the question as to the condition or validity of the vote in these various precincts, although it had discretionary power to investigate such vote for the purpose merely of aiding it in exercising its discretion in granting or denying the writ; (c) such investigation was unnecessary under the status of the pleadings in the mandamus proceeding, relators therein having in effect demurred to the sufficiency of the answer and refused to litigate the issues sought to be raised by such answer.

Counsel call attention in their brief to the cases of State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; State ex rel. Sunderall v. McKenzie, 10 N. D. 132, 86 N. W. 231; and Chandler v. Starling, 19 N. D. 144, 122 N. W. 198, in support of the proposition that the *ultimate right or title to the county seat* was not triable in the mandamus proceeding. The correctness of the rule thus announced is not, and cannot be successfully, questioned. But it does not follow from this that the court in such mandamus case did not have jurisdiction to determine certain issues which might, in the absence of such special proceeding, have been the proper subject of adjudication in the contest action. The crucial question seems to be whether, in the mandamus case, as presented, the court had jurisdiction to determine, as it did, that the election in the omitted precincts was illegal, null, and void. If it had such jurisdiction, then its adjudication of such issue is conclusive and final in the case at bar. This we deem well settled. 23 Cyc. 1215, 1216; Southern P. R. Co. v. United States, 168 U. S.

1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Murphy v. Scott County, — Minn. —, 147 N. W. 447, and cases cited. Also note to Peterson v. Butte, 27 Ann. Cas. 538–541. Indeed, appellant concedes this to be the law, but he contends, as above stated, that no such jurisdiction was possessed nor attempted to be exercised by the court in the mandamus proceeding. The difficulty with such contention is the fact that the court unquestionably did assume to adjudicate the validity of the election in such precincts, and its judgment declaring the same null and void was in all things affirmed by this court. State ex rel. Johnson v. Ely, supra. Such decision, whether right or wrong, is therefore conclusive in the present action. But we think the court had such jurisdiction. It goes without saying that it had jurisdiction to determine any proper issue raised in that proceeding, and it seems quite clear that the question of the validity of the election in the challenged precincts was squarely presented and litigated by the parties, not, however, for the direct purpose of determining in such proceeding the ultimate right or title to the county seat, but for the purpose of enabling the court to determine relator's right to the writ. Relator sought the issuance of such writ to coerce the canvass of returns from certain precincts, and in opposition thereto respondents, the members of the canvassing board, alleged and proved the fact that in such precincts the election was not held at the legally designated polling places therein, thus disclosing, in the absence of further proof, the invalidity of the election, and that the issuance of the writ as prayed for would therefore be entirely useless. Manifestly, this was a proper issue for consideration. The writ does not issue as a matter of absolute right. It must appear that it will serve some beneficial purpose and tend to promote rather than hamper justice. 26 Cyc. 143; State ex rel. Davis v. Willis, 19 N. D. 209, 124 N. W. 706; State ex rel. Johnson v. Ely, 23 N. D. 619, 137 N. W. 834, and authorities cited. In the latter case it was said: "It would be an improper use of the writ of mandamus to issue it when clearly apparent to the court to which application is made, or when it could be readily ascertained, that it could serve no purpose and would be useless when issued. *Hence, evidence regarding the location of the voting places and the unauthorized change was pertinent and material.*" It would seem that the foregoing completely disposes of appellant's contention on this point. We conclude, for the

above reasons, that the question of the invalidity of the election in the omitted precincts is not now open to further controversy, but that such question was conclusively settled in the prior litigation.

But it is urged by appellant that such former judgment is not *res judicata* for the alleged reason that the district court at the time of its entry had lost jurisdiction because of an appeal which had been previously taken from the order dismissing the alternative writ. Such contention is, we believe, clearly without merit, for several reasons. Such appeal from the order, if permissible, which we need not here determine, was apparently abandoned, and an appeal from the judgment was later perfected and prosecuted to a final determination, resulting in an affirmance in all things by this court, and on such appeal no point was raised as to the jurisdiction of the district court to enter such judgment. Hence, appellant is not in a position to urge such question. Furthermore, the question was effectually set at rest by the decision of this court in such mandamus proceeding.

The judgment appealed from is affirmed.

Goss, J., being disqualified, did not participate.

On Petition for Rehearing.

FISK, J. In a petition for a rehearing, counsel for appellant present merely a rehash of their former argument in an effort to convince us that the question of the validity of the election in the omitted precincts was not, and could not be, litigated in the mandamus proceeding. They seem to labor under the erroneous impression that such question was not and could not be litigated therein, first, because the court had no jurisdiction so to do; and, second, because they strenuously objected to the trial of such issue, and offered no testimony to rebut that of defendants after their objection was overruled. The fallacy of such contention is too clear to merit serious consideration. The district court clearly had jurisdiction over the subject-matter embraced in such issue, and, this being true, its decision adjudicating such issue is final until reversed on appeal, even conceding for the purposes of this case that it committed gross error in overruling relator's objection to the trial thereof in that proceeding. And, manifestly, relator's objection

to such trial, and his refusal or failure to introduce testimony on such issue, would not operate to oust the court of jurisdiction.

In order that our first opinion may not be misunderstood, we will briefly restate our views in another form.

The court in State ex rel. Johnson v. Ely, 23 N. D. 619, 137 N. W. 834, was called upon to decide whether the canvassing board which had, on account of the alleged existence of certain facts, refused to canvass the returns from certain precincts, should be compelled by mandamus to reconvene and perform such official duty. The board asserted in its return or answer that it ought not to be compelled to do so because the election in such precincts was not held at the proper voting places, and consequently was void. The sufficiency of such answer as a defense was challenged by an objection thereto, which was overruled. Whether such ruling was right or wrong, the court clearly had jurisdiction to make it. Testimony relating to such issue was thereupon introduced, over relator's objection, it is true; and after the evidence was submitted, and after an adjournment from December 16th to February 8th, relators interposed a demurrer attempting again to challenge the legal sufficiency of the facts set out in ¶ 4 of respondent's answer or return, to constitute a defense. This amounted merely to an invitation to the court to again rule on the identical question which it had previously ruled on, and appellant now complains because a second ruling was not made. The court apparently ignored such alleged demurrer, as it had a right to do. It was too late. The time for pleading or demurring had passed. The testimony had been submitted, and no leave had been granted to file such demurrer. No testimony was offered by relator to contradict that of defendants on such issue, and the court thereafter rendered its decision denying the writ upon the ground that the election in such precincts was void, basing it upon the facts thus disclosed. This decision was, on appeal to this court, in all things affirmed.

Counsel for appellant in the case at bar now strenuously assert in their petition for a rehearing just what they contended for on the argument, that the question of the validity of the election in the omitted precincts was not, and could not be, litigated and adjudicated in such prior proceeding. We attempted to answer such contention in our prior opinion filed herein, by stating in substance that, whether right

or wrong, the district court squarely held that it was proper to litigate and adjudicate such question, and this court on appeal in all things affirmed its judgment. The question, therefore, as to whether such facts properly constituted a defense in the mandamus case is, we think, forever foreclosed as between these parties and those in privity with them. If this position is unsound, there is no end to litigation, and the rule of *res judicata* might as well be abolished.

Appellant's argument proceeds upon the erroneous theory that the court had no *jurisdiction* in the mandamus case to try such issue, but manifestly jurisdiction existed, and, at the most, it was error to do so, and the ruling constituting such error, if error it was, unless corrected on appeal, must stand. "The errors of a court," says Mr. Herman, "do not impair the validity of their judgment. Binding until reversed, any objection to their full effect must go to the authority under which they have been conducted." Herman, Estoppel & Res Judicata, § 367, p. 425.

Counsel assert with apparent confidence in the correctness of their assertion that we have in effect overruled. State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; State ex rel. Sunderall v. McKenzie, 10 N. D. 132, 86 N. W. 231, and Chandler v. Starling, 19 N. D. 144, 121 N. W. 198, in our opinion as written, and that we ought to expressly say so if that is the intention. If the premise is correct we admit the correctness of the conclusion. The premise is, however, not well founded. These cases differ from that in the case at bar in important particulars. The question which counsel raises in the case at bar was raised in each of such cases on appeals *in the mandamus cases,* and the court in those cases was called upon merely to review the rulings as errors of law. What it said in each case must be construed, therefore, in the light of the fact that it was sitting in review of the rulings complained of, and all it really decided was that error was not committed in the Butler and Chandler Cases, and was committed in the Sunderall Case. In other words, it did not assume to hold that the lower courts had *no jurisdiction* to adjudicate the issue sought to be injected into the case; but we are asked to thus hold in the case at bar, which is a separate and distinct action from the mandamus case, and this in the face of our decision in the mandamus proceeding holding that the trial court acted correctly in receiving testimony and in

deciding such issue. The Butler and Chandler Cases also differ from State ex rel. Johnson v. Ely, in the fact that in those cases the relators each had a certificate of election or appointment which clothed them with a prima facie title and right to the office, while in State ex rel. Johnson v. Ely, the relator had no such prima facie right or title. The proceeding was brought, therefore, not to enforce a prima facie right or title, but to coerce the canvassing board to canvass the votes from certain omitted precincts, whether legal or not. If such votes were illegal as a matter of law, it seems strange that such fact could not be shown as a complete defense in the mandamus case. In other words, it does not seem to us to be a sound proposition of law that the relator was entitled to a writ compelling the board, in effect, to clothe him with a prima facie right by canvassing such votes and issuing a certificate of election, without an inquiry by the court into the question, when brought to its notice, of the validity of the election. Even in the Butler Case where, as we have seen, relator possessed a certificate of election conferring on him a prima facie title to the office, it was held, nevertheless, that if facts showing the election to be void existed, such as the court would take judicial notice of, the relator's case must fall, as the prima facie effect of the certificate would be defeated thereby.

Petition denied.

Goss, J. not participating.

THOMAS McKENZIE v. P. S. HILLEBOE.

(149 N. W. 342.)

Verdict and judgment — not sustained by substantial evidence — motion for judgment notwithstanding verdict — new trial.

From a judgment ordered against defendant on verdict, this appeal is taken, appellant contending that verdict and judgment to be without any substantial support in the evidence, and that his motion for dismissal made at the close of the case and thereafter his motion for judgment notwithstanding the verdict should have been granted. The evidence is reviewed, and it is held that the

verdict and judgment rendered thereon are not sustained by any substantial evidence and should be set aside, but the motion for judgment notwithstanding the verdict is denied and a new trial granted.

Opinion filed November 11, 1914.

From a judgment of the District Court of Bottineau County, *Burr*, J.

Defendant appeals.

Reversed and new trial granted.

Cowan & Adamson and *H. S. Blood,* of Devils Lake, attorneys for defendant and appellant.

Bowen & Adams, of Bottineau, attorneys for plaintiff and respondent.

Goss, J. The question involved is one of fact. The important assignments of error are upon the denial of defendant's motion for a direct verdict of dismissal at the close of all the testimony and the subsequent denial of defendant's motion for judgment of dismissal notwithstanding the verdict.

All the testimnoy must be considered, and any ambiguity or doubtful construction thereof resolved in support of the verdict.

It is established, that in 1909 title to certain land was in the First National Bank of Westhope as security of an amount owing that bank by the Bottineau County Investment Company; that one Hilleboe was throughout 1909 vice president of that bank, and, with the Porters and Cooper, constituted the investment company. In the fall of 1909 Hilleboe disposed of his bank stock. Until that time as vice president he had been one of its active and managing officials. In December, 1909, Cooper became cashier. Plaintiff McKenzie was a farmer in the vicinity of the particular land, and had rented it the previous year, 1908, while title thereof had been in the investment company. In the fall of 1908 McKenzie had done some plowing on this land, and which portion he cropped in the year 1909 under the 1908 arrangement previously made with Hilleboe in behalf of the investment company. In the summer of 1909 some talk was had between Hilleboe and McKenzie to the effect that 100 acres more needed summer fallowing, and pursuant thereto McKenzie summer fallowed the 100 acres under the understanding that, should the land be sold, the bank having the dealing

of it, McKenzie would be paid for his labor at the rate of $1.50 per acre, and in case it was not sold he should crop it on shares in 1910; on the strength of that deal the bank then loaned him $200, with the understanding that in case of a sale of the land $150 would be applied upon his note evidencing such loan, Hilleboe negotiating the loan to McKenzie in behalf of the bank. These facts are undisputed. The question is whether there is any proof that Hilleboe acted individually in this plowing and leasing contract, instead of in behalf of the bank. All the testimony on this question will now be recited. The plaintiff testified that he contracted in the summer of 1909 with Hilleboe in regard to plowing this land "for the defendant," he "to get paid for it when the farm was sold;" and he "was to have the crop off the land if the land was not sold. The farm was sold; $150 and interest is due." That Hilleboe did not tell him the title to this land was in the bank, but that Cooper, the cashier, in 1910 relative to the payment for the plowing, told him in the bank that as soon as settlement was made for the land by the purchaser with the bank the bank would pay for the plowing, and that Hilleboe said the bank would pay when the land was settled for; that McKenzie admits he testified in justice court that for this plowing he "expected to get credit on his note to the bank." That Hilleboe told him "to go to the bank and get credit on your note," but that on his going there Cooper said "that he did not know anything about it." In response to his own counsel, McKenzie testified: "Q. At the time that you made the contract with Hilleboe for the plowing above described, did he (Hilleboe) tell you who was the owner of the land? A. The bank had the dealing of it. Q. Did Hilleboe say in what capacity the bank had the land? A. He didn't say." Porter's testimony offered by plaintiff was that "McKenzie come to me and asked me if I had the renting of the place at one time, and I told him he better see Hilleboe in regard to it, and I understood afterwards he had rented the place." Concerning this incident of the talk with Porter, McKenzie testifies in cross-examination: "Q. Who did you first enter into negotiations with for the rental of the Craig farm? A. Hilleboe. Q. Did you talk with Porter first regarding the renting of this farm? A. No." Hilleboe in cross-examination under the statute testified that he entered into a contract with McKenzie on behalf of the bank for the plowing; that he "told

him that the bank had title, that the farm was for sale and probably would be sold, and he says, then, 'If I do the plowing, how will I be protected for the plowing?' and I told him if he did the plowing, it would be worth that much to whoever got it, but the bank had it that year, and 'I would see that the plowing was paid for.' McKenzie needed some money to carry him along, so he got some from the bank for which he gave his note. Sometime after that that land was sold and the money applied on the contract. That was all there was to that contract." "Later the farm was sold and I told McKenzie about when he came in, and he said that was all right, whenever the plowing was fixed up give me credit on my notes." "At the time that McKenzie rented this land of the investment company, in 1908, McKenzie came into the bank and wanted to rent this farm, and I told him to go and see Charley Porter, who looked after the land at that time and the handling of it, and McKenzie went and saw Porter; he come back to the bank and said that 'Cooper or Porter would not rent it to him,' or something to that effect. 'You better see the bank or see me,' Hilleboe." "Later McKenzie come in again and asked about that land, and I told him he better see Porter about it, and he was out for a while, and said he 'didn't make a deal, didn't arrange to work the land,' and I said that 'we want the land farmed, and it seems to me you better go ahead and plow it. You would be entitled to half the crop anyway.' That was in the fall of 1908. He wanted to do some breaking in the fall, so McKenzie asked if 'he couldn't get a contract on it,' and I says, 'I can't very well do that, because Porter had been looking after those things as secretary, and generally signed the contracts.' I said, 'I can't do that now, but later we may get together and fix up a contract,' but the contract was not fixed up. In renting the land in 1908 I acted in behalf of the Bottineau County Investment Company. I was still a member of that company in 1909. Meanwhile the land was deeded over to the First National Bank. At the second time McKenzie came in I told him that the bank now had a deed to the land. Q. At the time you made the contract with McKenzie in the summer of 1909 did you tell McKenzie for whom you were acting? A. I told him that the bank owned the land and the bank was making the deal with him." On this record at the close of plaintiff's case the defendant moved for a directed verdict on the ground that "there is no evidence in this case

to show that any agreement was made between the plaintiff and the defendant Hilleboe for the doing of this plowing, or any promise made on the part of the defendant to pay the plaintiff for the same;" and that the testimony of the plaintiff himself "affirmatively shows that at the time that this arrangement was made Hilleboe told the plaintiff that he was acting on behalf of the bank, and that at the time he did the plowing he expected he should receive pay for the plowing by having the same credited upon the indebtedness that he then owed to the bank," which motion was denied and an exception taken, upon which ruling error is assigned. On defendant's main case Hilleboe testifies: "He borrowed money from the bank on the strength of this plowing at the same time," and at the time he borrowed this money "he said he wanted to get the money on the plowing, and said when the land was sold to offset it, and I told him we couldn't do that, that the bank couldn't let money out without having something to show for it, but I says, *'you can get the money, and we will take your note and hold the note until the land is sold.'* He gave his note to the bank at that time, and the bank then loaned him $200 in money. At the time this land was sold the bank received $150 "for this plowing, *in addition to the purchase price of the land.*" "Q. And do you know who paid *that amount to the bank?* A. I do. Q. Who? A. Charley Porter. Q. At the time that this sale was made, was McKenzie still owing on this note for the borrowed money he gave at the time the deal was made? A. He was. Q. Was he owing on that note to the amount of $150? A. More than $150." At the time of this sale Hilleboe had sold his interest in the bank, but was still there. He told his successor as vice president about the different deals, including the one with McKenzie, and the sale of the farm, and left instructions to have the bank's contract with McKenzie carried out and the amount he was entitled to for the plowing endorsed on McKenzie's note. That he had testified in justice court that he had acted "for all parties interested in the land during the time that each party owned the land." There never was any time that there was any misunderstanding between McKenzie and me in regard to who had the land, never any question about that. In fact the first I knew of it was when I was sued, that there was some misunderstanding about that part of it. I never individually had any interest in this land, and never received any benefit

personally from any transaction made with reference to it. At the time that I went out of the bank, McKenzie was owing this note, and at that time was entitled to a credit on this note to the amount of that plowing." In rebuttal, plaintiff offers the testimony of MacDougall, a justice of the peace, to the effect that in the trial of this case against the bank, when it was a party defendant, Hilleboe "said he didn't know who he was acting for, whether it was for the bank or the Bottineau County Investment Company. Q. At that time do you remember whether or not he testified to the fact that he told McKenzie he was acting for the bank? A. I do not remember. I remember him saying positively he didn't know which party he was acting for that day. Q. Did you hear Hilleboe then testify that he did not inform the plaintiff McKenzie that he was acting for the bank? A. I couldn't say. I do not remember that." On cross-examination, MacDougall testified: "Q. And didn't Hilleboe say he couldn't tell (whether he was acting for the bank or the investment company) until the date was fixed? A. I couldn't say. Q. Will you testify he did not say that? A. I will not." MacDougall's testimony is of little importance. Taken as true, as it must be, it does not impeach nor contradict Hilleboe, who says he had acted at first for the investment company and later for the bank as to this land. Cooper was also called by plaintiff in rebuttal, and admitted that in the fall of 1909 he received instructions as cashier in regard to the notes and in regard to the payment for certain plowing done by McKenzie. Whereupon both parties rested, and the motion for directed verdict, made at the close of plaintiff's case, was renewed and denied, and the case submitted to the jury, it returning a verdict for plaintiff. Defendant later moved for judgment of dismissal, notwithstanding the verdict, which was denied, and when judgment was subsequently entered, this appeal was taken.

The charge of the court has not been excepted to, and must constitute the law of this case, and as such governs as to the issues submitted to the jury and involved in ascertaining whether there was any issue of fact for the jury to pass upon. The court's instructions bind the plaintiff and this court on such inquiry. The jury were instructed as follows: "The issue that is before you for you to determine is, *Did McKenzie* at the time he entered into the agreement *know that Hilleboe was not acting in his individual capacity? In that case it*

would be immaterial for whom Hilleboe was acting, whether it was for the First National Bank or the investment company, *so long as McKenzie knew that he was not acting personally.* If McKenzie knew —the burden of proof is upon him to show that he did not know—*if McKenzie knew that Hilleboe was acting for someone else, then he cannot recover in this action, for the reason he would have then sued the wrong party.* That is all there is in this case. If McKenzie didn't know, and has shown to you that he didn't know, Hilleboe was acting for anyone, he had a right to assume he was acting for himself, and if that is so he is entitled to recover, *but if he has failed to show you that he did not know that Hilleboe was acting personally, then he would not be entitled to recover,* and you haven't anything to do with whether the bank gave him credit on the note or whether the note is not paid, because that is not in the case and you would be required to return a verdict for the defendant."

It will be noticed that the foregoing is a plain instruction that, *if McKenzie knew that Hilleboe was acting for a principal, no matter whom, McKenzie cannot recover,* with the burden of proof upon McKenzie to show Hilleboe was acting individually or that he supposed he was so acting. This excludes any right of plaintiff to recover as on a guaranty that Hilleboe would pay for the plowing if the principal did not. The testimony then must be weighed with reference to whether there is any substantial proof (1) that Hilleboe acted individually, or that, if he acted as agent, (2) McKenzie did not know of it.

It is uncontroverted that McKenzie in the fall of 1908 had contracted with the investment company through Hilleboe for certain plowing then to be done, which portion of this farm McKenzie in 1909 had in crop, and at the very time he had the deal to do the summer fallowing on the balance of it, and upon the strength of which contract he borrowed from the bank $200, negotiating the loan through Hilleboe as a bank official. McKenzie admits that he was told by Cooper in the bank, as well as by Hilleboe outside the bank, that when the land was sold a settlement was made for it, and the bank, not Hilleboe, would pay for the plowing. In response to his own counsel, McKenzie testifies that at the time he made the contract with Hilleboe for the plowing, Hilleboe told him "the bank had the dealing of it," but he was not informed in what capacity. The testimony of Porter, his own witness, is "that

McKenzie come to me and asked me if I had the renting of the place at one time, and I told him he better see Hilleboe in regard to it, and I understood afterwards he had rented the place." The time is fixed as the year in question by the immediately succeeding question and answer: "Q. Do you know whether the farm was sold that year or not? A. It was." Concededly the sale was in the fall and before December 1, 1909.

Concede that McKenzie's testimony is true that he did not talk with Porter *first* about *renting* this farm, but entered into negotiations for its rental with Hilleboe: This does not dispute the testimony of either Porter or Hilleboe that Porter, during the negotiations in the fall of 1908, leading to the *renting* of this farm, was referred to Hilleboe when approached in that regard by McKenzie. Again, concede that at the time McKenzie "entered into negotiations" for either rental of or plowing upon this land (concerning which his testimony is indefinite), he "didn't know that the title to the land was in the bank," that does not establish nor is it proof that at or before the contract for the plowing was consummated, and before any plowing was done, McKenzie did not know and understand that title was in the bank. All of the plaintiff's testimony may be true and so may all of Hilleboe's. Plaintiff could answer as he did on his cross-examination, and still speak the truth and testify to nothing concerning the contract as actually entered into. Any lawyer or trial judge has often heard such semi-evasion, or equivocal testimony, whereby the whole answer given is made to depend upon the time stated in the question or other conditions. To the particular inquiry put, "During the summer of 1909 did you have any dealings with the defendant Hilleboe regarding the plowing of said land?" to which he replied, "Yes," the answer may be equally true, as the dealings were had with Hilleboe aside from the question of whether had with him individually or as an agent. The same is true as to the answer "yes" to the question, "Did you agree to plow certain land for the defendant during the summer of 1909?" There is nothing substantial in plaintiff's whole testimony to raise any issue as to the capacity in which or for whom Hilleboe contracted, as plaintiff has not testified upon those particulars. But plaintiff's testimony discloses that he expected the bank to pay for this work, as appears from the following: "Is it not a fact that you expected the amount due you for the plowing

from the bank to be credited on your debt to the bank? A. Yes. Q. And on the trial of this action in the justice court you there testified that you expected to get credit on your notes, did you? A. Yes." From plaintiff's testimony likewise it must be conceded that he had borrowed money from the bank and given his note for it, upon which the bank was to indorse a payment when the land was sold, and, as he testifies flatly, he expected the amount due from the plowing to be then credited on that note. And it must not be overlooked that this plaintiff has testified that "at the time he made the contract for the plowing of the land, Hilleboe told him the bank had the dealing of the land," so that besides corroborating Hilleboe and admitting knowledge of the bank's interest, McKenzie knew when he contracted to plow it in 1909, as he had known when he leased the land through Hilleboe the fall before, then acting as he knew for the investment company, that the bank had the dealing of it; that is, the control of it. He does not deny Hilleboe's testimony that the loan by the bank was made to him on the strength of and at the same time that the contract for the plowing was entered into, and knowledge in him that the bank then had the dealing of it, that the bank was thus loaning its money as indirectly an advance payment for that plowing. McKenzie at the time of the getting of the money asked that he be relieved from giving a note, and instead that the money be given him by the bank as an advance payment for the plowing to be done by him, but that instead his note was taken for the reason that the bank had to have something to evidence the money given him virtually as an advance of unearned money, but with the explicit understanding that the note would be held until fall, and if the farm was sold the plowing was to be credited thereon, and, if not, McKenzie should crop the ground so plowed on halves the succeeding year. All this is not denied by McKenzie, but his silence concedes it to be the fact. McKenzie then must have known that Hilleboe was loaning this money as an advance payment, not for Hilleboe, but for the bank, McKenzie's paymaster. He admits that he knew the bank had the dealing of the land. He knew that Hilleboe was its vice president, and its active official; that Hilleboe had the year before leased it to him as an agent for the investment company, the management of which had been succeeded by the bank after it had secured the dealing of the land, as he was told it had. Besides, the following testimony of Hilleboe is not denied, and Porter and Coop-

er both testified after Hilleboe. Q. "Now, at the time this land was sold, do you know whether or not the bank received pay for this plowing in addition to the purchase price of the land?" A. "They did; they received $150." Q. "And do you know who paid that amount to the bank?" A. "I do." Q. "Who." A. "Charley Porter." None of this testimony is denied by the plaintiff or anyone. Porter does testify that "all the money that came out of the farm was applied upon the indebtedness in the First National Bank of the Bottineau County Investment Company."

The court eliminated from the jury's consideration and from ours all question of the failure of the bank to apply this $150, admittedly received by it from the investment company or Porter, by its instructions to the jury that "you haven't anything to do with whether the bank gave him credit on the note, or whether the note is not paid, because that is not the case." This was on the theory that whatever was done by the bank was immaterial, as the application of the proceeds was no proof of whether Hilleboe contracted in his individual capacity or as agent, and as a matter occurring many months after the contract was entered into and had been fully performed.

The verdict must be supported, if at all, by Hilleboe's statement made on cross-examination and in explanation of McKenzie's inquiry as to whether McKenzie would get his pay if he did the work in case the bank sold the land, it being "for sale and probably would be sold, "whereupon Hilleboe stated to McKenzie that he "would see the plowing was paid for," a statement showing on its face under the facts concerning which it was made, and in response to the inquiry causing it, that respondent knew he was dealing with the bank and wanted Hilleboe to see that the bank paid him, and to that extent evidence against the plaintiff. This statement cannot be taken as an isolated statement; it must be considered with the other facts testified to by Hilleboe, of which it was given as a part. Under the instructions of the court, properly given, it cannot be considered as a guaranty of payment, as that matter is beyond the issues under the pleadings. Besides, if Hilleboe was here sued as guarantor, the proof in this case discloses an absolute defense would be available to him, inasmuch as he did see to it that $150 additional to the price of the land was paid to that bank, as a payment for and by McKenzie, which amount under the undisputed

proof should have been credited on this note, and under the law it is credited thereon, whether indorsed or not. The statement of McKenzie that he "had a dealing with Hilleboe in regard to the plowing," and that he "agreed to plow certain land for the defendant," this land in question, taken in connection with the statement of Hilleboe that he, Hilleboe, "would see that the plowing was paid for," standing separately unexplained might amount to enough testimony to sustain this verdict, if they could be considered alone and without regard to all the other admitted facts, including the testimony of McKenzie's own witness, Porter, and Hilleboe's uncontradicted testimony concerning plaintiff's knowledge of whom he was dealing with, together with the fact that McKenzie admits he was told the bank had the dealing of the land; that he was then growing a crop on part of it under lease made through Hilleboe with the investment company, not Hilleboe; he being at the time a lessee of such third party. The court instructed that the question for the jury was, "Did McKenzie at the time he entered into the agreement know that Hilleboe was not acting in his individual capacity?" "If McKenzie knew that Hilleboe was acting for someone else, then he cannot recover in this action, for the reason he would have then sued the wrong party." The evidence seems overwhelming, and, considered in connection with all the admitted facts, free from conflict as to this crucial question of fact. McKenzie not only knew the bank had the dealing of the place, that is, the control of it, as he admits, also that Hilleboe was the active officer for the bank; as such through him the bank advanced payment for his note, Hilleboe acting as its active, known, and disclosed agent, and as payment in advance for this very plowing. This fact McKenzie has not seen fit to deny. It is further admitted that the bank has been reimbursed after the sale made. The only conclusion left is that this lawsuit is the result of the refusal of those bank officials succeeding Hilleboe to respect the bank's contract with McKenzie fully performed and paid for, thereby attempting to shift the burden of payment of the bank deal upon this defendant. There is no substantial testimony raising any issue of fact. At the most it can be regarded as but a scintilla of testimony, and as such is insufficient to support the verdict. The court should have granted the motion for a directed verdict made at the close of the case; but the motion for judgment notwithstanding the verdict is denied, as possibly plaintiff may produce

some evidence on a new trial authorizing his recovery. It is therefore ordered that the motion for judgment notwithstanding the verdict be denied, but that a new trial be awarded. Defendant to recover costs taxable on appeal.

BRUCE, J. I concur in the result.

SPALDING, Ch. J. (dissenting). Under the guise of deciding only a question of fact, it appears to me that the opinion of the majority conflicts most emphatically with several principles of law and procedure established in this jurisdiction by numerous authorities. Hence, I cannot concur in the conclusion reached by my associates. The assignments of error relate to two propositions: First, that the court erred in not directing a verdict for the defendant at the close of the trial; second, that it erred in not granting defendant's motion for judgment notwithstanding the verdict.

The rule regarding granting motions for directed verdict is so well settled in this state as to hardly require citation. It has been passed upon in numerous cases, the language only varying. The most recent case is Oakland v. Nelson, post, 456, 149 N. W. 337. This rule is stated in John Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164, to be as follows: on a motion for directed verdict made at the close of the trial, all fair inferences from the evidence must be drawn in favor of the person against whom such verdict is directed, and it was held that it was error to direct a verdict when honest and intelligent men might fairly differ in their conclusions from the evidence. I can regard the opinion of the majority only as either overlooking or in conflict with this rule. The court has drawn all inferences in favor of the defendant. It has given him the benefit of all doubts regarding the meaning of the evidence, and construed it most strongly in his favor. It has passed upon the whole evidence as though it were an equity case, and in effect held that because the evidence preponderates in favor of the defendant a verdict should have been directed. Practically all the evidence in the case is quoted in the opinion in such order as will best sustain the defense, when under the rule established only the evidence favorable to the plaintiff should be considered in passing upon the motion. The issue was not one of payment, but whether the contract for

the plowing was made with the defendant, and, is so, whether it was disclosed who the principal was. It is elementary that, if not disclosed, the defendant is liable. It is nowhere contended that the Bottineau County Investment Company was to pay for the plowing. It lay between the defendant Hilleboe and the First National Bank of Westhope. The only evidence on the part of the plaintiff, susceptible of any construction indicating that the contract was being made for the bank, was his statement that Hilleboe said the bank had the dealing of it. This is an obscure and ambiguous statement. It might mean one thing or it might mean another. The jury, having all the facts and circumstances before it, construed this language and found in favor of the plaintiff. To have reached the verdict, it necessarily follows that the jury must have found that this did not inform plaintiff that the contract was being made on behalf of the bank. That a police magistrate, twelve jurors, and the trial judge construed it one way, and four members of this court construe it the other, would seem to have some tendency to show that honest and intelligent men not only might, but do, fairly differ in their conclusions from the evidence.

Let us see what the evidence favorable to the plaintiff discloses, when separated from the defense and when the inferences which it will bear are drawn in favor of the plaintiff, in accordance with the rule. Hilleboe, the defendant, was vice president of the bank and an officer of the investment company when the transaction occurred. The plaintiff had been a tenant on the farm the preceding season. It is not disputed that he then knew that he was the tenant of the investment company, but in the meantime title had been conveyed to the bank. The fact that it was only taken as security, in view of the circumstances, is immaterial. The statement that the bank had the dealing of it certainly did not tend to show that the investment company owned it. If, in fact, the plaintiff was not advised as to the ownership, Hilleboe himself was liable. True, Hilleboe testifies that he told him who owned it. This is denied by the plaintiff. The evidence which should be considered on this motion may be summarized as follows:

When plaintiff desired to rent the farm for the year 1910, he was informed that it was for sale and would probably be sold, and it was agreed that, if he would plow the land, he should have the use of it for the next season on terms agreed upon, if it were not sold, while, if sold,

he should be paid $1.50 an acre for the plowing. The land was sold after the plowing was done and before the next season. It is true that plaintiff borrowed $300 from the bank, gave his note therefor, and expected pay for the plowing to be indorsed on his note. This fact is nothing unusual, nor does it relieve the defendant. Banks often loan money on the strength of contracts, which the borrowers hold with third parties, and rely upon the fulfilment of the contracts to enable the borrower to pay. Making loan and taking note do not constitute payment by the bank in advance for work done.

The plaintiff testified by deposition taken before the trial. While his statements are not as complete as they might be, or as they doubtless would have been had he anticipated statements that were to be made by the defendant on the stand, yet they are to the effect that he was to plow the land and be paid for it when the farm was sold; that the dealings were between him and the defendant; that he first entered into the negotiations with the defendant; that he agreed to plow it for the defendant; that he did not know that the title to the land was in the First National Bank of Westhope. Hilleboe admits that he arranged payment for the plowing, and states that it was carried through as far as he agreed, but claims his arrangement was made on behalf of the bank, and says he told plaintiff that the bank had title to the land, but he admits that he also told him that he would see that the plowing was paid for; and that he acted for the Bottineau County Investment Company when the land was rented to plaintiff the preceding season. Evidence that he knew the year before that it belonged to the investment company cannot prove knowledge that the bank was the principal. When one enters into an oral contract, the presumption is that he is the principal, and he is liable as such unless it is disclosed who the principal is.

C. W. Porter testifies that in 1909 plaintiff saw him about renting the place; that he told him to see Hilleboe; that he afterward understood plaintiff rented it; that the members of the Bottineau County Investment Company at that time were Hilleboe, the defendant, Cooper, the cashier of the bank, George Porter, and himself; that he was secretary. He further testifies that, to the best of his knowledge, all the money that came out of the farm after the first mortgage, was ap-

plied by the bank on the indebtedness of the Bottineau County Investment Company to it.

Hilleboe testified that the bank received pay for the plowing in addition to the purchase price of the land; that the money was paid to C. W. Porter; that he agreed that the plowing should be credited on the note; that no other officer of the bank knew anything about the deal, except what he told his successor when he left the bank in the fall of 1909, when he left verbal instructions to have the contract carried out.

The police magistrate of Westhope was examined as a witness, and testified that on the trial of the case in his court Hilleboe testified that he did not know for whom he was acting in the transactions with the plaintiff,—whether it was for the bank or the Bottineau County Investment Company. If Hilleboe did not know for whom he was acting, how has the presumption been overcome and must this court assume that plaintiff knew more about it than did the defendant? It seems very clear to me that, notwithstanding the fact that the weight of the evidence is in favor of the defendant, and that, if I were a juror and passing upon the whole evidence, I might feel impelled to return a verdict in his favor, yet the jury having found for the plaintiff, and the question being only as to there being competent evidence to support the verdict, under the application of the rule to which I have made reference, the court is clearly unjustified in holding that a verdict should have been directed for defendant. Ambiguous statements are, with great pains and nicety, vigorously construed in defendant's favor, when they should be interpreted in favor of plaintiff. Taking the defendant's own statement in justice court, it is apparent that he failed to disclose that he was acting as agent for another party or who his principal was, and in such case the agent is liable. Reading the evidence of Porter and between the lines of the other evidence, it is apparent that the seat of the controversy lies between the bank, the investment company, and Hilleboe, that the investment company owed the bank, and that, instead of crediting the $150 on plaintiff's note, it applied it on the indebtedness of the investment company, and therefore had nothing left to apply on plaintiff's note. The defendant desires to cast the burden of his difficulties with the bank upon the plaintiff, and the majority seem disposed to aid him in doing so.

Some of the authorities sustaining the rule to which I have referred,

some of which state it still more strongly in favor of the plaintiff, are Beiseker v. Moore, 98 C. C. A. 272, 174 Fed. 368, a case decided by the circuit court of appeals for this circuit; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; Higgs v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 446, 15 L.R.A.(N.S.) 1162, 114 N. W. 722, 15 Ann. Cas. 97; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109; Galvin v. Tibbs, 17 N. D. 600; Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011; Ernster v. Christianson, 24 S. D. 103, 123 N. W. 711; Dickinson v. Hahn, 23 S. D. 65, 119 N. W. 1034.

In Beiseker v. Moore, 98 C. C. A. 272, 174 Fed. 368 it is held that when the evidence is given the strongest construction which it will bear in favor of the party against whom the motion is directed, if it cannot be said to be more than vague and uncertain, a construction in favor of the party against whom it is directed is properly refused. In Ernster v. Christianson, 24 S. D. 103, 123 N. W. 711, it is held that on such motion the court should assume the evidence of the plaintiff to be undisputed, and give it the most favorable construction for the plaintiff that it will properly bear, and give the plaintiff the benefit of all reasonable inferences arising therefrom.

In what seems to me a very strained and unwarranted effort to reverse this case, the majority do a novel thing by taking into consideration the instructions of the court to the jury. No error is assigned on any part of the instructions. They are not in the abstract, and when the motion for a directed verdict was made, of course, the instructions had not been given the jury, and could not be considered by the trial court in passing upon the motion, and are equally outside the record and irrelevant to the merits of the appeal. This is so plain and elementary and simple a proposition that I cannot understand why it is injected into the main opinion to support a reversal. It certainly establishes a new rule of procedure. An attempt is made by Judge Goss to show that the plaintiff's testimony is susceptible of more than one meaning. He then proceeds to interpret it most favorably to appellant, notwithstanding the rule established by authorities cited. Much comfort for the defendant has been found by reference to the statement of the case and by not resting upon the record, as contained in the abstract. There was no disagreement between the parties as to the accuracy of

the abstract, and no request that reference be made to the more complete record contained in the statement, and I protest that under such circumstances it is unwarranted and unjust to the parties to go to the original record in quest for evidence omitted from the abstract, or instructions which have not been brought into it or referred to on argument or in brief, to bolster up a reversal and set aside a verdict of the jury on conflicting evidence. But if this is proper, mention may be made of the fact that it discloses that both the bank and the investment company were made defendants in the case, and judgment had in their favor, leaving the plaintiff no remedy except against the defendant Hilleboe. Not only the jury has found in favor of the plaintiff, but the police magistrate so found, and the trial court denied the motion for a new trial, and its order denying such motion should be sustained. This court can and does only reach its decision by a flagrant invasion of the province of the jury.

HARRY L. FARMER v. J. W. DAKIN.

(149 N. W. 354.)

Ejectment — trespass — forcible entry and detainer — jurisdiction where land situated.

1. The actions of ejectment, trespass to real estate, and forcible entry and detainer, are local actions, and must be brought in the jurisdiction and state where the land is situated.

Promissory note — action on — counterclaim — relation of causes of action.

2. In an action to recover upon a promissory note, cross actions in ejectment, trespass to real estate, forcible entry and detainer, or conversion, are not proper subjects of counterclaim, there being no relation whatever shown between the contract evidenced by the note and the action sought to be counterclaimed.

Opinion filed November 12, 1914.

Appeal from the District Court of Sargent County, *Allen*, J. Action to recover on a promissory note. Counterclaim for the withholding of

the possession of real estate. Judgment for defendant. Plaintiff appeals.

Reversed.

Statement of facts by BRUCE, J.

This action was commenced in the justice's court, and the complaint was as follows:

"Plaintiff complains and alleges: That on June 11, 1912, the defendant executed and delivered to plaintiff his promissory note in the following words and figures; to wit: '$110 Crookston, Minnesota, June 11, 1912, October 1st, after date I promise to pay to the order of Harry L. Farmer one hundred ten ———— dollars at the First National Bank of Crookston, Minnesota, Value received with interest before and after maturity at the rate of 8 per cent per annum until paid. Interest payable annually. Due Oct. 11, 1912, J. W. Dakin.' Wherefore, plaintiff demands judgment of the court against the defendant for the sum of $110 and interest thereon at 8 per cent per annum from and since the 11th day of June, 1912, and for costs and disbursements herein. Dated March 10, 1913. O. S. Sem, Plaintiff's Attorney, Milnor, N. D."

To this complaint the following answer or counterclaim was interposed: "J. W. Dakin for his answer to the complaint in which Harry L. Farmer is plaintiff sets up for his defense and counterclaim as follows: That in the month of November A. D. 1910, he became the owner of a certain building located on section 9, township 147, range 51— Polk county, Minn., that this building was then in the possession of this plaintiff; that possession of said building has been demanded of this plaintiff and has been refused; that this defendant has been in need of this building on his own farm, and by reason of being deprived of the use of said building for more than two years this defendant has been damaged to the amount of $200. The defendant asks that the court takes nothing herein, and prays for judgment for his costs in this action. J. W. Dakin."

To this answer or counterclaim, the plaintiff demurred in the following language: "Comes now the plaintiff and demurs to the pretended defense and counterclaim of the defendant herein, and for ground of demurrer alleges: First, that the court has no jurisdiction of the

subject-matter attempted to be set forth in the pretended counterclaim; second, that the court has no jurisdiction over the subject-matter of the pretended counterclaim, as it involves real estate and the title and possession of and to real estate in the state of Minnesota; third, that there is a defect of parties plaintiff and defendant both, in that the title of this case is wholly omitted in the said pretended answer or counterclaim; fourth, that the pretended answer of the defendant, styled his defense and counterclaim, does not state facts sufficient to constitute a defense or counterclaim either, as therein alleged to plaintiff's complaint herein. Wherefore, plaintiff demands judgment as prayed for in his complaint. Dated March 10, 1913. O. S. Sem, Plaintiff's Attorney, Milnor, N. D."

This demurrer was overruled, and later and when defendant sought to prove his case, an objection to the introduction of any evidence under the answer and counterclaim on the ground "that said answer did not state facts sufficient to constitute a defense or counterclaim," was also overruled. The nature of this evidence is not disclosed by the transcript, save and except as it is disclosed that the defendant admitted the validity of the note. A judgment was then entered in favor of the defendant and against the plaintiff for $51.40 and costs, in all $55.50. Plaintiff then appealed to the district court under § 9164, Compiled Laws of 1913, "on questions of law alone," alleging that the justice court erred: "First, in overruling plaintiff's demurrer to the answer herein; second, in overruling plaintiff's motion to strike out defendant's so-called answer on the ground of ambiguity, and also that it is not so written out as to enable a person of common understanding to know what is intended; third, in denying plaintiff's motion for judgment on the pleadings for the amount prayed for in the complaint; fourth, in overruling plaintiff's objection to the introduction of any evidence by defendant on the ground that the so-called answer does not state facts sufficient to constitute a defense or counterclaim; fifth, in deciding and entering judgment in favor of the defendant and against plaintiff for the sum of $55.55, the same being against law; sixth, in refusing to enter judgment in favor of plaintiff and against the defendant for the amount prayed for in the complaint."

The district court found "that the assignments of error set out in the notice of appeal were not well taken," and entered judgment affirm-

ing the judgment of the justice of the peace in all things. From this judgment this appeal is taken.

O. S. Sem, for appellant.

The demurrer to the answer should have been sustained. Counterclaims sounding in tort cannot be pleaded against a claim upon contract. It clearly appears that defendant's claim set forth has no connection with plaintiff's cause of action, nor did it grow out of such cause of action. Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 137; Hanson v. Skogman, 14 N. D. 445, 105 N. W. 90; Tuthill v. Sherman, 32 S. D. 103, 142 N. W. 257; Cooke v. Northern P. R. Co. 22 N. D. 266, 133 N. W. 303.

It is not enough that one sued in justice court knows for what he is sued. The petition or statement must be specific, and must advise defendant of the nature of the claim, and sufficiently definite to bar another action. McCrary v. Good, 74 Mo. App. 425.

No appearance for respondent.

Bruce, J. (after stating the facts as above.) The judgment of the district court must be set aside. Both the demurrer to the answer and the motion to exclude all evidence thereunder should have been sustained. The answer did not deny the allegations of the complaint, or even ask for an affirmative judgment. The defendant, in fact, admitted the obligation of the note upon the trial. The answer, or whatever it may be called, was clearly worthless, either as an answer or as a counterclaim. The principal action was in contract and upon a promissory note. The defendant, by his alleged counterclaim, either attempted to set up a cross action in ejectment, forcible detainer, trespass, or, possibly, if the house was not attached to the freehold and was personal property, conversion. The land being in Minnesota, it is difficult to see how an action in ejectment, trespass to real estate, or forcible entry and detainer, would lie, as such actions are local in their nature. McLeod v. Connecticut & P. River R. Co. 58 Vt. 727, 6 Atl. 648; Mosby v. Gisborn, 17 Utah, 257, 54 Pac. 121; 5 Words & Phrases, 4202.

Even if the house were considered personal property, and there is nothing in the pleading or the record to indicate this, there can be no

pretense that the action arose out of the "contract or transaction set forth in the complaint as the foundation of the plaintiff's claim," or that it was in any way "connected with the subject of the action." This was, however, necessary to the counterclaim. See § 7449, Compiled Laws of 1913; Roney v. Halvorsen Co. 29 N. D. 13, 149 N. W. 688.

The judgment of the District Court is reversed, and the cause is remanded with directions to enter judgment in favor of the plaintiff and against the defendant for the sum of $110, with interest at 8 per cent per annum, from the 11th day of June, 1912, to the 10th day of March, 1913, and interest thereafter at the rate of 7 per cent per annum, together with the costs of said justice court and of said appeal to the district court and of the trial thereon in said court, with interest thereon at the rate of 7 per cent.

SAMPSON S. OAKLAND v. OLE NELSON.

(149 N. W. 337.)

Jury trial — taking case from jury — explosive nature of dynamite — employee — knowledge of — warnings by employer.

1. It is not error to refuse to take a case from the jury where there is evidence, though contradicted, to the effect that plaintiff, a boy of nineteen, who knows generally of the explosive nature of dynamite, and has seen it used occasionally, but has had no real experience in its use or knowledge of its explosive powers when placed in mud and water at a depth of from 19 to 23 feet, or of the time which it takes a fuse to burn, is directed to push dynamite down

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Note.—It is well settled that the fact that a servant at the time that he was injured was complying with the direct order of his master, or his master's representative, has a material bearing upon the question whether he can hold the master responsible. The servant's right to act upon the order and to recover for the resulting injury depends upon certain conditions. While the servant is usually entitled to act on the assumption that his master has performed and will perform his duty, and while the primary duty of a servant is obedience, yet if the risk to which the direct order exposes the servant is one of the assumed risks of the employment, or if the risk is so obvious and great that no reasonably prudent person would incur it, the servant can, of course, not recover. The various phases of this question are discussed, with a full review of the authorities, in a note in 48 L.R.A. 73, and the later cases are to be found in a note in 30 L.R.A.(N.S.) 437.

into a hole which has been drilled for the purpose of draining water from a swamp, and, after the dynamite has been twice caught on the sides of the hole, has been twice directed by the employer to push it down, but is not warned of the time limit of said fuse, or told to come away from the hole, or to desist from the work, until too late to escape the explosion.

General verdict — special findings — must be germain to issues — jury — misleading.

2. Where a general verdict is asked for, and in addition thereto special findings, it is not necessary that such findings shall cover all of the points in issue, provided only that they are germain to the same and are not calculated to mislead the jury.

Admissions — usually open to contradiction — contractual.

3. Unless admissions are contractual they are not usually conclusive, but are open to rebuttal or explanation, or they may be controlled by higher evidence.

Employer — degree of care — danger — guarding employee from — dangerous explosives — use of — instruction to jury.

4. The degree of care which is to be used by an employer in guarding an employee from danger in the case of the use of dangerous explosives is much greater than that which is to be used under ordinary circumstances, and it is not error for the court to suggest such fact to the jury.

Opinion filed September 14, 1914. On petition for rehearing November 16, 1914.

Appeal from the District Court of Ransom County, *Allen,* J. Action to recover damages for personal injuries. Judgment for Plaintiff. Defendant appeals.

Affirmed.

Melvin A. Hildreth, for appellant.

Plaintiff fully appreciated the danger he was in, and it must be held under settled authority that he assumed the risk. Chicago, B. & Q. R. Co. v. Shalstrom, 45 L.R.A.(N.S.) 389, 115 C. C. A. 515, 195 Fed. 725; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 15 Am. Neg. Rep. 476, 126 Fed. 495; Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 126 Fed. 524, 15 Am. Neg. Rep. 483; Burke v. Union Coal & Coke Co. 84 C. C. A. 626, 157 Fed. 178; James v. Rapides Lumber Co. 50 La. Ann. 717, 44 L.R.A. 40, 23 So. 469; Utah Consol. Min. Co. v. Bateman, 27 L.R.A.(N.S.) 958, 99 C. C. A. 365, 176 Fed. 57.

No duty rests upon the employer to inform the employee of defects or dangers or risks which are apparent or readily observed by reasonable use of his senses, having in view the age, intelligence, and experience of the employee. Bohn Mfg. Co. v. Erickson, 5 C. C. A. 341, 12 U. S. App. 260, 55 Fed. 943; Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 126 Fed. 524, 15 Am. Neg. Rep. 483; King v. Morgan, 48 C. C. A. 507, 109 Fed. 446, 10 Am. Neg. Rep. 200; Louisville & N. R. Co. v. Miller, 43 C. C. A. 436, 104 Fed. 124; Mississippi River Logging Co. v. Schneider, 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195; Lake v. Shenango Furnace Co. 88 C. C. A. 69, 160 Fed. 889; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390, 22 N. D. 242, 133 N. W. 61.

In this case, under the circumstances, the question of contributory negligence arose as a matter of law, and there was nothing to submit to the jury. McGlynn v. Brodie, 31 Cal. 377; Hayden v. Smithville Mfg. Co. 29 Conn. 548, 13 Am. Neg. Cas. 669; Williams v. Clough, 3 Hurlst. & N. 258, 27 L. J. Exch. N. S. 325; Griffiths v. Gidlow, 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404, 10 Mor. Min. Rep. 639; Dynen v. Leach, 40 Eng. L. & Eq. Rep. 492.

The use of dynamite with a fuse lighted by a man nineteen years of age is of itself perfect notice of the great danger accompanying such use. A minor, like an adult, assumes the obvious risks of injury. These risks are such as a man of plaintiff's age and intelligence ought to see, observe, and appreciate by the use of ordinary care. Kielley v. Belcher Silver Min. Co. 3 Sawy. 500, Fed. Cas. No. 7,761.

The special findings of the jury should be germain to the general issues in the case. In the case at bar, they are contradictory and misleading. Morrison v. Lee, 13 N. D. 591, 102 N. W. 223; Clementson, Special Verdicts, pp. 208, 209 and cases cited.

Curtis & Curtis, for respondent.

The questions of defendant's negligence, plaintiff's contributory negligence, assumption of risk, care, etc., are for the jury. Umsted v. Colgate Farmers' Elevator Co. 22 N. D. 242, 133 N. W. 61; Houston, E. & W. T. R. Co. v. De Walt, 96 Tex. 121, 97 Am. St. Rep. 877, 70 S. W. 531.

Where the servant acts under the immediate or personal direction of the master or foreman, he assumes no risks except such as are

ordinarily incident to the employment, unless the danger is so open and apparent that a prudent man, by the use of ordinary care, could or ought to see it. Faulkner v. Mammoth Min. Co. 23 Utah, 437, 66 Pac. 799.

BRUCE, J. This is an appeal from a judgment for the plaintiff in an action which was brought by a farm laborer of the age of nineteen to recover damages for injuries sustained while assisting his employer in exploding dynamite while seeking to drain a slough. The complaint is "that the defendant, the employer aforesaid, required of him (the plaintiff) services outside of the duties ordinarily incident to his employment and subjecting him to additional danger, to wit, the placing of dynamite for the purpose of explosion; that plaintiff being ignorant of the use of dynamite and the danger incident to the use thereof, and relying on the defendant to protect him from any danger in compliance with the specific demands of the said plaintiff, he being then and there present and commanding, said commands and directions being negligently and carelessly given by the defendant without warning plaintiff of the dangers thereof, placed the said dynamite in the way, and at the time directed by the said defendant, and while trying to push the said dynamite down into the hole prepared for it, as negligently and carelessly commanded by the defendant, the said dynamite, without fault or negligence on the part of the plaintiff exploded," etc.

These allegations, with the possible exception of that part which negatives contributory negligence, are so clearly sustained by the testimony of the plaintiff (and this testimony must of course be considered conclusive upon this appeal) that we deem no discussion to be necessary here. As to whether contributory negligence is shown to have existed, however, is a matter of far less certainty, and though we adhere to the negative of the proposition, it may be well to consider the evidence in detail. In doing so, however, all that we can and should consider upon this appeal is the evidence of the plaintiff himself, as the same, though contradicted to a large extent by the testimony of the other witnesses, is not so grossly improbable as to be unworthy of credence, and has the support of the verdict of the jury. This testimony is to the effect that the plaintiff was about eighteen and one-half years of age at the time of the accident, and had been in the United

States for about two years; that he had first worked upon a railroad and then upon a farm, and had begun to work for the defendant in the middle of January, 1913, the accident happening on February 13th; that on the day in question he was boring a hole with an auger in a slough to drain out the water; that the defendant was working with dynamite at a hole about 10 rods away, and told him to come over and help him; that when he got there the defendant gave him a stiff fence wire to the end of which were attached about five and one-half sticks of dynamite, and told him to push the dynamite down into the hole; that when the order was given the defendant was standing by and attending to the fuse, which was about 2½ feet in length, and when the plaintiff was pushing it down the defendant was standing by and looking at him; that the dynamite went down 8 feet until it struck the water, and then it would not go any further, so plaintiff called upon the defendant to help him. Defendant then told the plaintiff to push the dynamite down and come over and help him; that they got it started, and it went down about 10 feet, and that plaintiff could not get it any further; that the defendant then told him to push it down, and helped him; that he then told plaintiff to push it down, and himself went away, and then he said, "For God's sake, let go," and at the same time it blew up.

There is no pretense that the defendant at any time warned the plaintiff of the dangerous character of the work, or explained to him the use of dynamite. It is clear that the plaintiff was working in an occupation outside of the usual occupation of a farm laborer. From the evidence of both parties it appears certain that the defendant lighted the fuse (which was 2½ feet long) before the dynamite was pushed down into the hole. Plaintiff testifies that he was directed by the defendant to push it down at least two times after it was lighted. According to plaintiff's testimony no warning or order to desist was given until it was too late. Defendant, according to this testimony, was clearly guilty of a negligent breach of duty. The only question in the case is whether the plaintiff himself was, as a matter of law, guilty of contributory negligence or assumed the risk of the accident,—in other words, Was the danger "so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence, and experience." Umsted v. Colgate Farmers' Elevator Co. 18 N. D.

309, 122 N. W. 390, 22 N. D. 242, 133 N. W. 61; Lake v. Shenango Furnace Co. 88 C. C. A. 69, 160 Fed. 889, 892. On this question the evidence of the plaintiff is as follows: "He (the defendant) did not say anything to me about coming away before he used the expression, 'For God's sake, let it go.' When he sent we over there he did not tell me anything about there being any danger from handling dynamite. He said the dynamite we had in America wasn't much good. I never had any experience in handling dynamite before this. I saw my father use it a few times in the old country about four or five years ago. I was about fourteen or fifteen years old. He used it to blast stones that laid on top of the ground in the way. Shot them out of the way. The hole was about 19 feet deep. In the morning, Nelson (the defendant) and I worked together at the hole marked 'C' (another hole). We drilled about 4 feet. Then we went to the hole where the explosion took place. We worked there together about an hour. That hole was about 23 feet deep and about 6 inches across. We went home for noon. When we came back I helped him take the dynamite down, the first time, the time it didn't explode. We used two charges of dynamite on that day, on the day of the accident. The first charge didn't explode. This was about an hour before the explosion. During that hour I drilled on the hole 'C' (another hole). Nelson (the defendant) left that hole, and went back to that other hole where the explosion took place. He went back and pulled out the shot that did not go off. He went back to the house to get a new fuse to fix up for the same charge. When he came back to the hole where the explosion took place he fixed up the dynamite first, and then he came over to me and asked me if I had my knife with me, and I gave it to him. He didn't say anything else at that time. He went over towards the hole, and I stayed there and drilled. He asked me if I would come over and help him. I stood there and drilled at the hole until he said I should come over, and I left my mittens and came over. I worked in Minnesota, north of Detroit. I did not use dynamite there to blow out stumps. I was along and shot stones with dynamite. It was in the evening. We were doing this just for fun. I think it was a stone they had. They wanted it drilled before, and when we came home from the hay field, he asked me if I would come over and look at it. I said I would have to. . . . At the hospital I said that I got hurt in the

explosion, and he asked me how, what was the cause of it, and I said that I thought that the fuse was too short. I don't know how long it will take 2 and ½ feet to burn. I can't say exactly how long I was at the hole after the fuse was lighted and before the explosion. It was a little time. I didn't look at my watch. My best estimate is about two or three minutes. Immediately upon lighting the fuse (it was Nelson who lighted it) I dropped it into the hole. I began to push it down. A stick of dynamite is about 7 or 8 inches long. Both of the sticks that were dropped down in the hole were cut in two. It was five and one-half sticks that we dropped down there, tied with a twine string. The wire was attached to the string. There was just the paper that came from the store, that was all. The parcel was about 3 and ½ inches long, about that, I can't say for sure. I never measured it. I always thought the sticks were 6 or 7 inches long. I never measured them. The wire was heavy fence wire, a little bit smaller than a pencil. We used dynamite a few days before to blow the frost away so we could dig, half a day. Nelson (the defendant) said the dynamite used here wasn't any good. The first time we blowed, the shot went up and didn't blow off the frost. He said that the American dynamite wasn't much good. When we had shot the first time, the charge blew up without breaking the frost. It blowed down in the hole, and broke off just the edge, and then went up into the air. I don't know whether that was unusual. I don't know whether dynamite explodes with equal force in every direction. I didn't know that dynamite was dangerous. I knew it was an explosive. After the first shot had gone off I knew that it was dangerous, but I did not know that it was so dangerous as it was. I knew what a fuse was attached to the dynamite for. I did not know about the time that it would take the fuse to burn up. I had no idea the length of time it would take the fire to reach the dynamite. I saw father use dynamite at home in the old country, four or five shots, I can't remember exactly; it is quite a while ago. He blew up stones that were in the field and in the road. I saw the dynamite shatter the stone. The dynamite we used home I knew that was dangerous, but he (the defendant) said this dynamite wasn't much good. I saw father use it, and when he did use it he only used a little piece. Nelson said that this dynamite wasn't much good the first time we went out to use it." Q. "But you blowed the frozen ground up, didn't you?" A. "Yes, the

last time he blew it he blew it up with nearly a whole stick in there. What was put in here was put in so deep I didn't think anything would come up with it. I expected Nelson would call me away from the hole. I thought he knew what he was working with. He did not call me away. I did not see Nelson go away from the hole. He just went back of me. He was standing by my side, and we worked side by side, and he just went back of me. I don't know where he went. I knew it would hurt if it would come up, but I did not think it would come up. I saw it come up the day before, but that was on the top, up in the frost that shot was. When I saw them shooting dynamite in the old country it threw pieces of the rock about 20 rods. I was about fourteen or fifteen years old."

Here is a case where a boy helps in the explosion of dynamite, together with and under the direction of his employer. He knows generally of the explosive nature of dynamite when placed upon the surface of the earth, but not of its upward tendency when placed in water and from 19 to 23 feet beneath. He has no idea of the time which a fuse takes to burn. Provided that he had left the charge in ample time, that is to say, before the fuse had burned out, it is quite clear that the accident would not have happened, and it is equally clear that it was the duty of the employer who was directing him to warn him of that time, and that the boy neither assumed the risk of his employer's negligence in this respect, nor was it contributory negligence on his part, being unacquainted as he was with the burning time of fuses, to rely upon his employer exercising that care.

There is no merit in the contention that the interrogatories are in no way responsive to the issues of the case or supported by the evidence. These issues, it is maintained, were (1) that the master had taken the employee out of his ordinary labor, and had put him into the business of handling dynamite; (2) that he had not warned him in the use of it; (3) that it was carelessly handled on the day in question; (4) that the servant was free from contributory negligence. There were, it is claimed, no findings whatever upon the questions of the proximate cause of the injury,—whether it was the failure of the master to warn the employee in time to get away from the hole, or whether it was the failure to warn him that dynamite was dangerous, or whether it was a failure to inform the plaintiff just when the dynamite would be likely to explode.

We do not so understand, either the verdict or the pleadings. The questions and answers were: (1) Q. "Did Nelson, the defendant, say to the plaintiff before leaving the hole where the dynamite was placed, 'it is about time for us to get away?'" A. "No." (2) "Did Nelson, the defendant, say to the plaintiff, just after he, Nelson, had stepped back from the hole where the dynamite was placed, 'Come away?'" A. "No." (3) "Did Nelson, the defendant, say to the plaintiff a second time after he had taken a couple of steps from the hole where the dynamite was placed, 'Come away?'" A. "No." (4) "Did Nelson, the defendant, after he had gone still further away say to the plaintiff, 'For God's sake, come away?'" A. "Yes." (5) "Had the plaintiff sufficient time to get to a place of safety after being commanded by the defendant, Nelson, to come away?" Ans. "No." (6) "Did the plaintiff know or lead the defendant to believe that he knew of the dangerous character of dynamite?" Ans. "No."

We concede as a general proposition the truth of appellant's contention that a special verdict must find the facts as alleged in the complaint, and that a finding that does not pass upon the material issues in the case cannot form the basis of a judgment. Morrison v. Lee, 13 N. D. 591, 102 N. W. 223; Clementson, Special Verdicts, pp. 208, 209. The main trouble with the contention of counsel, however, is that in the present case the verdict was not a special verdict. It was, in fact, merely a general verdict with special findings. Such a verdict is, we believe, authorized by § 7034, Rev. Codes 1905, which among other things provides, "The court may also direct the jury, if they render a general verdict, to find in writing upon any particular questions of fact to be stated as aforesaid." We concede that these particular questions must be germain to the issues involved, and not calculated to lead the jury astray. We do not believe, however, that they need cover all of the questions and issues in the case. The case of Morrison v. Lee, supra, which is relied upon by counsel for appellant, relates to special verdicts, and not to special interrogatories. There can be no doubt that the questions here propounded, though not covering all, were pertinent to the issues involved. According to counsel for appellant himself, "the gist of the complaint is the failure to warn the plaintiff of the dangerous character of dynamite, and negligence in "commanding in the use thereof."

The first of these issues was squarely presented by the interrogatories, while the failure to give the order to desist and come away to one who had been commanded to press into a hole a dynamite charge to which a lighted fuse has been attached, without having first warned the workman of the danger, and he having no knowledge of the time limit of the fuse, is certainly evidence of "negligence in commanding."

It is true that the common law confers upon employers the right to decide how their work shall be performed, and to employ men to work in an unsafe place and with dangerous instruments, and without incurring liability for the lives of the workmen who knew, or should have known, the hazards of the service they have chosen to enter. If an employee enters upon the service knowing the risks involved, he is regarded as having voluntarily incurred them, unless the employer urges or coerces him into the danger, or in some way directly contributes to the injury. See note to Houston, E. & W. T. R. Co. v. De Walt, 97 Am. St. Rep. 877. It is to be remembered, however, that in the case at bar the proximate cause of the injury was the failure to leave the hole before the fuse had time to burn out, and it is quite clear to us that it was the duty of the employer to see that this was done. It is to be remembered that the fuse was lighted before the dynamite was placed under the water, and that the accident happened while it was being pushed down. It would be absurd to contend that in such a case, and when the work is done under the direction of a master, the time when the same can be safely continued is a matter for the individual opinion of each of the employees interested.

We have carefully examined the instructions which were given to the jury, and though some technical criticisms may be made thereon, we find no prejudicial error.

We cannot say that as a matter of law it was contributory negligence on the part of the plaintiff to help in placing the dynamite in the hole with the lighted fuse attached thereto, and to push it down as commanded by the defendant. This is a question for the jury, and not for the court, to pass upon. The same is true of the actual acquaintance with the use of dynamite that the plaintiff possessed, and as to whether the admissions claimed to have been made by him were in fact made. It is also true of the question as to whether under the circumstances the defendant should have instructed the plaintiff as to the particular

dangers of the occupation. Sims v. East & West R. Co. 84 Ga. 152, 20 Am. St. Rep. 352, 10 S. E. 543; Texarkana & Ft. S. R. Co. v. Preacher, — Tex. Civ. App. —, 59 S. W. 593; Atlanta & W. P. R. Co. v. Smith, 94 Ga. 107, 20 S. E. 763.

We find no error in the charge that "the plaintiff in this case, gentlemen, was a witness in his own behalf. You are the sole judges of the credibility. All statements made by him, if any, which are against his own interest, must be taken as true, but his statements in his own favor are only to be given such credit as the jury, under all the facts and circumstances in the evidence, deem them entitled to," which instruction was given after the following: "I instruct you further, gentlemen of the jury, that if the injury complained of on the part of the plaintiff was not due to his own carelessness and failure to obey orders, under the rules of law as I have defined them to you, then the statement upon his part, if you find any such statements were made, that the injury was due to his own carelessness or want of obedience of defendant's orders, in and of itself would not preclude or necessarily prevent a recovery. His right of recovery does not depend upon what he may admit or what he may deny, but it is dependent upon the state of facts upon which due care is predicated. At the same time, an admission of fact made under such circumstances at the very time of the happening of the accident, when all of the facts were fresh and open to observation, and made by a man who had engaged in this work, and made against his own interest, is evidence which you will give such weight as an admission of carelessness as in your judgment it may be entitled to."

In the latter case the court was speaking of admissions made or supposed to have been made by the plaintiff soon after the accident, but which the plaintiff denied having made. In the former case, he was speaking of the testimony of the plaintiff which was given upon the trial. "It is hardly necessary to add," says Mr. Jones, in ¶ 296 of his Commentaries on Evidence, that "unless admissions are contractual or unless they constitute an estoppel within some of the rules already stated, they are not conclusive, but are open to rebuttal or explanation, or they may be controlled by higher evidence." It is also true that the court spoke of admissions which were claimed to have been made at the very time of the happening of the accident, when some of those

testified to were claimed to have been made later, and when the plaintiff was in the hospital. The latter supposed admissions, however, covered the same ground and were of the same nature as those supposed to have been made at the time of the accident, and we cannot believe that the jury was in any way misled by the language used. We may not thoroughly understand counsel's objections, but if they are that the court should have charged the jury that the plaintiff was conclusively bound by these disputed admissions, there is clearly no merit in them. Testimony which is given upon the trial of a cause and under oath is one thing. Disputed admissions which are alleged to have been made before the trial are another.

Nor do we find reversible error in the following portions of the charge to the jury and of which complaint is made: "I instruct you further, gentlemen of the jury, that when the master employs a minor, that is, one less than twenty-one years of age, to perform work which is dangerous or hazardous to the person of such minor, it is the duty of the master or the employer to explain to such minor the proper manner of performing such work, and also to explain to such minor the dangers and hazards to his person incident to the performing of such work, and how to avoid such dangers, unless the dangers and risk incident to such work are patent and obvious to persons of like and intelligence of such minor; but the master, on the other hand, has the right to rely upon any representations made to him by the minor and employee as to said minor's experience in connection with any proposed work to be done by said minor, and I instruct you, further, gentlemen of the jury, that a servant, when he engages in a particular employment, is presumed to do so with a knowledge of and taking of the risk of its ordinary hazards, but when the servant shows that the injury grew out of the master's negligence, the burden is then upon the master to show that the servant knew and understood the increased dangers." Counsel states and contends that "while it is true that the law of contributory negligence in this state requires the master to establish such negligence by a proper preponderance of the evidence, yet it has never been the law that a servant nineteen years of age who has known the use of dynamite, both in the old country and in the new, who has had experience in the use thereof, and who has received an injury as the

plaintiff did in this case, that by the statements made as he has in this case, that he, and not the master, was to blame; we say here that to lay down a rule that the burden is upon the defendant to show that the plaintiff knew and appreciated the risk is to reach the limit of absurdity. Such cannot be the law. The burden cannot shift from the plaintiff to the defendant under such circumstances. If the servant knew and appreciated the situation and dangers, whether it was in the line of his ordinary employment or was out of that line makes no difference. . . . How it can be contended in any court of justice, under those circumstances, that the burden is then upon the defendant in this case to show that the servant knew and understood the increased dangers." The trouble with counsel for appellant is that he is arguing his case to the jury, and not to the court. All that the court did was to lay down the law, and it was for the jury to pass upon the facts. It was by no means admitted by the plaintiff, or proved by the witnesses, that the plaintiff was cognizant of the dangers attending the use of dynamite, nor does the evidence tend to show that he had anything more than a casual acquaintance with its use. It may be true, as counsel suggests, that a minor of nineteen *who is thoroughly acquainted with the use of dynamite* is not entitled to any more warning or protection than an adult who has the same knowledge, but here counsel begs the whole question at issue, which was, Was he so acquainted? He also contends that the only rule that should have been applied was "that the master owed the duty of ordinary care to his servant, considering all of the conditions and circumstances surrounding the use of dynamite." The degree of care, however, in the case of dangerous explosives must necessarily be much greater than that used under ordinary circumstances, and it is not error for the court to suggest such fact to the jury.

The question was the knowledge of the danger, and whether the employer was justified, under the circumstances, in assuming such knowledge, and this was a matter for the jury to pass upon. If we believe the plaintiff's testimony in this respect, and we have on this appeal no option but to do so, it would have been the duty of the defendant to have warned the plaintiff of the danger, even if he had been an adult.

The judgment of the District Court is affirmed.

On Petition for Rehearing.

BRUCE, J. Counsel for appellant complains because the testimony of the defendant is not quoted at length in the opinion. In the opinion we expressly stated that when a motion is made to set aside a verdict on the ground of the insufficiency of the evidence, the only question at issue is whether there is sufficient evidence to support the verdict, and the fact that there may be much evidence in contradiction thereof is immaterial. When this statement is made, and it is clearly intimated that it is the plaintiff's evidence that is being considered, we do not believe that any confusion or erroneous impression can be created. The evidence of defendant's witnesses is indeed only material on this appeal on the question of the instructions, and we believe that we have given sufficient thereof for the consideration of the same.

Counsel further complains because the following instructions were not specifically passed upon by this court: "I instruct you further, gentlemen of the jury, that a servant when he engages in a particular employment is presumed to do so with a knowledge of and a taking of the risk of its ordinary hazard, but when the servant shows that the injury received was in consequence of a risk not ordinarily incident to the employment, and that said injury grew out of the master's negligence, the burden is then upon the master to show that the servant knew and understood the increased dangers." It is claimed that this eliminates any care upon the part of the servant. Counsel also complains of the following instruction: "I instruct you further, gentlemen of the jury, that if an employee, in the discharge of the duties in his line, voluntarily takes a place which he is not required to take, he assumed the risk which may attach to the place he may have taken by reason of his employment, and if you find that the plaintiff in this action, of his own free will, without invitation from his employer, the defendant, and notwithstanding the warning of the defendant, placed himself in an unnecessarily perilous position, and in consequence sustained the injury complained of, and you further find that the defendant was in no way negligent, plaintiff, under these circumstances, would not be entitled to a verdict at your hands." This instruction, however, clearly negatives the complaint in regard to the one formerly quoted; namely, that the former instruction "eliminates any care on the part of

the servant," and under it "the servant could close his eyes and stand in front of a gun, and if the master did not tell him to come away before the gun went off, the court, under this opinion, would hold that the master was liable, and would stand by his instruction."

Counsel has, however, throughout his brief and in his petition for a rehearing, taken isolated portions of the instructions, and has refused to consider the instructions as a whole. The question is not whether any particular clause or paragraph in itself is complete and satisfactory, but whether the instructions as a whole are such as to present the case fairly to the jury. We have examined the instructions as a whole in this case carefully, and are satisfied that the case was fairly and fully presented. The second instruction quoted by us, for instance, cures any omission in the one first quoted, while the complaint in regard to the subsequent one, namely, that the court erred in using the words, "and you will further find that the defendant was in no way negligent," and that such words seem to eliminate the offense of contributory negligence, is abundantly met by the other portions of the instructions. In one of them, for instance, the court says, "I instruct you, in this connection, that in determining the relative degrees of care, the want of care manifested by the parties at the time of the injuries, the age and discretion of the party injured, is a proper subject for you to consider; and in determining the issue of the plaintiff's contributory negligence you may look at all the surrounding facts and circumstances in evidence before you, and determine therefrom whether or not the plaintiff used such care as a person of like age and ordinary prudence would have used under the same or similar conditions, and the burden of proof is on the defendant to show contributory negligence of the plaintiff." Again the court said, "Now, gentlemen, by contributory negligence is meant some negligent act or omission on the part of the plaintiff in an action, some act or some omission on the part of Oakland, which concurred or co-operated with some negligent act or omission on the part of the defendant as the approximate cause of the injury complained of by plaintiff; and in this connection, gentlemen, I instruct you that if you believe from the evidence that the plaintiff himself was guilty of contributory negligence approximately contributing to his injury, as contributory negligence has been defined, you will find for the defendant, even though you should believe that the negligence of the defendant

contributed to the cause of the plaintiff's injury. I instruct you further, gentlemen, that the defendant was not an insurer of the plaintiff's safety, at the time and place here in question, and you cannot infer or presume that defendant was negligent at said time and place, or find a verdict in favor of plaintiff, from the mere fact that an explosion occurred and that plaintiff was injured."

Counsel further complains and states that "this court overlooked entirely the question of contributory negligence involved in this case. It overlooks entirely the fact that this story that was told afterwards was, in the judgment of every man, woman, and child that knows the defendant in this case, a manufactured story learned for the purpose of this lawsuit." He is absolutely correct in this assumption, except that this court has overlooked the question of contributory negligence. This court knows nothing of the opinion "of every man, woman, and child that knows the defendant." It is governed by the *record* merely, and has nothing to do with any opinion that is not expressed in the record. In fact, it is governed by the facts disclosed, and not by *opinions,* whether given in or out of the court. Nor, too, does it believe that it is overstepping its duty in affirming a judgment when it can see no prejudice in the record, and believes that the instructions to the jury, when taken as a whole, presented the case fairly and fully, and that no errors of law were committed, even though it appears that there is a material conflict in the evidence which the jury must pass upon.

The petition for a rehearing is denied.

JAMES P. CAIN, as Trustee of the Estate of Charles T. Tracey, Bankrupt, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and Herman Leutz, Intervener.

(— N. W. —.)

Collision — traction engine on railroad track — observance of approaching train — damages — recovery — negligence.

Where a traction engine is stuck upon a railroad crossing, at a point where the track is curved and persons in charge of the train cannot determine its exact position, and the train is observed at a distance of some 5 miles, and no

effort is made to flag said train or in any manner to attract the attention of the persons in charge thereof, excepting to blow the whistle of the tractor, the persons in charge of the tractor are guilty of such negligence as prevents recovery for damages sustained by the collision.

Opinion filed October 13, 1914. Rehearing denied November 18, 1914.

Appeal from the District Court of Stark County, *Crawford,* J.

Reversed.

Watson & Young, and *E. T. Conmy,* for appellant.

There is no negligence shown on the part of defendant that proximately caused the injury and damages. Pennsylvania Co. v. Davis, 4 Ind. App. 51, 29 N. E. 425; Early v. Louisville, H. & St. L. R. Co. 115 Ky. 13, 72 S. W. 350; Cincinnati, N. O. & T. P. R. Co. v. Reynolds, 31 Ky. L. Rep. 529, 102 S. W. 890.

The undisputed evidence shows plaintiff was guilty of contributory negligence as a matter of law. The question of negligence becomes one of law for the court when the facts are undisputed and the inferences to be drawn from them are so clear that reasonable men ought not to differ. Northern P. R. Co. v. Tracy, 111 C. C. A. 557, 191 Fed. 15; Elliott, Railroads, § 1179c, p. 394.

This action is *res judicata.* The same issues have already been tried and a decision rendered on the merits by a court of competent jurisdiction. Seep v. Ferris-Haggarty Copper Min. Co. 120 C. C. A. 191, 201 Fed. 893; United States v. Wonson, 1 Gall. 5, Fed. Cas. No. 16,750; Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732; Walker v. New Mexico & S. P. R. Co. 165 U. S. 596, 41 L. ed. 841, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; Capital Traction Co. v. Hof, 174 U. S. 13, 43 L. ed. 877, 19 Sup. Ct. Rep. 580; Chicago Theological Seminary v. People, 189 Ill. 439, 59 N. E. 980.

Where the mandate of a superior court requires the entry and execution thereof and in conformity therewith, no different order or judgment can be entered in the lower court. Newberry v. Blatchford, 106 Ill. 584; Hook v. Richeson, 115 Ill. 431, 5 N. E. 98; Gage v. Bailey, 119 Ill. 539, 9 N. E. 199; Parker v. Shannon, 121 Ill. 452, 13 N. E. 155; Gage v. Stokes, 125 Ill. 40, 16 N. E. 925; Buck v. Buck, 119 Ill. 613, 8 N. E. 837; West v. Douglas, 145 Ill. 164, 34 N. E. 141; Lynn v. Lynn, 160 Ill. 307, 43 N. E. 482.

And where questions have been passed upon and determined by the supreme court and the cause is remanded generally, it is not open in the lower court as to such questions. Brooklyn v. Orthwein, 140 Ill. 620, 31 N. E. 111; Reed v. West, 70 Ill. 479; Rising v. Carr, 70 Ill. 596; Ogden v. Larrabee, 70 Ill. 510; Champaign County v. Reed, 106 Ill. 389; Loomis v. Cowen, 106 Ill. 660; Smyth v. Neff, 123 Ill. 310, 17 N. E. 702; Tucker v. People, 122 Ill. 583, 13 N. E. 809; Burton v. Perry, 146 Ill. 71, 34 N. E. 60; Palmer v. Woods, 149 Ill. 146, 35 N. E. 1122.

Full faith and credit is given to adjudications of a Federal court by state courts. Wandling v. Straw, 25 W. Va. 692; Borches v. Arbuckle Bros. 111 Tenn. 498, 78 S. W. 266; Holstein v. Edgefield County, 64 S. C. 374, 42 S. E. 180; Baldwin v. Rice, 44 Misc. 64, 89 N. Y. Supp. 738, 183 N. Y. 55, 75 N. E. 1096; Wonderly v. Lafayette County, 150 Mo. 635, 73 Am. St. Rep. 474, 51 S. W. 745; Thornton v. Natchez, 88 Miss. 1, 41 So. 498; 11 Decen. Dig. § 638; 24 Am. & Eng. Enc. Law, § 9, 833.

The question of contributory negligence must be considered and determined regardless of defendant's negligence. West v. Northern P. R. Co. 13 N. D. 221, 100 N. W. 254; Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997; Cromwell v. Sac County, 94 U. S. 351, 25 L. ed. 195; Washington Steam Packet Co. v. Sickles, 24 How. 333, 16 L. ed. 650; Bissell v. Spring Valley Twp. 124 U. S. 225, 31 L. ed. 411, 8 Sup. Ct. Rep. 495; Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608; Wright v. Griffey, 147 Ill. 496, 37 Am. St. Rep. 228, 35 N. E. 732; Leopold v. Chicago, 150 Ill. 568, 37 N. E. 892; Louisville, N. A. & C. R. Co. v. Carson, 169 Ill. 247, 48 N. E. 402; Markley v. People, 171 Ill. 260, 63 Am. St. Rep. 234, 49 N. E. 502; Young v. People, 171 Ill. 299, 49 N. E. 503; Chicago Theological Seminary v. People, 189 Ill. 439, 59 N. E. 979; Wilson v. Deen (Milne v. Deen) 121 U. S. 525, 30 L. ed. 980, 7 Sup. Ct. Rep. 1004; Louis v. Brown Twp. 109 U. S. 163, 27 L. ed. 892, 3 Sup. Ct. Rep. 92; Corcoran v. Chesapeake & O. Canal Co. 94 U. S. 741, 24 L. ed. 190; Southern P. R. Co. v. United States, 168 U. S. 18, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Stearns v. Lawrence, 28 C. C. A. 66, 54 U. S. App. 532, 83 Fed. 742.

A defendant may interpose as many defenses as he has, and the court may determine all, though the decision of any one may be sufficient to

end the case, and as to such as are considered and determined the parties are concluded. Sheldon v. Edwards, 35 N. Y. 279; Florida C. R. Co. v. Schutte, 103 U. S. 118–142; 26 L. ed. 327–335; Hawes v. Contra Costa Water Co. 5 Sawy. 296, Fed. Cas. No. 6,235; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Charles E. Henry Sons Co. v. Mahoney, 97 Ill. App. 313; 2 Decen. Dig. p. 1097, and cases cited.

T. F. Murtha and *C. H. Starke,* for respondents.

It is the duty of men in charge of a train approaching a public crossing to keep a special lookout to avoid collisions with objects that might be lawfully on the crossing. In such cases the law imposes exceptional care. Bishop v. Chicago, M. & St. P. R. Co. 4 N. D. 536, 62 N. W. 605; Coulter v. Great Northern R. Co. 5 N. D. 568, 67 N. W. 1046; Johnson v. Great Northern R. Co. 7 N. D. 284, 75 N. W. 250, 4 Am. Neg. Rep. 568; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; Belshan v. Illinois C. R. Co. 117 Minn. 110, 134 N. W. 507; San Antonio & A. P. R. Co. v. Votaw, — Tex. Civ. App. —, 81 S. W. 130.

That reasonable men might not agree on just what should have been done affords no reason or excuse for defendant's negligence. If all reasonable men could agree on the question of negligence or contributory negligence, they would agree as did the jury, that plaintiff was not negligent. The question of contributory negligence was clearly one for the jury. Bishop v. Chicago, M. & St. P. R. Co. 4 N. D. 536, 62 N. W. 605, supra; Johnson v. Great Northern R. Co. 7 N. D. 284, 75 N. W. 250, 4 Am. Neg. Rep. 568, supra; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225, supra; Belshan v. Illinois C. R. Co. 117 Minn. 110, 134 N. W. 507, supra; 33 Cyc. 922–924; Klotz v. Winona & St. P. R. Co. 68 Minn. 341, 71 N. W. 257, 3 Am. Neg. Rep. 201; Continental Improv. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; St. Louis, I. M. & S. R. Co. v. Tomlinson, 78 Ark. 251, 94 S. W. 613; St. Louis, I. M. & S. R. Co. v. Denty, 63 Ark. 177, 37 S. W. 719; Virginia Midland R. Co. v. White, 84 Va. 498, 10 Am. St. Rep. 874, 5 S. E. 573; Zipperlen v. Southern P. Co. 7 Cal. App. 206, 93 Pac. 1049; Bullock v. Wilmington & W. R. Co. 105 N. C. 180, 10 S. E. 988; Crowley v. Louisville & N. R. Co. 21 Ky. L. Rep. 1434, 55 S. W. 434; Wilds v.

Hudson River R. Co. 33 Barb. 503; Illinois C. R. Co. v. Murphy, 11 L.R.A.(N.S.) 352, and annotation, 123 Ky. 787, 97 S. W. 729.

Men suddenly placed in dangerous positions must act in a careful and prudent manner and according to their best judgment; and because it can afterwards be pointed out that a different course of conduct might have produced different results, affords no true ground upon which to base the claim of negligence. Chicago & N. W. R. Co. v. Netolicky, 14 C. C. A. 615, 32 U. S. App. 168, 406, 67 Fed. 668; Haff v. Minneapolis & St. L. R. Co. 14 Fed. 558, 7 Am. Neg. Cas. 571; The City of Norwalk, 55 Fed. 102.

The United States district court could do nothing but to grant a new trial, and a new trial having been ordered, the plaintiff could take a nonsuit and begin his action over in the same or a different court. The former proceedings do not constitute *res judicata*. 3 Cyc. 481, 482 and note, 84; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 992.

The decision on a prior appeal fixes the law of the case on the same facts, but not on a different state of facts. Chapman v. Greene, 27 S. D. 178, 130 N. W. 30; 3 Cyc. 493, and note 42; Hastings v. Foxworthy, 34 L.R.A. 321, see notes pages 332, 345, 346.

BURKE, J. The accident upon which this action is based occurred about 10 o'clock in the forenoon of the 28th of August, 1909, upon a crossing of the defendant company at the village of Taylor, North Dakota, the crossing being practically a street of the village, about 1,050 feet east of the depot. The defendant's tracks at this point run practically east and west, but from the east the roadway approaches at a three-degree curve beginning about one half a mile east of the depot and extending about 1,600 feet or until about 900 feet from the depot, where the track continues and goes straight west through the town. The crossing in question is on the curve, about 150 feet east of the beginning of said straight portion of the track. There is also a passing track south of the main track parallel thereto, and 14 feet distant therefrom. Upon the day of the accident the company was engaged in ballasting its tracks at that point, and planks had been removed from the crossing for that purpose. A steam traction engine belonging to one Tracey was being driven that day by one Brown, engineer, and one Naset, fireman, both in the employ of Tracey. They approached the crossing from the south,

and, desiring to cross to the north, placed loose planks between the rails, and succeeded in crossing the first or passing track and getting the front wheels of the tractor over the main track and the rear or drive wheels between the rails thereof, but it was impossible to get the drivers over the north rail of the main track. When the tractor was in that position the men in charge discovered a train coming from the east. This discovery was made, owing to smoke from the train while at the village of Richardton, about 5 miles farther east. The men in charge of the tractor then tried to back, and succeeded in getting the drivers over the south rail and then backward until they struck the north rail of the passing track, where they stuck. In this position the boiler was over the track and the front wheels were right up against the south rail of the main track. The main crossing at this point was 18 inches above the surrounding country. The engineer of the tractor testifies in part: "After I saw the smoke I kept on trying to get over the track. I did not go back until I saw it was impossible to go ahead, then I reversed and tried to get back. I reversed and tried to get back after the train got in sight. I blew the whistle on the traction engine to give notice to the train. The whistle is one of those three-chamber whistles, pretty loud whistle. I was not surprised that he did not hear it. . . . I blew the whistle when the train was pretty close to me. She was not very far away." No other effort was made by the men in charge of the tractor to notify the train of the danger. The train was a passenger, the North Coast Limited, running late and making about 40 miles an hour. On account of the curve, the engineer was unable to see the crossing from the right-hand side of the engine, but the fireman upon the left side had a full view thereof, and testifies: "I was fireman on this engine. . . . The train where it approaches this crossing at Taylor is curved. . . . I was on the left side of the engine on the day in question. That is the south side of the track. . . . I saw this traction engine about 12 or 13 car lengths from the crossing. When I saw it at that time I could not tell where it was, I just about could tell where it was, and I couldn't quite either. They were kind of tumbling, and I couldn't tell whether they were on their side of the crossing. I thought they were on their side of the crossing, waiting for us to pass. When I first made out that this traction engine was on the track, we were about 8 car lengths from the crossing. I then told the engineer to stop and he set the emergency brake. Then we went about 8 or 9 car lengths be-

fore the train came to a stop. From my position in the cab I was prevented from telling whether this traction engine was on the track on account of the curve in the track. . . . I do not remember whether I was on my seat before we passed the east switch. When I got upon my seat I think I saw the engine about 12 or 13 car lengths from the crossing, about 1,000 feet. It took us about 7 or 8 car lengths to stop the train that day . . . it took us from six to eight hundred feet to stop the train." One Dyer, a brakeman on the train also saw the traction engine standing there. He thought it was standing there waiting for the train to pass. The traction engine was pushed off the track and badly injured. Action was brought and judgment had in the United States district court of North Dakota. An appeal was taken to the United States circuit court of appeals, where the judgment was reversed upon the grounds that the plaintiff was guilty of contributory negligence, and a new trial ordered. Northern P. R. Co. v. Tracy, 111 C. C. A. 560, 191 Fed. 18.

Plaintiff, however, instead of submitting to a new trial in the United States district court, dismissed that action and started a new one in the state court, limiting his demand for damages to the sum of $3,000, thus preventing a return of the action to the United States court. Trial was had to said state court resulting in a verdict for the plaintiff. This appeal alleged generally three grounds for reversal: First, that the defendant was not guilty of any negligence whatever; second, that plaintiff is guilty of contributory negligence; third, that the action is *res judicata*. All three of the propositions appeal to us strongly, but we will discuss only the second, which we have agreed, necessitates dismissal of the action, and renders unnecessary a decision upon the first and third grounds.

(1) The circuit court of appeals in its opinion uses the following language: "The servants of the plaintiff realized that the train was approaching the crossing and a collision was possible when the train was yet at Richardton, 5 miles distant. The traction engine was so massive that a collision might well result in loss of life to passengers on the train. The exigency was not so sudden as to preclude cool judgment. The train running at 40 miles an hour must have taken between seven or eight minutes to traverse the intervening distance. What effort was made to avoid the accident? An unsuccessful attempt was made to back

the traction engine. This was essentially a doubtful experiment, and in this case entirely fruitless. Next, a few blasts were blown on the steam whistle. The engineer of the traction engine, familiar with the operation of trains, testified that it was no surprise to him that those blasts were not heard by the men in the cab of the locomotive. The curve and the consequent difficulty in determining the relation of the traction engine to the railway track was patent. Some signal ought to have been given. There was time for one of the men to have proceeded eastward along the track, and, by the waiving of a hat or coat, to have indicated the danger. If this had been done, the accident would not have happened. That it ought to have been done seems to us so clearly to accord with reason and experience as to have entitled the defendant to a directed verdict."

Plaintiff attempts to avoid the logic of the above language by pointing out differences in the testimony taken at the two trials. The main differences being that in the latter trial a witness testified the crossing was in plain view for 2,700 feet from the east, and that there was no rolling ground or obstruction to prevent the fireman from seeing the engine. Had the track been straight an altogether different question would have arisen. The undisputed testimony is that the fireman saw the tractor in sufficient time to have avoided the accident had he realized that it was upon the main track, but on account of the curve at which he was approaching was unable to determine the danger until it was too late. The fact that he could see the crossing for about half a mile would not be important unless, when so seeing it, he was apprised of the danger. It seems plain to us that ordinary care upon the part of those in charge of the tractor required some effort to flag the approaching train. If neither of the men in charge of the tractor could be spared for this purpose, at least a request should have been made to some of the by-standers to make the effort. Plaintiff insists that the tractor standing on the track was signal enough to warn the train, and that if the train crew did not see it, neither would they have discovered a man sent forward to flag them. We do not believe the argument sound. Had the train approached upon a straight track, there would be still a debatable question, but on account of the curve some other warning was imperative. Had a man walked down the track, even a short distance, making any demonstration, the fireman would have discovered it. If, as argued by plaintiff, he had gone much

farther down the track and missed the fireman, yet might not he have attracted the engineer's attention as the train was passing? Cases supporting this are numerous; we will cite only a few: Tracy v. Northern P. R. Co. 111 C. C. A. 557, 191 Fed. 15; Elliott, Railroads, § 1179c, p. 394; Johnson v. Great Northern R. Co. 7 N. D. 284, 75 N. W. 250, 4 Am. Neg. Rep. 568.

The trial court will set aside its previous order and enter a judgment for the defendant notwithstanding the verdict.

GRANT COUNTY STATE BANK, a Corporation, v. NORTHWESTERN LAND COMPANY, a Corporation.

(150 N. W. 736.)

Defendant company and the First National Bank of Rugby occupied the same offices. Jones was cashier of the bank and treasurer of the company and later its vice president. In October, 1907, the bank by said cashier sold plaintiff some negotiable paper one note of which purported to be that of the defendant for $2,500, with said national bank as payee, and due in October, 1908. Defendant's directors and officials, besides Jones, did not authorize issuance of this note and knew nothing of it, and no part of the proceeds of the note was received by it, though plaintiff paid full-face value for the note to Jones. As its vice president Jones was in charge of defendant's offices, and before purchasing this note plaintiffs' cashier, Wells, inquired of Jones as to who the defendant's officials were and facts as to its worth, and was informed thereof and that Jones was its treasurer then, and when the note was signed shortly prior thereto. The purported signature to the note was "Northwestern Land Company, by A. H. Jones, Treasurer." Jones was not treasurer but vice president. Defendant's by-laws provided that no promissory note should be valid unless signed jointly by its president and treasurer. Both said officials were nonresidents of Rugby, where its principal and only office was maintained. From 1902 to 1907 Jones had been its treasurer and as such had largely transacted its business. He was superseded in January, 1907, but elected vice president, and continued apparently in charge of business. There is evidence that the actual authority of Jones was but little curtailed, and that the managing officers acquiesced thereafter in the assumption by Jones of authority he did not actually possess in its business affairs. Shortly before his removal as treasurer, he had unauthorizably borrowed from said national bank $2,500, for which he had given the company's note. It received the money,

and this loan was twice unauthorizably renewed by note, and ratified, and paid by the company. While treasurer he had disbursed much money, satisfied real estate mortgages, redeemed from real estate foreclosures, conducted its farming operations on a large scale, all under actual authority, and had more or less supervision of its business affairs, and had always been in charge of its offices though at times other officials were present during short intervals. It by-laws made the treasurer its disbursing officer. Defendant carried a checking account in said national bank, and its books and records were usually kept in the bank vaults. A printed form of checks on this account was provided with printed signature of "Northwestern Land Company, by ———— Treasurer." One hundred thirty of these checks, many of which bear the genuine signature of Jones, were issued with this form of signature, ostensibly by Jones as treasurer and after he had ceased to be such, and all with the knowledge and sanction of the company and its treasurer. The purported note of defendant purchased by plaintiff fell due in the fall of 1908. Just prior thereto Wells presented it to Jones as defendant's treasurer for payment, and he renewed it by a duplicate of the first, due one year later, indorsed and guaranteed by the bank, and delivered it to Wells, paying him the accrued interest, approximately $300, on the original note thus taken up. Evidence was received that this interest payment was not charged to defendant's account on the bank books, and that its moneys were not used in making this interest payment. The notes were not entered upon the company's records. Its officials other than Jones had no knowledge thereof. Wells, plaintiffs' cashier, when purchasing the original note and accepting the renewal, had no knowledge of the company's by-laws, and made no inquiry relative thereto, nor did he ask to be shown the same. He relied upon the information given him by Jones and upon the banks guaranty executed by Jones as its cashier. Wells did not know of Jones having issued corporate checks as ostensible treasurer, nor of the many acts performed by him while he had been treasurer. Before the maturity of renewal note, said national bank became insolvent and a receiver took charge. Later, when other officials of the defendant learned of this outstanding note and the transactions of plaintiff with Jones, they in defendant's behalf repudiated the note. It asserts Jones was without authority to issue its notes; that it was invalid under its by-laws; that the testimony of issuance of checks by Jones as ostensible treasurer is inadmissible as not having been known to Wells, and not having induced his purchase of the note, it is not estopped to deny liability; that the statements of Jones to Wells should not be considered as evidence of either actual or ostensible authority in Jones; that valid corporate negotiable paper cannot be issued under mere ostensible authority; that plaintiff has failed to make a prima facie case against defendant.

Trial was had without a jury and findings were made in defendant's favor on all questions of authority, the court finding that Jones had neither actual nor ostensible authority to issue the note. In the memorandum opinion of the trial court accompanying the findings, it appears that the finding of want

of ostensible authority was based on the fact found that the defendant was not guilty of want of ordinary care in permitting Jones to exercise the limited power actually conferred upon him.

By-laws — contents — knowledge of — negligence.

Held: 1. Wells was not charged with knowledge of the contents of the by-laws in the absence of actual knowledge thereof or of negligence in failing to acquaint himself with their contents.

Officials of company — responsibility — statements — estoppel — authority.

2. His inquiry at defendant's office of its vice president in charge, as to the personnel of its officials, and facts to elicit its financial responsibility, were made of its official authorized in its behalf to speak, and such statements of Jones, so made, bound the company and estopped it from denying the truth of such statements as here material, including his statement that he was its treasurer, not constituting a statement of his agency or his authority, but of independent facts, "not including the terms of his authority, but upon which his right to use his authority depends," binding the company under § 5772, Rev. Codes 1905.

Negotiable instruments act — agency — ostensible authority — proof of — corporation — common law.

3. Section 6321, Rev. Codes 1905, a part of the "negotiable instruments act," providing that the agent's authority to issue negotiable instruments "may be established as in other cases of agency," permits proof of the ostensible authority of the agent to act for the corporation in the issuance of its negotiable paper; but what shall constitute sufficient proof of such ostensible authority is left to the common law. The negotiable instruments act has not permitted less proof to establish such ostensible authority in the agent than would be required without that enactment.

Commercial paper — authority of officers to issue — corporation — has implied corporate power — wrongful exercise of.

4. This case involves the irregular or wrongful exercise of authority in the issuance of commercial paper on behalf of a corporation, instead of any want of power of the corporation to issue commercial paper,—an implied corporate power.

Note — delivery of — interest payment — ostensible — treasurer — agent.

5. The note is to be regarded as having been delivered to plaintiff by its ostensible treasurer, and the interest payment made is to be deemed a payment made by defendant's ostensible treasurer and agent.

Liability — dependent upon authority of treasurer — prima facie case — question of fact.

6. The defendant's liability depends upon the ostensible authority of its treasurer to issue its promissory notes under the circumstances of its issue;

and the facts in evidence are sufficient to present a prima facie case of liability thereon; the question of ostensible authority to issue such note is one of fact determinable under all the evidence bearing thereon.

Ostensible treasurer — issuance of checks — company obligations — directors and officers — knowledge of — acquiescence — proof of.

7. Issuance by Jones as treasurer, of checks and of other company obligations in its behalf, known to the company's directors and officials, and acquiesced in by them, is admissible as proof of ostensible authority in Jones to issue this negotiable paper.

Ostensible authority — proof of — estoppel.

8. It is immaterial that neither plaintiff nor its cashier, Wells, had knowledge of the facts offered tending to show such ostensible authority in Jones, as proof of ostensible authority does not depend upon or concern estoppel.

Purchaser in due course — without notice — defects.

9. Under the evidence plaintiff is entitled to a finding that it is a purchaser in due course and without notice of infirmity in the instrument, the purported promissory note.

Evidence — original note — interest payment — treasurer had authority — agent's duty.

10. Evidence that the interest payment of $300, made on the original note at the time of the execution of the renewal note, was not paid from defendant's funds, is immaterial and inadmissible, as it was a payment made by its treasurer clothed with authority under the by-laws to pay its debts, and his act was that of the company whether its money was used or not, and which, if erroneous, was but an error in performance of the agent's duty, and bound defendant his principal.

Officers and treasurer — testimony — denying authority to act — inadmissible — by-laws — best evidence — conclusions.

11. The testimony of the officers and treasurer that Jones had no authority to act, received over objections, constituted prejudicial error on the important question of the extent of Jones' authority. The records of meetings of the board of directors and the by-laws are the best evidence of actual authority in its officials; directors cannot testify to what amounts to but their conclusions upon the actual and ostensible authority of Jones.

Officer — permitting to act as — negligence — findings.

12. The proof presenting an intentional permitting of Jones to exercise ostensible authority as well as that of a negligent allowance thereof, and it appearing from the memorandum opinion filed that the question of negligence only was considered, the findings are held to not fully cover the issues presented.

Opinion filed September 8, 1914. On petition for rehearing January 4, 1915.

From a judgment of the District Court of Grand Forks County, *Templeton,* J., plaintiff appeals.

Reversed and a new trial granted.

Purcell & Divet, for appellant.

Agency to execute negotiable paper may be established in the same way as agency to do any other act. This is fixed and settled by our negotiable instrument law. The issuance of commercial paper is within the implied powers of the defendant corporation. Rev. Codes, 1905, § 6321; 10 Cyc. 1111, 1113, ¶ 2, 1114, ¶ 3, 1115, ¶ c, 1118, subdiv. b; Martin v. Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428; Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115; Swedish American Nat. Bank v. Koebernick, 136 Wis. 473, 128 Am. St. Rep. 1090, 117 N. W. 1020.

Apparent authority in officer or agent is sufficient; as to the things the corporation can do, it will be bound by the acts of its representations with apparent authority. Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 552, 570, 571, 574, 43 L. ed. 1081, 1089, 1090, 1091, 19 Sup. Ct. Rep. 817; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 905, 66 N. W. 115; G. V. B. Min. Co. v. First Nat. Bank, 36 C. C. A. 633, 95 Fed. 33; Martin v. Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428; Mahoning Min. Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707; Leroy & C. Valley Air-Line R. Co. v. Sidell, 13 C. C. A. 308, 26 U. S. App. 656, 66 Fed. 31; Egbert v. Sun Co. 126 Fed. 570; Armstrong v. Chemical Nat. Bank, 27 C. C. A. 601, 54 U. S. App. 462, 83 Fed. 569; Davenport v. Stone, 104 Mich. 521, 53 Am. St. Rep. 467, 62 N. W. 722; St. Clair v. Rutledge, 115 Wis. 583, 95 Am. St. Rep. 972, 92 N. W. 234; Kocher v. Supreme Council, C. B. L. 65 N. J. L. 649, 52 L.R.A. 861, 86 Am. St. Rep. 690, 48 Atl. 544; Jones v. Williams, 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 446, 39 S. W. 486, 40 S. W. 353; Hanover Nat. Bank v. First Nat. Bank, 48 C. C. A. 482, 109 Fed. 423; Olcott v. Tioga R. Co. 27 N. Y. 546, 84 Am. Dec. 301; Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed. 552; St. Louis Gunning Advertising Co. v. Wannamaker & Brown, 115 Mo. App. 270, 90 S. W. 737; Florida Midland & G. R. Co. v. Varnedoe, 81 Ga. 175, 7 S. E. 129.

Where, as in this case, a corporation has the inherent power to issue

negotiable instruments, and any of its officers or agents assume to issue such paper, the presumption is conclusive in favor of an innocent holder, that such officer had authority. Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 573, 43 L. ed. 1091, 19 Sup. Ct. Rep. 817; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Milwaukee Trust Co. v. Van Valkenburgh, 132 Wis. 638, 112 N. W. 1083; St. Clair v. Rutledge, 115 Wis. 583, 95 Am. St. Rep. 972, 92 N. W. 234; Gelpcke v. Dubuque, 1 Wall. 203, 17 L. ed. 524; Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Bissell v. Michigan S. & N. I. R. Cos. 22 N. Y. 290; Northern Hudson Mut. Bldg. & Loan Asso. v. First Nat. Bank, 11 L.R.A. 846, note.

Especially is this true as to an officer or agent in charge of the corporate officer. Kissam v. Anderson, 145 U. S. 435, 442, 36 L. ed. 765, 767, 12 Sup. Ct. Rep. 960.

A corporation cannot ignore the negligence of all its officers and profit by their omission of duty. St. Clair v. Rutledge, 115 Wis. 583, 95 Am. St. Rep. 972, 92 N. W. 234; Armstrong v. Chemical Nat. Bank, 27 C. C. A. 601, 54 U. S. App. 462, 83 Fed. 571; Martin v. Webb, 110 U. S. 14, 28 L. ed. 52, 3 Sup. Ct. Rep. 428; Cook, Stock & Stockholders, 2d ed. §§ 620, 713; Thorington v. Gould, 59 Ala. 461; Hennessy Bros. & E. Co. v. Memphis Nat. Bank, 64 C. C. A. 125, 129 Fed. 557; Kissam v. Anderson, supra; Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; Dana v. National Bank, 132 Mass. 156; Whitaker v. Kilroy, 70 Mich. 635, 38 N. W. 606.

The agent's authority must be direct and specific, or the facts and circumstances must be of such a nature that the right to act may be fairly inferred. Corey v. Hunter, 10 N. D. 12, 84 N. W. 570.

Corporations are only capable of speaking through their officers and agents, and parties dealing with them have the right to rely upon their statements and the appearances existing. Thomp. Corp. § 4889, quoted in Helena Nat. Bank v. Rocky Mountain Teleg. Co. 20 Mont. 379, 63 Am. St. Rep. 635, 51 Pac. 829; Herman, Estoppel & Res Judicata; Quirk v. Thomas, 6 Mich. 119; Steinke v. Yetzer, 108 Iowa, 512, 79 N. W. 286; Cadillac State Bank v. Cadillac Stave & Heading Co. 129 Mich. 15, 88 N. W. 67.

Parties so dealing do not need to go elsewhere for information. Tunison v. Detroit & L. S. Copper Co. 73 Mich. 452, 41 N. W. 502; Leroy & C. Valley Air-Line R. Co. v. Sidell, 13 C. C. A. 308, 26 U. S. App. 656, 66 Fed. 31; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; Page v. Fall River, W. & P. R. Co. 31 Fed. 257; 10 Cyc. 111 et seq.

The evidence shows that it was contemplated by the corporation that it would be necessary in their business to give notes. The by-laws provide for this also. 10 Cyc. 904, ¶ B., notes 74–76; Glidden & J. Varnish Co. v. Interstate Nat. Bank, 16 C. C. A. 534, 32 U. S. App. 654, 69 Fed. 912; Africa v. Duluth News Tribune Co. 82 Minn. 283, 83 Am. St. Rep. 424, 84 N. W. 1019; Richmond, F. & P. R. Co. v. Snead, 19 Gratt. 354, 100 Am. Dec. 677; Jones v. Williams, 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353; Helena Nat. Bank v. Rocky Mountain Teleg. Co. 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829; Dexter Sav. Bank v. Friend, 90 Fed. 703; Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 573, 43 L. ed. 1091, 19 Sup. Ct. Rep. 817; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; St. Clair v. Rutledge, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234; Claflin v. Lenheim, 66 N. Y. 305; Bennett v. Curry, 21 N. Y. Supp. 47.

Holding out an ostensible agency and ratification of unauthorized acts are all akin to estoppel, and exist as elements of estoppel. Thomp. Corp. § 4889.

One ought to safely rely upon the word and representations of the treasurer of a corporation. When he speaks with reference to a subject over which the corporation has authority, it is the corporation speaking. Whitaker v. Kilroy, 70 Mich. 635, 38 N. W. 606; Hirschmann v. Iron Range & H. B. R. Co. 97 Mich. 384, 56 N. W. 842; Beattie v. Delaware, L. & W. R. Co. 90 N. Y. 643; St. Clair v. Rutledge, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234; Hennessy Bros. & E. Co. v. Memphis Nat. Bank, 64 C. C. A. 125, 129 Fed. 560.

Unless waived, findings of fact must be made by the trial court. Garr, S. & Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867; Rev. Codes, 1905, § 7041; 38 Cyc. 1974, note 24, 1962, Subdiv. B. Rev. Stat. § 649; Anglo-American Land, Mortg. & Agency Co. v. Lombard, 68 C. C. A. 89, 132 Fed. 721, and cases cited; Briere v. Taylor, 126 Wis. 347,

105 N. W. 817; Wood v. La Rue, 9 Mich. 160; Adams v. Champion, 31 Mich. 233; Hudson v. Roos, 72 Mich. 363, 40 N. W. 467; Bates v. Wilbur, 10 Wis. 416; Humpfner v. D. M. Osborne & Co. 2 S. D. 310, 50 N. W. 90; Barton v. Northern Assur. Co. 10 S. D. 132, 72 N. W. 86; Hardin v. Branner, 25 Iowa, 368; Chesapeake Ins. Co. v. Stark, 6 Cranch, 268, 3 L. ed. 220; Prentice v. Zane, 8 How. 470, 12 L. ed. 1160; Pint v. Bauer, 31 Minn. 4, 16 N. W. 425; Hodge v. Ludlum, 45 Minn. 290, 47 N. W. 805; People v. Fuqua, 61 Cal. 378; Noblesville Gas & Improv. Co. v. Loehr, 124 Ind. 79, 24 N. E. 579; Evansville & R. R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Wells, Railroad Corp. pp. 34 et seq.; Rev. Codes 1905, § 7229.

Bangs, Netcher, & Hamilton for respondents.

There is no difference in principle or precedent between the powers, duties, and liabilities of the agents of corporations and those of natural persons, unless expressly made so by the act of the corporation, or by the by-laws. New York, P. & B. R. Co. v. Dixon, 114 N. Y. 80, 21 N. E. 110; Jones v. Williams, 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353; Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115; Rev. Codes 1905, §§ 5770, 5784; Story, Agency, 126; Corey v. Hunter, 10 N. D. 12, 84 N. W. 570; Busch v. Wilcox, 82 Mich. 336, 21 Am. St. Rep. 563, 47 N. W. 328; Trull v. Hammond, 71 Minn. 172, 73 N. W. 642; Ermentrout v. Girard F. & M. Ins. Co. 63 Minn. 305, 30 L.R.A. 346, 56 Am. St. Rep. 481, 65 N. W. 635.

One dealing with a supposed agent is bound to ascertain the scope of his authority, otherwise he assumes the risk and must suffer the consequences. Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 613, 81 Pac. 4; Dodge v. Birkenfeld, 20 Mont. 115, 49 Pac. 590; Cleveland v. Pearl, 63 Vt. 127, 25 Am. St. Rep. 748, 21 Atl. 261; Franklin F. Ins. Co. v. Bradford, 88 Am. St. Rep. 780, note 1; Chaffe v. Stubbs, 37 La. Ann. 656; Siebold v. Davis, 67 Iowa, 560, 25 N. W. 778; Bohart v. Oberne, 36 Kan. 284, 13 Pac. 388; White v. Langdon, 30 Vt. 599; Adams v. Herald Pub. Co. 82 Conn. 448, 74 Atl. 755; Baker v. Seaweard, 63 Or. 350, 127 Pac. 961; Brown v. Johnson, 12 Smedes & M. 398, 51 Am. Dec. 118; Strawn Farmers' Elevator Co. v. James E. Bennett & Co. 168 Ill. App. 428; United States Bedding Co. v. Andre, 105 Ark. 111, 41 L.R.A.(N.S.) 1019, 150 S. W. 413, Ann. Cas. 1914D

800; Vanada v. Hopkins, 1 J. J. Marsh. 285, 19 Am. Dec. 92; Tidrich v. Rice, 13 Iowa, 214; Kraniger v. People's Bldg. Asso. 60 Minn. 94, 61 N. W. 904; Farmers' & M. Bank v. Butcher's & D. Bank, 16 N. Y. 125, 69 Am. Dec. 678; Pearce v. Madison & I. R. Co. 21 How. 441, 16 L. ed. 184; Dabney v. Stevens, 40 How. Pr. 341; French v. O'Brien, 52 How. Pr. 394; 1 Am. & Eng. Enc. Law, 2d ed. 988; Hurley v. Watson, 68 Mich. 531, 36 N. W. 726.

When a note is executed by an agent whose authority for that purpose is denied, the burden of proving authority rests with the party seeking to enforce payment of the note. Miller v. House, 67 Iowa, 737, 25 N. W. 899; 1 Am. & Eng. Enc. Law, 2d ed. 968; Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640; Kelly v. Strong, 68 Wis. 152, 31 N. W. 721; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Snow v. Perry, 9 Pick. 542; Denning v. Smith, 3 Johns. Ch. 332, note; Story, Agency, § 133.

An agent can only contract for his principal within the limit of his authority, and a person dealing with such agent must inquire about and ascertain the extent of his authority. Swindell v. Latham, 145 N. C. 144, 122 Am. St. Rep. 434, 58 S. E. 1010; Blum v. Whipple, 120 Am. St. Rep. note, 556; Moore v. Skyles, 33 Mont. 135, 3 L.R.A.(N.S.) 136, 114 Am. St. Rep. 802, 82 Pac. 799; Bickford v. Menier, 107 N. Y. 490, 14 N. E. 438; Dyer v. Duffy, 39 W. Va. 148, 24 L.R.A. 339, 19 S. E. 540; Owings v. Hull, 9 Pet. 607, 9 L. ed. 246.

The fact of agency cannot be proved by the declarations of the agent. Somers v. Germania Nat. Bank, 152 Wis. 210, 138 N. W. 713; Bond v. Pontiac, O. & P. A. R. Co. 62 Mich. 643, 4 Am. St. Rep. 885, 29 N. W. 482; Fisher v. Denver Nat. Bank, 22 Colo. 373, 45 Pac. 440; Leu v. Mayer, 52 Kan. 419, 34 Pac. 969; Bacon v. Johnson, 56 Mich. 182, 22 N. W. 276; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924.

Admissions or declarations of an agent are not admissible to establish the fact of agency or the extent of authority. Taylor v. Commercial Bank, 174 N. Y. 181, 62 L.R.A. 783, 95 Am. St. Rep. 564, 66 N. E. 726; Somers v. Germania Nat. Bank, 152 Wis. 210, 138 N. W. 713; 1 Am. & Eng. Enc. Law, 690; McPherrin v. Jennings, 66 Iowa, 622, 24 N. W. 242; Wood Mowing & Reaping Mach. Co. v. Crow, 70 Iowa, 340, 30 N. W. 609; Bacon v. Johnson, 56 Mich. 182, 22 N. W. 276; Marvin v. Wilber, 52 N. Y. 270; Gordon v. Vermont Loan & T. Co. 6 N. D.

454, 71 N. W. 556; Walsh v. St. Paul Trust Co. 39 Minn. 23, 38 N. W. 631.

That one assumes to act as agent is not sufficient to show the relation unless his acts are so open and notorious that it is evident they must have been known to the principal and assented to by him. 1 Am. & Eng. Enc. Law, 2d ed. 969; Reynolds v. Continental Ins. Co. 36 Mich. 131; Walsh v. St. Paul Trust Co. 39 Minn. 23, 38 N. W. 631; Burchard v. Hull, 71 Minn. 430, 74 N. W. 163; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Rev. Codes, 1905, §§ 5770, 5784.

There must be belief of agency by the party dealing with a person holding himself out as an agent, and such belief must be caused by some act or neglect of the person to be held. Harris v. San Diego Flume Co. 87 Cal. 526, 25 Pac. 758; Weidenaar v. New York L. Ins. Co. 36 Mont. 592, 94 Pac. 1; Gibson v. Trow, 105 Wis. 288, 81 N. W. 411; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 59 L.R.A. 657, 93 Am. St. Rep. 113, 65 N. E. 136; First Nat. Bank v. Farmer's & M. Bank, 56 Neb. 149, 76 N. W. 430; Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483; 2 Enc. L. & P. 960.

The doctrine of apparent or ostensible agency or authority cannot be invoked by one who has relied only upon the alleged agent's declarations of his authority, and made no future inquiry. Christ v. Garretson State Bank, 13 S. D. 23, 82 N. W. 89; Harris v. San Diego Flume Co. 87 Cal. 526, 25 Pac. 758; Robinson v. Nipp, 20 Ind. App. 156, 50 N. E. 408; O. W. Loverin-Browne Co. v. Bank of Buffalo, 7 N. D. 569, 75 N. W. 923; 31 Cyc. 1217, 1236; Rev. Codes 1905, § 5769; Gregory v. Loose, 19 Wash. 599, 54 Pac. 33.

The extent of the implied authority of an agent is limited to acts of a like kind with those from which it is implied is fully supported by the authorities. Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 59 L.R.A. 657, 93 Am. St. Rep. 113, 65 N. E. 136; Trent v. Sherlock, 24 Mont. 255, 61 Pac. 650; Moyle v. Congregational Soc. 16 Utah, 69, 50 Pac. 806; McAlpin v. Cassidy, 17 Tex. 449; 2 Enc. L. & P. 952; Dan. Neg. Inst. § 293; 1 Parsons, Contr. 6th ed. p. 62.

Authority to make a negotiable instrument must be expressly conferred or be necessarily implied from the peculiar circumstances of each case. It will not be implied from a mere appointment as general agent.

Mechem, Agency, § 398; Helena Nat. Bank v. Rocky Mountain Teleg. Co. 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829; Dan. Neg. Inst. 292; Foster v. Ohio-Colorado Reduction & Min. Co. 5 McCrary, 329, 17 Fed. 130; Dexter Sav. Bank v. Friend, 90 Fed. 703.

The agent must have either express general authority to issue such paper or express power to issue the particular paper, or there must be implied general authority arising from such frequent exercise of the power by the agent, followed by ratification as to constitute a custom of the corporation. Elwell v. Puget Sound & C. R. Co. 7 Wash. 487, 35 Pac. 376; New York Iron Mine v. First Nat. Bank, 39 Mich. 644, 1 Mor. Min. Rep. 453; Bank of Commerce v. Baird Min. Co. 13 N. M. 424, 85 Pac. 970; Dan. Neg. Inst. §§ 289, et seq.; Bank of Deer Lodge v. Hope Min. Co. 3 Mont. 146, 35 Am. Rep. 458, 1 Mor. Min. Rep. 448; Blum v. Robertson, 24 Cal. 140; City Electric Street R. Co. v. First Nat. Exch. Bank, 62 Ark. 33, 31 L.R.A. 535, 54 Am. St. Rep. 282, 34 S. W. 89; American Exch. Nat. Bank v. Oregon Pottery Co. 55 Fed. 265.

The question of agency must always be determined from the peculiar facts and circumstances of each case. 2 Morawetz, Priv. Corp. § 608.

A person dealing with an agent, knowing that he acts only by a delegated authority or power, must at his peril see that the paper on which he relies comes within the scope and power of the agent. Judge Miller of Supreme Court of the U. S., The Floyd Acceptances (Pierce v. United States) 7 Wall. 666, 19 L. ed. 169.

The acts of an ostensible agent must be known to plaintiff so that it may be possible for plaintiff to have been influenced by them. A single act importing agency and authority, and unknown to plaintiff, would prove nothing. Stanley v. Sheffield, Land, Iron & Coal Co. 83 Ala. 260, 40 So. 34; Adams v. Herald Pub. Co. 82 Conn. 448, 74 Atl. 755.

The treasurer of a corporation is not such an officer as is vested with implied power to make and issue negotiable paper in its name. Oak Grove & S. V. Cattle Co. v. Foster, 7 N. M. 650, 41 Pac. 522; Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318; Torrey v. The Dustin Monument Asso. 5 Allen, 327; Railway Equipment & Pub. Co. v. Lincoln Nat. Bank, 82 Hun, 8, 31 N. Y. Supp. 44; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 565; White v. Madison, 26 N. Y. 117.

An innocent purchaser for value, without notice, of a negotiable note of a corporation, takes it at his peril as to the authority of the officer to draw such note for it. Against such a purchaser the corporation may plead want of authority in such officer to bind it. Chemical Nat. Bank v. Wagner, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535.

Where there is an entire want of power, a note is not made good by transfer before maturity to a bona fide purchaser. 10 Cyc. 1114 Sub. 3 note B.

Such a note is void. Elliott Nat. Bank v. Western & A. R. Co. 2 Lea, 677; Dexter Sav. Bank v. Friend, 90 Fed. 703.

In an action against a corporation on a note, where its execution is denied, the burden of showing the authority by which it was executed is on the plaintiff. Walsenburg Water Co. v. Moore, 5 Colo. App. 144, 38 Pac. 60; Sears v. Daly, 43 Or. 346, 73 Pac. 5; Chicago Electric Light Renting Co. v. Hutchinson, 25 Ill. App. 476; Topeka Capital Co. v. Remington Paper Co. 61 Kan. 6, 59 Pac. 1062; Miller v. House, 67 Iowa, 737, 25 N. W. 899; Marshall Field Co. v. Oren Ruffcorn Co. 117 Iowa, 157, 90 N. W. 618; McRobert v. Crane, 49 Mich. 483, 13 N. W. 826; Parr v. Northern Electrical Mfg. Co. 117 Wis. 278, 93 N. W. 1099; Oberne v. Burke, 30 Neb. 581, 46 N. W. 838.

An agent's apparent powers are those which are conferred by the terms of his appointment, or those with which he is clothed by the character in which he is held out to the world, although not strictly within his commission. Mechanics' Bank v. New York & N. H. R. Co. 13 N. Y. 633; 1 Am. & Eng. Enc. Law, 960; Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 827; Wierman v. Bay City-Michigan Sugar Co. 142 Mich. 422, 106 N. W. 75; Leu v. Mayer, 52 Kan. 419, 34 Pac. 969.

Appellant knew it was dealing with a corporation and was chargeable with notice of Jones' authority, and of the limitations upon it, contained in the corporate act and its by-laws. Dabney v. Stevens, 40 How. Pr. 341; French v. O'Brien, 52 How. Pr. 394; 1 Am. & Eng. Enc. Law, 2d ed. 968; Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640; Kelly v. Strong, 68 Wis. 152, 31 N. W. 721.

Where no authority was shown the admission of the note in evidence was prejudicial error. Marshall Field Co. v. Oren Ruffcorn Co. 117 Iowa, 157, 90 N. W. 618; Louisville, N. A. & C. R. Co. v. Louisville

Trust Co. 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; G. V. B. Min. Co. v. First Nat. Bank, 36 C. C. A. 633, 95 Fed. 33.

Goss, J. This is an action at law on a promissory note of Northwestern Land Company. It is a renewal note of one for the same amount to said national bank as payee, and by it assigned to plaintiff as a purchaser in due course for full value and before maturity. The signature of the defendant to both the original and the renewal note was affixed with a rubber stamp by Jones, who signed his name, so that the purported signatures read: "Northwestern Land Company, by A. H. Jones, Treasurer." Jones was not treasurer, but vice president. He was also cashier of said First National Bank. The principal place of business of the defendant company was in the same office as was that of the First National Bank of Rugby, in the vault of which bank was kept defendant's records, and inside and outside of which building defendant had its signs displayed, noticing its place and kind of business. Defendant is an ordinary trading corporation "for the purchase, ownership, sale, and management of titles to, interest in, and liens upon real estate; and for the purchase, ownership, sale, and management of stock." Jones was one of its three incorporators and always a member of its board of directors. He was the only resident official, as all others resided in Grand Forks, and were but occasionally and temporarily at Rugby. Jones became vice president in January, 1907, when the former president, F. W. Wilder, succeeded him as treasurer. Some eastern stockholder became suspicious that there were irregularities in the transactions of Jones with the company, and were responsible for an investigation of its books in November, 1905. July 6, 1905, Jones had unauthorizedly as treasurer of defendant company executed to the First National Bank, of which he was cashier, the company's note for $2,500, for which the company received full value. This note was twice unauthorizedly after its ratification renewed by Jones as treasurer. No change was made in the actual authority of Jones, so far as the evidence discloses, and Jones remained its treasurer until 1907. But in the spring of 1906 president Wilder, to use his words, "was there a great deal of the time," to keep a check on the operations of Jones and to actually ascertain what was being done, and to participate in the affairs of the company. Its business then and thereafter consisted almost entirely in

managing and handling its farms, some forty quarter sections. The actual authority of the treasurer under the by-laws at all times was that of a general manager. The by-laws provide: "The treasurer shall be the custodian of all the funds, deeds, and property, real and personal, and all evidences of title, ownership, or indebtedness of every kind and description belonging to the corporation. Subject to the control of the board of directors, he shall have the general management of the affairs of the company, with power to contract for the corporation, and to invest the corporate funds within the limitations prescribed, and with authority to execute in the corporation's name and behalf any and all instruments affecting titles to, liens upon, and interests in real and personal property which shall be required to make his contracts operative." This general power, however, was limited by another by-law, dated November 22, 1905, evidently passed at the time of said examination of the records, reading: "But notwithstanding anything hereinbefore contained, the treasurer's power to make any contracts or instruments, affecting in any way the title to any of the real estate of the company or any lien thereon or interest therein, shall not be exercised except with the assent of a majority of the directors." The by-laws also provided that the treasurer "shall have general management of the corporation business, with authority to contract in its behalf, to collect, invest, *and disburse* its funds, and shall perform such other duties as in law devolve upon the executive officer of such corporations;" conditioned that "the power to contract indebtedness rests with the board of directors, no evidence of the indebtedness shall be valid against the corporation unless the same shall be executed in the corporation's name by the president and treasurer jointly." These by-laws were received over plaintiff's objection. It and its cashier, Wells, at all times had been ignorant of their provisions. From 1902 to 1907 Jones as treasurer had exercised to the full at least the actual authority reposed in such office by the by-laws. He had as treasurer redeemed property from real estate foreclosure, and had satisfied real estate mortgages, and had disbursed money in considerable amounts. Checks of the company on the First National Bank were customarily issued on printed blanks by Jones as treasurer, and were paid. The unauthorized promissory note for $2,500 of the defendant to the First National Bank of Rugby was unauthorizedly renewed in January, 1906, by Jones as treasurer, he

shortly afterwards notifying President Wilder thereof, however, and on November 3, 1906, this note was again renewed for $2,500. These notes bore 12 per cent interest, which presumably was paid, the second renewal note bearing the stamp, "paid November 22, 1907," though Wilder testifies that the same was paid at a later date, in May, 1908. Jones was always in *sole charge* of the company's correspondence. In 1907 and 1908 Wilder, then treasurer, to quote his testimony, "After January, 1907, I spend very little time there, still less probably;" and again, "In 1907 and 1908 I was not there very much of any time. . . . it would be very difficult for me to tell you how often I was present in Rugby during the year. I was there very seldom, not many times, perhaps five or six. I stayed only a short time on each occasion." During 1907 and 1908, as always, the power to issue checks and make payments of money was recognized as possessed by Jones, whether he was treasurer or vice president, and during the years he was vice president the evidence discloses nearly 150 paid checks, with Jones' name affixed to the printed checks ahead of the word "treasurer." Many of these bear the genuine signature of Jones, and on others the bank clerks affixed his purported signature, the check thus signed being used as a voucher against defendant's account with the bank. In other words, during this time while Jones was vice president, he was continually issuing and putting in circulation company checks as its ostensible treasurer, and this with the admitted knowledge, acquiescence, and sanction of Wilder, the treasurer, to which office general power was delegated by both by-laws and by the board of directors to superintend corporation affairs. This authority in Jones is shown by the proof to have always been exercised in good faith, and within the scope of his actual authority under Wilder to issue such checks in tthe payment of farming operations of the company during the years 1907 and 1908. Wilder testifies as follows: "I checked up the matter of checks that were given at intervals when I went out there. Whenever I went out there I checked up the account. I knew that during the year 1908 Jones was using the blank printed form, and not scratching out 'treasurer.' I knew that that form was being used in a large number of instances, either by Jones himself or his employees after the act was performed. I saw all those checks. These checks extend over a considerable period of time. I knew that from time to time as I checked up the account. I did not dis-

cover it all at one time. These checks were paid out of the account of the Northwestern Land Company." It also appears that many of these checks were mere vouchers filled out by clerks in the bank as memorandums of charges against the defendant's account. Dozens of them, however, bear Jones' genuine signature, and presumptively were put in circulation before payment. It also appears that loan interest was paid by Jones the same way and during the same period, some of it on direction of Wilder to pay the same, without any particular instructions as to the methods of payment.

The facts concerning the purchase of the note are that plaintiff's cashier, Wells, went to Rugby in October, 1907, and met Jones in the First National Bank office, and in the course of negotiations for the purchase of commercial paper of the bank, was offered by it, acting through Jones, its cashier, a note, purporting to be that of the Northwestern Land Company to the said First National Bank, for $2,500, bearing date of a few days before and due in one year, with interest at 12 per cent. Wells then inquired as to the "standing of the land company, its capital stock, what property it had, and who was connected with it." Jones informed him that its authorized capital was $200,000, with $93,000 paid in, and that the company's net worth was about $110,000, that Wilder was connected with it, that Jones was an officer of the company, "that he signed the note as treasurer, and that he was the treasurer of the company, that Wilder was president." Wells then made a memorandum of Jones' statements concerning the responsibility of the makers of this and of the other notes offered for purchase, and made inquiries of an old acquaintance residing near Rugby, and other residents of the Rugby and county officials. As a result of favorable information so obtained, Wells purchased from the bank, acting through Jones as its cashier, some $8,500 worth of commercial paper, including this note, paying full value therefor to the national bank, which it by Jones as cashier not only indorsed, but guaranteed. A year afterwards, or on October 26, 1908, Wells reappeared at Rugby. He told Jones, acting officer in charge of defendant's business and offices, that it would be perfectly satisfactory to have the Northwestern Land Company note renewed on the same conditions under which the original note had been given, which resulted in the execution and delivery of the note sued on, a duplicate of the original purchased and running to the First National

Bank as payee, and indorsed and guaranteed by it through Jones as cashier. Jones gave Wells for the plaintiff the draft of the First National Bank for the approximately $300 interest accrued on the purported old note of the defendant, which draft was paid in due course. Wells believed Jones to be the treasurer of the defendant, and had no information that he was not such official, or was not actually authorized to execute this negotiable paper in behalf of the corporation. The original note was purchased, and the renewal thereof permitted and accepted on the strength of the financial standing of the defendant company, together with the indorsement and written guaranty of the First National Bank by Jones, its cashier. In 1908 Wells was in the office "probably ten or a dozen times, that is, different trips there; was in and out a number of times when there,—in fact, made my headquarters there." It is not shown that Wells knew that Jones was permitted to or had ever issued checks or any other paper on behalf of the defendant. When taking the renewal note, Wells made no inquiries as to who the officials of the land company were, or as to whether Jones was its treasurer, relying on his acts and the information given by Jones the year before. There is in evidence, all received over plaintiff's objection, the testimony of the assistant receiver for the First National Bank, which bank went into a receiver's hands in January, 1909, to the effect that the bank books did not show any entry in connection with either the original or the renewal note in question, and that the interest payment on such renewal of the original note was not paid out of the funds of the defendant company; and also that more of purported notes of the First National Bank negotiated by Jones were not entered upon the bank books. It was also shown, over objection, that the defendant received no value from the First National Bank or from any person for the first note or the renewal, and repudiated the whole transaction, and denied its liability on the note as soon as its officials, other than Jones, became cognizant thereof, presumably sometime after the bank had gone into the receiver's hands.

Plaintiff's claim to a recovery is based upon alleged ostensible authority of Jones to act as treasurer, and his ostensible authority in such capacity to issue this note in defendant's behalf. Defendant asserts that the acts of Jones were not its acts, and that whatever was done by him was beyond the scope of his either actual or ostensible authority;

that all evidence of the issue of checks by Jones was immaterial, as unknown to plaintiff, and not inducing its purchase or subsequent acts; that the by-laws, limiting the actual authority of Jones' imputed constructive notice to plaintiff of their contents, and charged plaintiff with knowledge of the want of actual authority in Jones to execute its negotiable paper; that the statements of Jones that he was its treasurer cannot be considered as establishing either actual or ostensible authority in him to act as such, or establish his agency to bind defendant; that an apparent agency is insufficient to obligate defendant on its purported note, and actual authority in Jones to issue its negotiable paper must be shown; that no facts upon which an estoppel against defendant can be based are disclosed, and no relationship of principal and agent by estoppel can be found to have existed; that this is a case of utter want of power in Jones to issue this negotiable paper, not a case of irregular exercise of the power conferred; that the burden of proof was upon the plaintiff, and it has failed to make a prima facie case.

The court made findings of fact and conclusions of law in defendant's favor, and judgment of dismissal was entered, from which plaintiff appeals on specifications of error and assignments in its brief, necessitating a review of all the evidence, and a determination of whether the findings are sustained by any competent evidence. Though tried to the court, the findings have the force of a jury's findings. So far as necessary all matters so raised will be discussed and passed upon.

This is a trading corporation. To issue commercial paper one of its implied powers, it not being restricted from so doing by its charter or by statute. 10 Cyc. 1111; Thomp. Corp. 2d ed., §§ 2185–2192. This promissory note, if void, must be so because of the irregular or wrongful exercise of the power, instead of any want of power in the corporation to issue commercial paper. If, then, this note is issued under actual or ostensible authority for its issue, it is the corporation's note and binding upon it. But its officer, purporting to act for it as its treasurer, was not such in fact, but instead was its vice president. Whether the company is bound by the act of its vice president as the act of its treasurer depends upon whether the vice president had ostensible authority from it to so act as its treasurer, or is estopped to allege he was not treasurer, and, in addition, in either event it is also necessary that plaintiff further establish either actual or ostensible authority in the treasurer to issue negotiable paper for defendant.

The authorities recognize the theory of ostensible authority in a corporate agent to issue negotiable paper in behalf of a corporation, but usually limit the scope of such claimed ostensible authority: Mechem, Agency, §§ 389, 390; Blood v. La Serene Land & Water Co. 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Sanford Cattle Co. v. Williams, 18 Colo. App. 378, 71 Pac. 889; Bank of Commerce v. Baird Min. Co. 13 N. M. 424, 85 Pac. 970; Helena Nat. Bank v. Rocky Mountain Teleg. Co. 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829; New York Iron Mine v. First Nat. Bank, 39 Mich. 644, 1 Mor. Min. Rep. 453; Henderson Mercantile Co. v. First Nat. Bank, 100 Tex. 344, 99 S. W. 850; Crawford v. Albany Ice Co. 36 Or. 535, 60 Pac. 14; Grommes v. Sullivan, 43 L.R.A. 419, 26 C. C. A. 320, 53 U. S. App. 359, 81 Fed. 45; Hennessy Bros. & E. Co. v. Memphis Nat. Bank, 64 C. C. A. 125, 129 Fed. 557; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Armstrong v. Chemical Nat. Bank, 27 C. C. A. 601, 54 U. S. App. 462, 83 Fed. 556, as modified in Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498. Section 19 of the uniform negotiable instruments act, as enacted in chap. 113, Sess. Laws, 1899, § 6321, Rev. Codes, 1905, provides: "The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency." This declares the authority of this agent of the corporate principal may be established as in other cases of agency, *i. e.*, by proof of the ostensible authority of the agent; but upon what shall constitute sufficient proof of ostensible authority of the agent to issue negotiable paper of the various kinds the statute is silent. That is left to the common law or other statutes for definition and limitation. The negotiable instruments act has not permitted less proof to establish such ostensible authority in the agent than would be required without it.

In its relation to agency our statute, § 5770, Rev. Codes 1905, defines ostensible authority to be, "such as the principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess;" and § 5768, Rev. Codes 1905, declares: "An agent has such authority as the principal actually or ostensibly confers upon him." Its application presupposes, of course, the existence of the relation of principal and agent. But all proof in this case of actual as well as ostensible authority establishes that at all times Jones has been

the agent of the corporation principal, and at the times in question was its vice president, and as such in sole charge of its principal place of business. The statute defining ostensible authority is but a codification of the common law on the subject. "All authority emanates from the principal, who may confer as little or as much as suits his purposes, and unless an alleged authority can be traced home to him as its author and its source, it cannot operate against him. It rests upon his will and intention. That will and intention may find expression in words, but it may also be declared by conduct. The authority of the agent, then, so far as third persons are concerned, is as broad, not only as the words of *the principal,* but *as broad also as his acts and conduct.* In other phrase it is, so far as third persons are concerned, as broad as *the principle has made it appear to be.* As respects the mutual rights and dealings of the principal and agent, the actual authority may govern, but as respects the liability of the principal to third persons for the acts and contracts of the agent, it is the apparent authority which controls. This apparent authority may be the result of his negligent act,—of his omission, silence, or acquiescence. . . . If the principal leads third persons acting reasonably in good faith to believe that his agent possesses a certain authority, then as to them he does possess it;" Mechem, Agency, § 707. This is but the stating in other language of §§ 5768, 5769, and 5770, Rev. Codes 1905, defining actual and ostensible authority of agents. "While, as has been stated, persons dealing with the agent are bound to know the extent of his authority, they may reasonably take the visible and apparent interpretation of that authority by the principal himself as the true one and as the one by which he chooses to be bound." Same authority, § 708. Applying these rules to facts necessitates a conclusion upon, first, whether Jones as its vice president had ostensible authority to represent defendant in the capacity of its treasurer in its dealings with third persons; and, if so, whether he had ostensible authority under the circumstances to issue and deliver this particular note as that of the corporation.

The question now arises, To what extent do the by-laws and records of the defendant corporation affect this plaintiff, who dealt in ignorance of them? So far as they grant actual authority they are binding upon the defendant; so far as they restrict the ostensible authority of its vice president, and in the absence of negligence on the plaintiff's part, they do not limit plaintiff's right to deal under and in reliance upon the

ostensible authority of that agent. Knowledge of the by-laws and contents of the corporate books are not imputed to plaintiff, in the absence of negligence. It had the right to deal in the customary manner and in ignorance of them. True, it was bound to know at its peril that it was dealing with an agent of the corporation, and an agent with either actual or ostensible authority to act and to issue corporate paper; but further than that it need not inquire when so dealing. The rule that a person, dealing with an agent in ignorance of his actual authority as defined by the by-laws, is not protected, but is presumed to have knowledge of the agent's actual authority as evidenced by the by-laws, is in force in but few jurisdictions, and is contrary to the weight of authority in the absence of a statute so providing. No statute here covers this question. Consult §§ 4201–4226, Rev. Codes 1905, as to corporations generally. "The apparent authority of an agent of a corporation cannot be extended or restricted as against a stranger by by-laws of such corporation in the absence of actual knowledge thereof." Thompson on Corporations, §§ 1055 & 1687, citing many authorities, some of which are Johnston v. Milwaukee & W. Invest. Co. 46 Neb. 480, 64 N. W. 1100; Rathburn v. Snow, 10 L.R.A. 355, note; Moyer v. East Shore Terminal R. Co. 25 L.R.A. 48, and note, 41 S. C. 300, 44 Am. St. Rep. 709, 19 S. E. 651; Ashley Wire Co. v. Illinois Steel Co. 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410; Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359; Austin v. Searing, 69 Am. Dec. 665, note; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671. See also 10 Cyc. 924. "The person dealing with the agent is only entitled to assume that he has such powers as the principal has expressly or impliedly held him out to possess. If the agent is not held out as belonging to a definite class whose powers are established by custom, and the corporation has not acquiesced in a course of dealing by the agent in this character, then the party dealing with the agent must at his peril ascertain what powers have been actually delegated to him, and if these powers are conferred by a by-law he must ascertain its terms." Thomp. Corp. § 1688. But, "corporations are held to whatever is within the apparent scope of the powers with which they have either *intentionally* or *negligently* clothed their agents, unless the parties with whom such agents contract have notice that their powers are limited. Third persons will not be affected by secret instructions given agents restricting these pow-

ers. The principle is that a person is bound to know whether an officer or agent of a corporation is authorized to act in its name. If he is, and the act is within the apparent scope of his authority, he is not bound to have knowledge of extrinsic facts incapacitating the officer or agent to act in that case." Thomp. Corp. § 1690. The by-laws and records of the company were inadmissible to limit the ostensible authority of Jones, either to conclusively establish his official character as vice president and that he was not treasurer, if the evidence establishes ostensible authority in him to act as treasurer, or to negative his ostensible authority to execute as its treasurer the promissory notes of this company. Of course the by-laws were properly receivable as evidence of the defendant's claim of limited actual authority in Jones as a part of its defense.

The actual authority under the by-laws not precluding the plaintiff from relying upon the ostensible authority of Jones, further consideration necessitates the examination for such basis for claimed ostensible authority in Jones to bind defendant as his principal. Wells in November, 1907, found Jones the actual agent and vice president of defendant, surrounded with all the indicia of full authority to represent it; he was in sole charge of its principal place of business, was its executive agent, with considerable actual authority; he was cashier and in full charge of a national bank, whose officers were also the defendant company's offices,—facts in themselves vouching for the financial responsibility and business repute of this official of defendant. True, defendant was not responsible for his cashiership, but it was responsible for the identity of offices and apparent business connection, and for this cashier's ability to represent it as its vice president and ostensible treasurer, if he did so. Defendant must be charged with those reasonable inferences that Wells, the cashier of the foreign plaintiff bank, would naturally draw from appearances he there found, and from what he, as a reasonable business man, would reasonably conclude from finding these two corporations nesting in the same offices, and both apparently in the charge of the same executive officer, with each corporation lending influence and drawing business for the other. Land companies in connection with and operated by banks are almost the rule, instead of the exception. If the removal of Jones as treasurer in January, 1907, be considered, the fact must not be overlooked that he was vir-

tually left in charge of whatever business was done by the company. Neither its president nor treasurer after 1906 actively participated in its affairs, but left matters to Jones. The suspicion of Jones that developed among the stockholders in 1906 had evidently been allayed. Defendant's unauthorized notes to the bank were ratified because the company had received the proceeds. The many disbursements of company money by himself as ostensible treasurer were treated as regular, and scores of these checks are in evidence disbursing several thousand dollars for the company, continually from practically the time he actually ceased to be treasurer in fact down to the receivership. All these facts are sufficient to present the question of fact of his removal as treasurer being more apparent than actual. While he did not hold that official position, he often exercised the powers of treasurer, and with the acquiescence of the company. In this respect we speak of Wilder as the company, as it appears that he was given general actual authority to direct its affairs and supervise the operations of Jones, he having been the recognized authority for such purposes even during the last year Jones was actual treasurer. And it appears that Wilder thus acting not only acquiesced in an appearance of actual authority in Jones, but also by letter advised Jones as to how to hold himself out as possessing authority Jones did not in fact have in connection with real estate instruments. In January, 1907, after the removal of Jones as treasurer, Wilder writes him: "I inclose you herewith a deed from the Northwestern Land Company in blank to the Passmore land, which I have executed in behalf of the corporation as its treasurer, thereby complying with the by-laws. If you desire to demonstrate your connection with the corporation, all you have to do is to sign 'A. H. Jones, Vice President,' and put an acknowledgment on the back, and those people up there won't know but that is the only thing that makes the deed good; all that they can possibly know about it is that there has been a shifting of the officers." Every word of this is significant, and strongly indicative of an intent of the official contended by defendant to be in control that the actual authority of Jones should not be known, unless Jones desired it to appear, it being left with him as to how far he should deceive "those people up there" as to what his actual authority was. "Those people up there" were the inhabitants of Rugby and vicinity, the patrons of this land company and of the associate bank. If this

was the attitude of the controlling officer of this corporation in the early part of 1907, as appears over his own signature to be the fact, the conclusion of fact might naturally follow that the ostensible authority of Jones was not in reality more limited in the years 1907 and 1908 than his actual general authority as treasurer prior thereto had been, inasmuch as the inspection visits of Wilder became less frequent and almost ceased, as appears from Wilder's own testimony. After this, in November, 1907, Wells happens along, finds Jones in such apparent authority, and in dealing with the bank of which Jones was cashier was offered notes for discount, among them this one of the defendant company. Wells was a banker, and the proof is that he used at least ordinary care, making considerable inquiry concerning this company, in the course of which he inquired at its only and principal office,—the proper place to get first-hand reliable information (Tunison v. Detroit & L. S. Copper Co. 73 Mich. 452, 41 N. W. 502; Bank of Batavia v. New York, L. E. & W. R. Co. 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433; Donohue v. Watson, 72 Misc. 56, 128 N. Y. Supp. 1089),—and of the company's representative in charge to give such, and, as the proof discloses, of the agent who would have given it in writing, had the inquiry been by letter; and that representative thus inquired of was a director and the vice president, and, with the president, treasurer, and other officials absent, the one to whom inquirers for the manager were always referred. He was authorized to answer this inquiry of Wells as to who were the officials of the company as a duty within the actual scope of his employment and authority, and as the official in charge of its principal place of business. His response to such business inquiries was the voice of the company speaking through its *authorized* agent, and for whose such acts it was responsible. "Corporations are liable for the acts of their servants while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances." Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604–646, 19 L. ed. 1008–1018; notes in 33 Am. St. Rep. 720, 2 Am. St. Rep. 312, and 82 Am. Dec. 520. To this inquirer in the course of a pending business transaction, Jones made answer that he was the treasurer of the defendant company, and was such when the note he exhibited was given, and that he signed it as its treasurer. He told who the president

of the company was and for what it was capitalized, and the amount thereof paid in and of what its assets consisted. These statements were made under actual (not apparent or ostensible) authority in Jones to make them in the defendant's behalf, and Wells had the right to rely on their truth as a statement of facts. That these statements were made in fraud of defendant concerning a transaction in fact unauthorized does not change the fact that they were within the general scope of the duty and employment of Jones, and his wrongful or untruthful representations as to facts bind where his truthful statement of facts would do likewise. Jarvis v. Manhattan Beach Co. 51 Am. St. Rep. 727, and note (148 N. Y. 652, 31 L.R.A. 776, 43 N. E. 68); Gunster v. Scranton Illuminating Heat & P. Co. 59 Am. St. Rep. 650, and note (181 Pa. 327, 37 Atl. 550). It will be noticed that the statement made by Jones was not that he was an agent of the company or authorized by it to issue this paper. Short v. Northern P. Elevator Co. 1 N. D. 159 at 163, 45 N. W. 706. Instead, it is a declaration of independent facts, "not including the terms of his authority, but upon which his right to use his authority depends," and which this agent, his vice presidency, directorship, and charge of defendant's offices having been shown, had authority to make under the express provisions of § 5772, Rev. Codes 1905. Such is the law independent of statute. Mechem, Agency, §§ 714, 715; Clark & S. Agency, §§ 466, 467; North River Bank v. Aymar, 3 Hill, 262, at page 266. Having actual authority to make a truthful response to the inquirer, his misrepresentation that he was treasurer, though false, was an act committed by the agent in and as a part of the transaction of authorized business, for which, under the provisions of § 5788, Rev. Codes 1905, his principal, the corporation, is responsible, and whose act is the corporation's act to that extent. Had Wilder, the treasurer, or Wheeler, the president, made the same representation, it would have been no more the word of the company than the statement made by Jones that he was its treasurer then and when the note was signed. The company itself then had informed Wells before he dealt for its paper that Jones was its treasurer, and he had the right to rely on the truth of its representation concerning that fact. Farmers' & M. Bank v. Butchers' & D. Bank, 16 N. Y. 125, 69 Am. Dec. 678, quoted and approved in Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 649, 19 L. ed. 1008, page 1019; Fifth Ave. Bank

v. Forty-second Street & G. Street Ferry R. Co. 33 Am. St. Rep. 712, and note (137 N. Y. 231, 19 L.R.A. 331, 33 N. E. 378); Griswold v. Gebbie, 12 Am. St. Rep. 878, and note (126 Pa. 353, 17 Atl. 673), and if Wells's testimony be true, defendant is estopped to deny the truth of such representations so made within the scope of Jones' actual authority, including his representation that he was treasurer then and when the note was signed by him as such. See above authorities and also Ring v. Long Island Real Estate Exch. & Invest. Co. 93 App. Div. 442, 87 N. Y. Supp. 682; Jarvis v. Manhattan Beach Co. 148 N. Y. 652, 31 L.R.A. 776, 51 Am. St. Rep. 727, 43 N. E. 68; Knox v. Eden Musee American Co. 148 N. Y. 441, 31 L.R.A. 779, 42 N. E. 988; Hannon v. Siegel-Cooper Co. 167 N. Y. 244, 52 L.R.A. 429, 60 N. E. 597.

But, it may be asked, if Jones' statement of facts thus made binds the corporation principal, when do the statements of an employee or official not bind his principal? "The test as to liability of the principal for the acts of his agent is as to whether the acts were committed in the course of his employment and within the scope of his agency." Jennie Clarkson Home v. Missouri, K. & T. R. Co. 182 N. Y. 47, 70 L.R.A. 787–792, 74 N. E. 571. "What an agent does within the scope of his authority binds his principal; and this applies not only to his acts, but to all the representations made by him in that business;" not merely narration of past transactions or occurrences, note in 2 L.R.A. 808 at 810, citing: Cotton States L. Ins. Co. v. Edwards, 74 Ga. 220; Byne v. Hatcher, 75 Ga. 289; Lilley v. Fletcher, 81 Ala. 234, 1 So. 273; Hakes v. Myrick, 69 Iowa, 189, 28 N. W. 575; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. 232; Hennessy Bros. & E. Co. v. Memphis Nat. Bank, 64 C. C. A. 125, 129 Fed. 557–560; Myers v. Southwestern Nat. Bank, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280.

It may be here remarked that in purchasing this note the plaintiff was not dealing with the company, though receiving from it information relied upon in dealing, but instead dealt with the bank, ostensibly holding the commercial paper, and as such plaintiff is protected in its title to the purported obligation as a holder in due course. American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99; McPherrin v. Tittle, 44 L.R.A.(N.S.) 395, and extensive note (36 Okla. 510, 129 Pac. 721).

Nearly a year after the first transaction, Wells reappears at Rugby, is at defendant's place of business a dozen times, finds conditions as formerly, with Jones in full charge and apparently in sole authority, and, as Wells supposed, the treasurer; and, if Jones had been such official, he would have had both actual authority under the by-laws and ostensible authority under the proof to pay its obligations. Wells presents the note for payment, and the interest is paid to the amount of nearly $300, and Wells in further satisfaction accepts the renewal note sued on, to which the land company's signature is affixed by Jones as treasurer, and upon which note the indorsement of the First National Bank is also placed by its cashier. It is not necessary to pass upon whether this payment is a ratification of the purported original obligation. Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co. 67 Fed. 49. It is a familiar rule that to ratify the power must exist to create the debt ratified. But, it certainly is evidence of ostensible authority in Jones to execute this particular paper. Though the treasurer by virtue of his office was without actual authority to issue corporate promissory notes, yet he had the actual power to pay the debts of the corporation, and a finding that Jones was at this time the ostensible treasurer, or that defendant is estopped to deny that he was such, is the equivalent of a finding that the payment of interest thus made was the act of the defendant corporation. It is therefore immaterial on the question of authority of the agent that the money used in making such payment was not that of the defendant, nor charged against defendant's deposit, as it would be liable to the party whose funds were so wrongfully used by its official to pay its purported obligation when the scope of the employment authorized payment of its debts, as the making of an erroneous payment was but an error in the performance of the agent's duty. Fifth Ave. Bank v. Forty-second Street & G. Street Ferry R. Co. 19 L.R.A. 231 and note (137 N. Y. 231, 33 Am. St. Rep. 712, 33 N. E. 378); Manhattan L. Ins. Co. v. Forty-second Street & G. Street Ferry R. Co. 139 N. Y. 146, 34 N. E. 976, as construed in Jennie Clarkson Home v. Missouri, K. & T. R. Co. 182 N. Y. 47, 70 L.R.A. 787, 74 N. E. 571. The underlying controlling principles involved are identical with those applicable, had Jones in October, 1908, paid plaintiff in full both principal and interest, instead of but the interest on the original note, and were the parties reversed, and this was

a suit by defendant to recover of plaintiff the amount so paid, or instead, for this interest payment of $300. But by such a suit, it may be urged, defendant would necessarily admit that its money made such payment of interest or principal or both to Wells for plaintiff, which fact it denies and has sought to disprove. But whether its money was used is not the test of its liability. Its agent made the payment under actual authority under the by-laws, if Jones was then its ostensible treasurer. His embezzlement of the bank's money to pay the defendant's debt was the defendant's act,—minus criminality, so far as third persons without notice were concerned. Otherwise, an act done in excess of actual authority by a corporate agent in performance of his duties, but within the scope of his employment in matters with third persons, exonerates his corporate principal. Such is not the law, and the trend of authority is to hold the principal as responsible for the excess over strict actual authority of the agent, rather than penalize the innocent third party reposing confidence in the chosen representative of the principal intentionally clothed by it with an actual, though secretly limited, authority. All things being equal, the principal as the party at fault must suffer the results as those of his own act. North River Bank v. Aymar, 3 Hill, 262–268; McCord v. Western U. Teleg. Co. 1 L.R.A. 143 and note (39 Minn. 181, 12 Am. St. Rep. 636, 39 N. W. 315); Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326, 5 L. ed. 100; Rathburn v. Snow, 10 L.R.A. 355 and note (123 N. Y. 343, 25 N. E. 379); Wheeler v. McGuire, 2 L.R.A. 808 and note (86 Ala. 398, 5 So. 190).

The defendant as principal is responsible "only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused by the agent." 2 Enc. L. & P. 960, citing among other authorities Wheeler v. McGuire, 86 Ala. 398, 2 L.R.A. 808, 5 So. 190; St. Louis, I. M. & S. R. Co. v. Bennett, 53 Ark. 209, 22 Am. St. Rep. 187, 13 S. W. 742; Godshaw v. J. N. Struck & Bro. 109 Ky. 285, 51 L.R.A. 668, 58 S. W. 781; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570. The appearances of authority from which ostensible authority must be judged, and for which the defendant is responsible as having caused, include among others the official relation of Jones to the company, he standing in the relation thereto both ostensibly and under estoppel arising from his represen-

tations as its treasurer, and as such under its by-laws possessed of general executive authority in its behalf, as its general manager exercised for years, besides being the actual custodian of its moneys and its disbursing officer to pay debts and to determine as well what purported obligations were its debts, a power necessarily included in and to be inferred from the general authority in the agent, both under the by-laws and under the evidence.

But respondent, citing Corey v. Hunter, 10 N. D. 5, 84 N. W. 570, invokes another rule of agency, that the scope of the ostensible authority in the agent is both circumscribed and measured by the nature of the acts authorized actually or ostensibly to be done by the agent, and contends that as the evidence shows but three instances of unauthorized issuance of corporate negotiable notes by Jones, and but the issuance of checks and other payment of money disbursements prior to the issuance of this note, that no implied authority or ostensible agency is shown in Jones to issue this promissory note. It is true that "the nature and extent of an implied authority are deemed to be limited to acts of a like nature with those from which it is implied, and an implied agency is never construed to extend beyond the obvious purposes for which it is *apparently* created." 2 Enc. L. & P. 952. But "obviously the question whether any particular power is to be implied in any particular agency is one depending in large measure on the facts and circumstances of the individual case." 2 Enc. L. & P. 953. The question is largely one of fact as to what the scope of the apparent authority in the agent was. Jones had been general agent as treasurer for several years, and had issued three notes of the company as treasurer, whether such official in fact or not apparently made no difference with him or with the company. He assumed to act three times in direct violation of the company's by-laws, and there is evidence from which it might be found that he was negligently permitted to remain in a position of apparent authority to issue more of its notes, and dispose of them through the bank as once before and here done. The only difference between the previous issue of notes by Jones and this instance is that here he has misappropriated the proceeds. The issuance of a series of its checks during the years in question when he was permitted to remain the virtual custodian of its funds, inasmuch as its deposits were under his control in the same vault as was its records, its intrusting of its busi-

ness to him with slight supervision in fact, the commingling of its business and offices with the bank, and permitting Jones to preside over both with seeming authority and apparent financial responsibility and trustworthiness in any dealing with others and the community in general,—*all these taken together* might be taken as sufficient to apparently clothe him with an ostensible authority to issue negotiable promissory notes of his corporate principal, of which he was the *apparent* general manager for years. "The question in every case is whether the principal has, by his voluntary act, placed the agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform the particular act in question. Agents of private corporations are within the rule." 2 Enc. L. & P. 959. Johnston v. Milwaukee & W. Invest. Co. 46 Neb. 480, 64 N. W. 1100; Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086. Coupled with the actual authority and appearances thereof arising therefrom, under which plaintiff purchased the first note, are the circumstances surrounding the execution and delivery of the note sued upon, including actual part payment of the first note by the exercise of an actual authority to pay debts, though by an unknown misuse of its funds it is true. The situation is not one of a stranger parting with his money by making a corporation a loan, it acting by its vice president in charge without actual or ostensible authority to act, and it receiving no consideration for its purported note. Instead, it is rather a situation well fitted to deceive the careful and prudent banker, which to all appearances and presumptions Wells was. The question is one of fact, and the evidence is prima facie sufficient as to ostensible authority in Jones to issue this promissory note to at least carry the question to the jury. Galbraith v. Weber, 28 L.R.A.(N.S.) 341 and note (58 Wash. 132, 107 Pac. 1050); Gratton & K. Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 Pac. 879; Holt v. Schneider, supra.

As to the objection made by the defendant to the numerous checks in evidence, offered for the purpose of showing that Jones had ostensible authority to act as treasurer, notwithstanding he was not such officer, which proof defendant contends was inadmissible except on the theory of estoppel, and to work which it is contended knowledge in Wells of the issue of the checks prior to the purchase of the notes should be

shown; a discussion of this involves the fundamental theory of ostensible authority. This very question is exhaustively treated in Blake v. Domestic Mfg. Co. 64 N. J. Eq. 480, at page 491 et seq., 38 Atl. 241, at page 256 et seq. "The precise question now involved . . . relates to the effect against the company of an agent's holding himself out to the public as authorized to indorse for discount and for the company's credit the business paper of the company without the directors' actual knowledge, but when they ought to have known of the agent's discounting for their credit; and the point to be resolved is whether the exercise of the authority under such circumstances creates the power as to the public, or whether the power is only created as against the company by reason also of the actual knowledge of the directors; and of the actual reliance upon the previous holding out to the public by the person dealing with the agent. The solution of the question depends . . . upon the application of principles relating to the law of agency, which are now too firmly settled to be called in question. In the first place a distinction between special and general agents is firmly settled in the law, which has also recognized general agencies either to transact a business or to perform a particular act or class of acts for the principal. And in reference to the creation of these general agencies either for a particular class of acts or the transaction of a business, the principle established is that such general agencies are in fact created against the principal by reason of his conduct in permitting the agent to hold himself out to the public as having the authority. . . . In Smith v. M'Guire, 3 Hurlst. & N. 554 (1858) the question of the effect toward the public of permitting another to act as a general agent was directly involved, and the particular question involved was whether the agent, who in the transaction of the business of the principal had constantly chartered vessels, but always or usually under special instructions, had a right to charter a vessel without such instructions so as to impose a liability upon the principal for not taking a cargo. Chief Baron Pollock says (at p. 560): 'I think that questions of this kind, whether arising on a charter party, a bill of exchange, or any other commercial instrument, or on a verbal contract, should be decided on this principle: Has the party who is charged with liability under the instrument or contract authorized and permitted the person, who has professed to act as his agent, to act in such a manner and to such an

extent that from what has occurred publicly the public in general would have a right to reasonably conclude, and persons dealing with him would naturally draw the inference, that he was the general agent? If so, in my judgment, the principal is bound, although as between him and the agent he takes care on every occasion to give special instructions.' In this case the holding out to the public by permitting the continued and general acts itself as to the public created the general agency to bind the principal by the act in question, although the actual authority as created between the principal and agent would not have permitted the act. The same principle that a general agency to do a particular act (*e. g.,* to indorse paper and make loans) may be created by a holding out to the world, is also recognized in our own decisions. In Fifth Ward Sav. Bank v. First Nat. Bank, 47 N. J. L. 357, 1 Atl. 478 (1885) the treasurer of the plaintiff savings bank obtained a loan of the defendant in the name of the plaintiff, and ostensibly for its use, pledging securities of the savings bank for its repayment. The treasurer fraudulently misappropriated the funds to his own use, and the savings bank brought an action of trover for the value of the securities. On verdict for the plaintiff and application for a new trial, Chief Justice Beasley said (at p. 358): The treasurer not having express power to make the loans or pledge the bonds, 'the only open point of inquiry on this question was whether or not the plaintiff had put its treasurer in such an attitude before the public or before the defendant as to have warranted a reasonable inference that he was its general agent, and had the right to execute the transaction in question.' . . . The opinion of the court said (at p. 527) that: 'When in the usual course of a business of a corporation an officer has been permitted to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business, and that in such cases the authority of the officer does not depend so much upon his title or on the theoretical nature of his office, as *on the duties he is in the habit of performing.*' The careful and precise statement in the above case by the learned chief justice of the question to be left to the jury in such cases distinguishes, it will be noticed, between the holding out to the world and the holding out to the defendant; and this distinction as it seems to me, touches directly one of the questions now involved, *viz.,* whether the general agency in such cases arises

from estoppel. If there was a holding out to the defendant, but not a holding out to others or to the public as well, then the agency in such case might well be said to depend upon the estoppel of the principal to deny the agency, which he had held out to the creditor, and which the creditor had relied on. But it is clear . . . that in commercial transactions, which must be carried on largely by means of general agencies to do particular acts, there is an agency which is created by the general and public exercise of an authority with the permission of the principal; and where this general agency in fact exists as arising from this source, it is not necessary for the creditor to show further that it was previously known to him, and that he acted in reliance on it. Where the agency is a general agency provided by the continued exercise of the authority toward the public by the permission of the principal, and there is an estoppel to the public, the law presumes that the public knew of the holding out by the principal and acted on it. The principle of technical estoppel as between parties is not at all involved in such cases, and . . . could not be, for the reason that an estoppel of the principal toward the third person dealing with the agent must depend upon the representation by the principal made to the creditor. A representation to others could not, generally speaking, give rise to a technical estoppel at all, and the holding out to others or to the public, if it is to have any legal basis at all, must be by creating of itself, and wherever it is proved to exist a general authority as to the public for the particular act. For this reason . . . the distinction, as stated by the chief justice, must be taken as the true one, *viz.*, whether the holding out as general agent is to the public or to the particular dealer only. If the latter only, estoppel is the basis, but not in the former cases." Citing Fifth Nat. Bank v. Navassa Phosphate Co. 119 N. Y. 256, 23 N. E. 737; Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318. Evidence of disbursements by Jones as its acting, though not actual treasurer, was proof on the question of his ostensible authority. See also Johnson v. Milwaukee Invest. Co. 46 Neb. 480, 64 N. W. 1100; Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086; General Cartage & Storage Co. v. Cox, 74 Ohio St. 284, 113 Am. St. Rep. 959, 78 N. E. 371.

Inasmuch as all ostensible authority of the active officials of banks, whether cashier or president, is, under the banking acts, national and

state, generally greater than that of executive officials of the same class in the ordinary corporation, what is said in First Nat. Bank v. Michigan City Bank, 8 N. D. 608, 80 N. W. 766, upon the ostensible powers of bank cashiers and in conflict with this opinion on the subject of ostensible powers of officials of this trading corporation, is disapproved. That decision was based upon, and but followed, Western Nat. Bank v. Armstrong, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572, twice since explained, and in part virtually overruled in Auten v. United States Nat. Bank, 174 U. S. 125, 141, 43 L. ed. 920, 926, 19 Sup. Ct. Rep. 628, 635, and in Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 627, 44 L. ed. 611, 614, 20 Sup. Ct. Rep. 498. The Federal Supreme Court in the later two cases reverses its position on the controlling question, and holds that the power of borrowing money is not one out of the usual course of banking business, directly contrary to its holding in Western Nat. Bank v. Armstrong, that "such transactions would be so much *out of the course of ordinary and legitimate banking* as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money." After analysis of the business of banking in Auten v. United States Nat. Bank, 174 U. S., at page 143, with reference particularly to Western Nat. Bank v. Armstrong, this language is used: "A power so useful *cannot be said to be illegitimate and declared* as a matter of law *to be out of the usual course of business,* and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like *a question of fact to be resolved in the particular case by the usage of the parties or the usage of communities.*" Quoted and reaffirmed in Aldrich v. Chemical Nat. Bank, 176 U. S. at page 627. If borrowing money is within the usual course of banking business, a bank cashier, ostensibly clothed with the usual authority as such to act in behalf of his principal as to all transactions within the ordinary scope of that banking business, would bind his bank in borrowing money ostensibly for it, of one dealing with it through him, in reliance upon his ostensible authority as its cashier, and without notice of any actual limitation thereof. We do not say that evidence of usage of the parties or community as might be shown in the particular case might not change the presumption of ostensible authority otherwise applying, or that other circumstances, such as the amount of the

loan taken in connection with the capitalization and assets of the bank and banking usage of the locality, if known to the third party, might not have an important bearing on whether the loan might be considered as one made in the usual course of the particular banking business. But further discussion of this question is needless. Strictly speaking, it may be said that the question is not in issue in this case further than as incidentally involved as above explained. The case referred to has practically been twice modified. First Nat. Bank v. State Bank, 15 N. D. 594, 109 N. W. 61, in effect held that authority might be conferred upon a cashier to borrow on behalf of the bank, without resolution of its board of directors, and by its acquiescence in his general management of the institution, constituting him "virtually the sole manager of the bank, and as such clothed with ostensible authority to bind it to pay loans made by its cashier in its behalf." No mention was made of First Nat. Bank v. Michigan City Bank. But in the later case of First Nat. Bank v. Bakken, 17 N. D. 224, 116 N. W. 92, attention is called to the fact that Western Nat. Bank v. Armstrong, upon which the holding in First Nat. Bank v. Michigan City Bank was based, was later overruled in Aldrich v. Chemical Nat. Bank. In Smith v. Courant Co. 23 N. D. 297, 136 N. W. 781, attention is called particularly to the fact mentioned in that opinion that it was governed by the actual, rather than ostensible, powers, of the corporate agent; it involving dealings between the corporation and its manager, or the wife of the manager, for whom the corporate agent was also an agent. It is not precedent on the facts wherein dealings were had with a third party ignorant of the actual authority of the agent, and who relies for recovery upon his ostensible authority.

Exception is taken by the plaintiff to the proof offered that the defendant received no value or consideration for the note, as incompetent, immaterial, and not binding upon the plaintiff under its theory of right of recovery under the ostensible, rather than actual, authority of Jones, and to the proof offered and received, over objection, that neither of these notes was entered on the books of the bank. It is undisputed that plaintiff paid full value for this note to the First National Bank, which bank, through Jones as its cashier, under liabilities prescribed by the national banking act (Yates v. Jones Nat. Bank, 206 U. S. 158–179, 51 L. ed. 1002–1014, 27 Sup. Ct. Rep. 638; Farmers' & M. Nat.

Bank v. Dearing, 91 U. S. 29–35, 23 L. ed. 196–199) received the same. The bank could not be heard to question that transaction as against plaintiff's suit, it having received plaintiff's money (Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604–646, 19 L. ed. 1008–1018), and the fact that Jones may have acted in bad faith toward the bank, or embezzled the bank assets coming from its sale of these notes to Wells or plaintiff, is immaterial and irrelevant, except to corroborate the proof offered, that no credit on the bank books was given defendant for said notes, for which purpose it was admissible. As a part of defendant's main case, it could offer evidence to establish that it received none of the money paid by Wells to the national bank, nor any value from said national bank for said notes, to negative any estoppel that otherwise might be invoked against defendant from a receipt of any benefits of the transaction, preventing it from defending on the ground of want of authority in its agent to execute and deliver its commercial paper, or to negative any presumption of ratification by receipt and retention of money from the national bank for delivery of its notes. For such reasons, testimony was admissible that the national bank books disclosed no payment to it as a consideration for said notes. But for reasons hereinbefore discussed at length this does not apply to the $300 interest payment made on renewal of the original note. Much evidence of conclusions tending to refute the authority of Jones was also erroneously received. This is illustrated by the following questions asked witness Trepanier, a director, testifying for the defendant, in direct examination: "Q. Now during these years (1907 and 1908) after Wilder was elected treasurer, did Jones, to your knowledge, have any authority to transact or carry on any business of the Northwest Land Company?" Witness answered in the negative. Again: "Q. Had Jones since January, 1907, had any authority from the directors to borrow any money for the corporation?" This was likewise answered in the negative. If the question has reference to the actual authority of Jones, the by-laws and corporate records are the best evidence, especially so here, where it was early disclosed by the testimony of F. W. Wilder that correct records of the directors' meetings and of the business transacted at them were kept, and such records were in court. If reference is made to ostensible authority, want of knowledge of the witness of any assumption of authority by Jones, or facts showing his nonacquiescence in any assumed

authority, or his ignorance of the facts upon which the same is predicated, may be shown, but, if ostensible authority is meant, the question as framed is open to the objection made that the same calls for a conclusion of the witness instead of a statement of fact. The impropriety of the questions is the more evident under the admissions of the witness in cross-examination that he had never checked over the books or made any inquiries or investigation to ascertain what Jones was doing, and would not say whether or not he knew Jones was vice president, and did not in fact know who was vice president of the company, and in fact had not been in Rugby since the election of Wilder as treasurer in January, 1907, or for nearly a year prior to the time that Wells dealt for these notes. Almost identical questions were asked another director, George H. Wilder, who testified he became a director in the latter part of 1906, but never attended directors' meetings, except one at Rugby and some at Grand Forks. This witness was asked: "Q. I would ask you whether, to your knowledge, Jones at any time after the meeting of January 8, 1907, had any authority to transact any of the business of the Northwestern Land Company,"—to which, over objection, answer was made in the negative. He was then asked: "Q. Did he, after that meeting in January, 1907, have any authority, to your knowledge, to borrow any money or issue any evidence of indebtedness of the Northwestern Land Company?"—to which, over objection, he answered in the negative. What is above said as to the same questions offered over the same objections here applies.

The court having erroneously received this testimony over objection where it should have been excluded, it must have considered it upon the all-important and crucial question of fact of Jones' authority as agent. The presumption is that it was considered to plaintiff's prejudice, and constitutes prejudicial error.

It was proper, of course, to show that whatever was done by Jones was without the knowledge, sanction, or direction of the individual directors or of the board of directors, hence the following question propounded to these witnesses was proper: "Q. I will ask you whether, prior to the commencement of this action, you had any knowledge that Jones had since January, 1907, attempted to borrow any money or issue any evidence of indebtedness of the Northwestern Land Company."

Turning to the findings, it appears that the court has found explicitly that "Jones was not the treasurer of said Northwestern Land Company, neither did he at said time have any actual or ostensible authority to execute or deliver said note in the name of or for or in behalf of said Northwestern Land Company; that the note was not made, executed, or delivered by said defendant, nor by any person authorized to make, execute, and deliver the same, nor was the same made, executed, or delivered with its knowledge, consent, or acquiescence." From the fact that the court permitted the introduction of the evidence of all transactions offered by the plaintiff tending to prove the ostensible authority of Jones, and that without proof of prior knowledge thereof in Wells or his reliance thereon, these findings, in the absence of reversible error in the admission of evidence, would be conclusive, and have the same force as the findings of a jury. But the memorandum decision accompanying the findings plainly shows error in the reasoning of the court in arriving at its conclusions of fact, and also discloses that the evidence must have been weighed under a misapprehension of the law applicable to the proof. The opinion of the trial court is very brief. It reads: "I have carefully considered the written arguments by both sides and the authorities cited. It is plain that Jones did not have actual authority to execute the note in suit. It does not seem to me that the defendant was guilty of want of ordinary care in permitting Jones to exercise the limited power, that the defendant permitted him to exercise after January, 1907, in connection with the affairs of the land company. Hence, I am unable to find that Jones had ostensible authority to execute the note. Further, I do not think under the evidence that defendant is estopped to deny Jones' authority to execute the note. Defendant's attorneys may prepare proper findings."

It is readily apparent from the views of the trial court thus expressed that his findings, against ostensible authority in Jones to do as he did do, are based upon the mistaken premise of whether or not defendant was *negligent* "in permitting Jones to exercise the limited power that the defendant permitted him to exercise after January, 1907;" and on the question of estoppel of the defendant to deny authority to execute the note. Instead of questions of negligence, the issue was, not the manner of the creation of any ostensible authority (as whether by negligence without intent to confer it, or instead of intentional conferring of it,

but rather whether ostensible authority, however conferred, had been granted Jones to exercise authority in behalf of the corporation in these instances. It was not the method of creating the ostensible authority, but instead the fact of whether authority was, by either method prescribed by the statute, § 5770 (*i. e.,* intentionally or negligently), conferred. To say, as did the learned trial judge, that the defendant was not guilty of "want of ordinary care in permitting Jones to exercise the limited power that the defendant permitted him to exercise after January, 1907, in connection with the affairs of the land company, hence I am unable to find that Jones had ostensible authority to execute the note,"—is not a finding on the fact of his ostensible authority, especially under the evidence in this case, which tends as strongly to establish that whatever ostensible power was conferred upon Jones was not negligently or unintentionally conferred, unless it be said that business men and directors of corporations do not intend, and cannot be held to intend, the natural consequences of their deliberate acts. Reference need be made only to the letter above quoted of Wilder to Jones, as evidence of that. The trial court has not found, under its reasoning, upon whether ostensible authority intentionally conferred existed in Jones to execute and negotiate this commercial paper. It has not decided whether Jones was defendant's ostensible agent in such transactions, nor really passed upon his ostensible authority at all. Had the trial been to a jury and the court's instructions authorized it to reason, as has the court in its memorandum decision, in arriving at its verdict, its findings or verdict would be vitiated by its false basis, because of faulty instructions. Though the memorandum opinion is no part of the decision itself, yet when it reflects fundamental error in arriving at the conclusions of fact found, the decision thereon should be vacated.

To epitomize and briefly recite and apply the foregoing. Whoever deals with a corporation by its purported agent does so at his peril as to the existence of the relationship of principal and agent between the corporation and the purported agent. But where the agency exists, and the agent's authority is drawn in question, the burden is on the party asserting the authority in the agent to bind the corporation, as to the particular act to prove such authority. Such proof may be made by evidence of actual authority as derived from the by-laws or resolution of directors, or from the general manager, to whom has been delegated

general corporate authority, or it may be established by evidence of ostensible authority usually (as here sought to be proved) shown by dealings, acts, or course of corporate conduct, from which it may reasonably be said to be implied an acquiescence, consent, or authority to do the particular act has been conferred upon the agent, and will be recognized by the corporation as vested in the agent. In determining the sufficiency of such proof to establish ostensible authority, knowledge of the by-laws is not imputed to the third person dealing in reliance upon such ostensible authority, unless by custom concerning the particular dealing the by-laws are usually considered, in which event to ignore them may amount to negligence, and may defeat recovery on any ostensible authority of the agent. Ostensible authority may be shown by prior acts of the corporation with third persons, independent of whether known to or relied upon by the person dealing with the corporation in reliance upon the ostensible authority of the agent, as such proof is based upon a holding out by the corporation of the agent to the public as having authority so to act for it in the particular capacity, and is in no sense based upon technical estoppel between the corporation and such third person.

The declaration of the agent as to facts, as here, that he was treasurer, made in the course of and within the scope of his duties, to an inquirer and concerning particularly a pending business transaction involving the known contemplated purchase of the corporation's purported negotiable paper, the agent being shown to have been the vice president, director, and resident manager of the corporation, binds the corporation, and as to it in such transaction the agent is in contemplation of law its treasurer.

The proof submitted by plaintiff was sufficient to present for determination the issue of whether this note was executed under ostensible authority therefor, and as such was the act and note of the corporation.

The payment of interest of $300 on the first note given is to be deemed a payment made by defendant's ostensible treasurer.

The renewal note was likewise the act of its ostensible treasurer, and the defendant's liability thereon depends upon the ostensible authority of its treasurer to issue its promissory note as its authorized act under the circumstances under which it was issued, it being a renewal of a

purported note, and delivered and accepted contemporaneously with payment of the interest made upon the original purported obligation.

The by-laws are admissible as a part of the defense in support of its claim of no actual or implied authority, to prove which the actual authority conferred upon its agent is important in weighing evidence of both actual and ostensible authority. Proof of nonreceipt of any consideration for the notes is admissible to negative any estoppel otherwise arising from a reception of benefits of the transaction.

Ostensible authority is an ultimate conclusion to be determined by the proof of facts, and it is error to receive in evidence the testimony of corporate officials, amounting in effect to their conclusions on the existence of such ostensible authority in the agent to so act. For such repeated error on trial, this case is reversed.

A new trial is ordered.

Goss, J. Rehearing has been had, and after full reargument and examination of briefs and authorities, we adhere to what is stated in the foregoing opinion.

J. J. MURPHY and Chas. L. Merrick v. MISSOURI & KANSAS LAND & LOAN COMPANY, a Foreign Corporation, James T. Wilson, Mary L. Wilson, Anna F. Wilson, George J. Wilson, John R. Mulvane, and All Other Persons Unknown Claiming Any Estate or Interest in, or Lien or Encumbrance upon, the Property Described in the Complaint.

(149 N. W. 957.)

Plaintiffs bring this action to determine adverse claims. Substituted service was had. All defendants appeared. Corporation answers and asserts title in itself. Individual defendants do not answer. Thereafter, but before the trial was begun, the twenty-year period expired for which the foreign corporation was chartered. Ignorant thereof, the attorneys for the parties then served and filed amended pleadings and went to trial. Attorneys of corporation were also attorneys for the individual defendants. Upon trial, plaintiffs failed to

general corporate authority, or it may be established by evidence of ostensible authority usually (as here sought to be proved) shown by dealings, acts, or course of corporate conduct, from which it may reasonably be said to be implied an acquiescence, consent, or authority to do the particular act has been conferred upon the agent, and will be recognized by the corporation as vested in the agent. In determining the sufficiency of such proof to establish ostensible authority, knowledge of the by-laws is not imputed to the third person dealing in reliance upon such ostensible authority, unless by custom concerning the particular dealing the by-laws are usually considered, in which event to ignore them may amount to negligence, and may defeat recovery on any ostensible authority of the agent. Ostensible authority may be shown by prior acts of the corporation with third persons, independent of whether known to or relied upon by the person dealing with the corporation in reliance upon the ostensible authority of the agent, as such proof is based upon a holding out by the corporation of the agent to the public as having authority so to act for it in the particular capacity, and is in no sense based upon technical estoppel between the corporation and such third person.

The declaration of the agent as to facts, as here, that he was treasurer, made in the course of and within the scope of his duties, to an inquirer and concerning particularly a pending business transaction involving the known contemplated purchase of the corporation's purported negotiable paper, the agent being shown to have been the vice president, director, and resident manager of the corporation, binds the corporation, and as to it in such transaction the agent is in contemplation of law its treasurer.

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(149 N. W. 957.)

Plaintiffs bring this action to determine adverse claims. Substituted service was had. All defendants appeared. Corporation answers and asserts title in itself. Individual defendants do not answer. Thereafter, but before the trial was begun, the twenty-year period expired for which the foreign corporation was chartered. Ignorant thereof, the attorneys for the parties then served and filed amended pleadings and went to trial. Attorneys of corporation were also attorneys for the individual defendants. Upon trial, plaintiffs failed to

prove title in them, but established payment by them of $329 taxes paid under void tax deeds. On plaintiffs resting, defendants moved for dismissal because of plaintiffs' failure of proof. Later the defunct corporation defendant submitted its proof as on the merits. Plaintiffs having pleaded a forfeiture of charter of the defendant corporation because of noncompliance with the Kansas statutes under which it was chartered, at the close of the trial the case was kept open for proof on that question, and, later, depositions were taken and filed, disclosing not a forfeiture, but the death of the corporation through the lapsing of its charter. Thereupon its former officers designated by the Kansas statute as those upon whom trusteeship devolved made written application, supported by affidavit and the depositions taken, for their substitution, and that the action not abate but continue against them as trustees for said foreign corporation defendant dissolved. Trial was then closed, the court not ruling on the motion to substitute, but taking everything under advisement. On the first session of the trial, in March, 1912, plaintiffs' attorneys gave oral notice in open court that they would apply for a default judgment against the individual defendants not answering but appearing. Later and before the final session of the trial, judgment was entered without notice and as by default in favor of plaintiffs and against said nonanswering individual defendants, adjudging the individual defendants to have no interest in the lands as against the plaintiffs. Six weeks after the final session of the trial, after motion to substitute had been made but not ruled upon, and after default judgment had been taken against the individual defendants, the plaintiffs filed a written dismissal of the action and a written application to the court for an order of dismissal both, as against the foreign corporation, claiming there was no adverse party corporation defendant. This motion was not ruled upon. The trustees asking substitution have not answered, and the title of the action remains unchanged. The court made its findings, conclusions, and order for judgment without any change in the title, finding in favor of the foreign corporation, and awarding judgment quieting title in its favor, with a writ of restitution for possession to it, and finding that the applicants for substitution as trustees were entitled to be substituted, and setting aside, as erroneously and inadvertently entered, the judgment by default taken against the individual defendants; and ordered payment to plaintiffs of the amount of the taxes. Judgment was accordingly entered without change of title, adjudging the foreign corporation to own the land, and awarding it the costs of suit. From this judgment plaintiffs appeal, demanding a trial *de novo*. *Held:*

Tax deeds — void — title — defendants not answering — failure of proof — action dismissed.

1. Plaintiffs' tax deeds under which they assert title are void, and they have failed in their proof of right to recover as against the individual defendants appearing but not answering, and as to whom the action should be dismissed as to plaintiffs as already tried on the merits.

Foreign corporation — charter — lapsing — defunct — subsequent proceedings — voidable only.

2. Upon the lapsing of the charter of the foreign corporation it became defunct, but the proceedings subsequently had will be treated in equity as voidable, not void.

Substitution of parties — motion for — pleadings — issues — judgment.

3. That the motion for substitution of the trustees should have been then and there granted, and said trustees ordered substituted as defendants in lieu of the defunct corporation, and the action continued against them; that they as trustees should have served and filed pleadings, and the issue so joined should have been tried as between plaintiffs and said trustees before rendition of judgment.

Individual defendants — interest in action as to plaintiff — adverse claims — statute — default judgment — vacating.

4. That plaintiffs having affirmatively disclosed their want of interest as against the individual defendants as to whom trial was had, judgment in their favor against the defendants could not be entered by default. Said defendants were not in default, but appeared, as they had a right to do under the adverse claims statutes, §§ 8151, 8153, even though not answering. The judgment awarded as by default was properly set aside.

Dismissal of action by plaintiffs — substitution of parties — motion for — corporation — void judgment.

5. Plaintiffs could not, after the submission of the cause supposedly on the merits, in the face of a pending motion for substitution of parties, dismiss as to the defunct corporation because it had become defunct, and leave intact, reserved by the motion, said erroneous judgment previously entered against the individual defendants.

Findings — order — substitution — as of date of motion — default judgment — action dismissed as to individuals.

6. The findings and order made thereon are to be treated as an order for a substitution of trustees as defendants as of the date the motion was made, and as an order vacating said default judgment, and as authorizing dismissal of this action as to the individual defendants, as far as plaintiffs are concerned, further than this, the findings, conclusions, order, and judgment are vacated and set aside.

Affirmative judgment by defendants — stand as plaintiffs — dismissal of action.

7. Respondents urge that as it appeared that plaintiffs have no interest or title, that on plaintiffs' appeal, after such proof, judgment in defendants' favor should be summarily affirmed, and no review be had of defendants' proof. *Held*, that as defendants assert and have recovered affirmative judgment of title and possession (conceding the trustees to be parties), they stand as plain-

tiffs in their relations to appellants, with their counterclaim deemed denied, with the burden of proof upon them before any judgment other than for dismissal of the action can be rendered under the statutes governing procedure in adverse claim suits, §§ 8151, 8153 (Comp. Laws 1913).

Title of action — trustees — issue.

8. The cause is remanded, with directions to change title of the action that it may run against the trustee defendants; that plaintiffs and said trustee defendants may join issue on pleadings, and trial and further proceedings be had according to law.

Final judgment — allowance for taxes — void tax deeds.

9. Any final judgment rendered will allow defendants for the amount of taxes and interest thereon paid by them under color of title,—the void tax deeds.

Trial — opportunity for trial — costs.

10. After trial on the merits or opportunity afforded for trial, appellants will recover costs and disbursements taxable on this appeal. Past and future district court costs and disbursements will be awarded in favor of the party to whom is awarded final judgment of title to the half section of land in controversy.

Opinion on Rehearing filed September 12, 1914.

From a judgment of the District Court of Logan County, *Coffey*, J., plaintiffs appeal.

Modified and remanded.

Watson & Young, for appellants.

The court had jurisdiction over the persons of the five individual defendants. Due service had been made on each of them. They failed to answer, and a default judgment was duly entered against them. This judgment was vacated by the order of the court without notice and without hearing; without answer and without affidavit of merits, and without an order to show cause. This was error. Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 25, 84 N. W. 581; Fargo v. Keeney, 11 N. D. 484, 92 N. W. 836, 14 N. D. 419, 105 N. W. 92; Emmons County v. Thompson, 9 N. D. 598, 84 N. W. 385; Kirschner v. Kirschner, 7 N. D. 292, 75 N. W. 252; Gauthier v. Rusicka, 3 N. D. 1, 53 N. W. 80; Cline v. Duffy, 20 N. D. 525, 129

N. W. 75; Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Freeman v. Wood, 14 N. D. 95, 103 N. W. 392; Olson v. Mattison, 16 N. D. 231, 112 N. W. 994; Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491; Braseth v. Bottineau County, 13 N. D. 344, 100 N. W. 1082; Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A. (N.S.) 858, 126 N. W. 102; Hunt v. Swenson, 15 N. D. 512, 108 N. W. 41; Olson v. Sargent County, 15 N. D. 146, 107 N. W. 43; Colean Mfg. Co. v. Feckler, 16 N. D. 227, 112 N. W. 993; Garr, S. & Co. v. Collin, 15 N. D. 622, 110 N. W. 81; Williams v. Fairmount School Dist. 21 N. D. 198, 129 N. W. 1027; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; Acme Harvester Co. v. Magill, 15 N. D. 116, 106 N. W. 563; Plano Mfg. Co. v. Doyle, 17 N. D. 386, 17 L.R.A.(N.S.) 606, 116 N. W. 529; Kitzman v. Minnesota Thresher Mfg. Co. 10 N. D. 26, 84 N. W. 585; Phelps v. McCullam, 10 N. D. 536, 88 N. W. 292; Naderhoff v. George Benz & Sons, 25 N. D. 165, 47 L.R.A.(N.S.) 853, 141 N. W. 501.

The plaintiffs' judgment by default was property,—their property. The order of the court wiped this out as to the five defendants, and this without notice, application, or hearing, and deprived plaintiffs of property without due process of law. Const. § 13; Const. 14th Amendment, § 1; Parsons v. Russell, 11 Mich. 120, 83 Am. Dec. 728; Clapp v. Houg, 12 N. D. 600, 65 L.R.A. 757, 102 Am. St. Rep. 589, 98 N. W. 710; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Bank of Columbia v. Okely, 4 Wheat. 235, 244, 4 L. ed. 559, 561; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L. ed. 979, 983, 984, 17 Sup. Ct. Rep. 581; Ex parte Virginia, 100 U. S. 339, 346, 347, 25 L. ed. 676, 679, 680, 3 Am. Crim. Rep. 547; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722; Cooley, Const. Lim. pp. 504, 505 and notes; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

Where the charter of a corporation, or the general law under which it is organized, fixes the term for the existence of the corporation it will, upon the expiration of the term, become *ipso facto* dissolved.

2 Beach, Priv. Corp. § 780; Angell & A. Priv. Corp. 9th ed. 778, A, 195, 196, 779, 779 A; 2 Cook, Corp. 6th ed. 637m, 638; State ex rel. Green v. Lawrence Bridge Co. 22 Kan. 438.

The attorneys had no right to appear for a client that did not exist. 4 Cyc. 953, 954 and cases cited; Judson v. Love, 35 Cal. 463; Cases cited in 5 Century Dig. "Attorney and client," 127.

The only claim made in this case was by a corporation that had ceased to exist, the other five defendants not having appeared or answered. Plaintiffs' dismissal was the exercise of a statutory right. The proceedings taken by the court after such dismissal were void. Allen v. Van, 1 Iowa, 568; Burlington & M. R. Co. v. Sater, 1 Iowa, 421; Ballinger v. Davis, 29 Iowa, 512; St. John v. Hardwick, 17 Ind. 180; Miller v. Mans, 28 Ind. 194; Gordon v. Goodell, 34 Ill. 429; Ferguson v. Ingle, 38 Or. 43, 62 Pac. 760; Deere & W. Co. v. Hinckley, 20 S. D. 359, 106 N. W. 138; Koerper v. St. Paul & N. P. R. Co. 40 Minn. 132, 41 N. W. 656; Minor v. Mechanics, 1 Pet. 46, 7 L. ed. 47; Hancock Ditch Co. v. Bradford, 13 Cal. 637; Reed v. Calderwood, 22 Cal. 464; Dimick v. Deringer, 32 Cal. 488.

Andrew Miller and *W. P. Costello,* for respondents.

The issue in this case was limited to the legality of plaintiffs' tax deeds. The possession of the property was not alleged, claimed, or proved. The tax deeds under which plaintiffs base their title and claim are void. Youker v. Hobart, 17 N. D. 296, 115 N. W. 839; Brown v. Corbin, 40 Minn. 508, 42 N. W. 481 and cases cited.

The sale upon which the deeds were issued was advertised for a certain date, and sale had on a subsequent date. A tax deed which recites the time of sale as being different from the time fixed by law is void. Salmer v. Lathrop, 10 S. D. 216, 72 N. W. 570.

No newspaper had been properly designated for publication of the delinquent tax list. Such fact is shown by affirmative proof of no record of same. Cass County v. Security Improv. 7 N. D. 528, 75 N. W. 775; Griffin v. Denison Land Co. 18 N. D. 246, 119 N. W. 1041; Rev. Codes 1899, § 1259; Rev. Codes 1905, § 1259.

This is jurisdictional. Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Finlayson v. Peterson, 5 N. D. 587, 33 L.R.A. 532, 57 Am. St. Rep. 584, 67 N. W. 953.

The description was insufficient. Power v. Bowdle, 3 N. D. 107,

21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; Wright v. Jones, 23 N. D. 191, 135 N. W. 1120.

The redemption notice was insufficient,—forty-two days, instead of ninety days, being given. Rev. Codes 1899, § 1289.

A proper notice of the expiration of the period of redemption is necessary to a valid tax deed. Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566.

The sheriff's return of service of notice was lacking, in that no diligence is shown. Campbell v. Coulston, 19 N. D. 645, 124 N. W. 689; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737; Youker v. Hobart, 17 N. D. 300, 115 N. W. 839.

Plaintiffs having no interest themselves, they could not litigate defendants' claim. Morrill v. Douglass, 14 Kan. 293.

The plaintiff must recover upon the strength of his own title, and can take nothing by reason of defects in the defendant's claim. Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Wallace v. Swinton, 64 N. Y. 192; Youker v. Hobart, 17 N. D. 300, 115 N. W. 839.

If any right of appellants was wiped out by vacating the judgment, it was a mere abstract right which would not warrant relief. Equity will not lend its aid for the protection of abstract rights. 16 Cyc. 123, § 4; Hildreth v. James, 109 Cal. 299, 41 Pac. 1038; Woolworth v. Root, 40 Fed. 723.

The judgment vacated did not grant to plaintiffs any valuable right, and therefore the manner in which it was vacated will not be considered. They must show that a substantial right has been lost. Richman v. Wenaha Co. 74 Wash. 370, 133 Pac. 467; Hull v. Ely, 2 Abb. N. C. 440; Warden v. Fond du Lac County, 14 Wis. 618; 16 Cyc. 123, § 4; Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937.

No notice given that proof for a judgment would be made. Naderhoff v. George Benz & Sons, 25 N. D. 165, 47 L.R.A.(N.S.) 853, 141 N. W. 501.

The judgment was void because without proof of facts upon which to base it. Weeks v. Cranmer, 18 S. D. 441, 101 N. W. 32; Morrill v. Douglass, 14 Kan. 293; Amador Canal & Min. Co. v. Mitchell, 59 Cal. 168; Johnson v. Girdwood, 143 N. Y. 660, 39 N. E. 21.

The court would have the right to substitute the names of directors and managers of such corporation, for the corporation, before or after

verdict. Eagle Chair Co. v. Kelsey, 23 Kan. 632; Root v. Sweeney, 12 S. D. 44, 80 N. W. 149.

Where plaintiff's title is declared bad, and another's title good, it is not material to plaintiff in whose name decree is entered. Woolworth v. Root, 40 Fed. 723.

The dismissal of an action can only be accomplished as the statute provides. In the case at bar the trial was in progress. Rev. Codes 1905, § 6998, Subdiv. 1.

Defendants were entitled to have their title quieted. Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227.

Goss, J. This is an equitable action brought to determine adverse claims to real estate. This opinion is written after a rehearing had. Substituted service of summons was made upon the five individual defendants and one corporation defendant in 1910, and all of them appeared in due time by their attorneys of record, who served written notice of appearance and demand for a copy of the complaint on behalf of all defendants. The individual defendants have never answered, and are in default of answer, but their attorneys of record appeared for them at all times during the progress of the trial. An original answer and counterclaim was served by the corporation, the Missouri & Kansas Land & Loan Company, which was held to have been served in time, on appeal to this court decided in 22 N. D. 336, 133 N. W. 913. Remittitur on that appeal left this court in January, 1912. A few days prior thereto, December 26, 1911, the twenty-year period of corporate existence, the lifetime of the corporation under the Kansas statutes, expired, it thereby becoming dissolved with this action undetermined after issue joined. On April 30, 1912, the attorneys for the plaintiffs and the defendant corporation served, respectively, amended complaint, answer, counterclaim, and reply thereto on eve of the trial, and proceeded to a trial upon the merits, all in ignorance of the lapsing of the corporate charter. The amended complaint, and likewise the reply, pleads a forfeiture of the corporate charter by nonuser and noncompliance with the Kansas law, but the pleadings do not plead a dissolution of the corporation by lapse of time. A forfeiture is one thing, and dissolution without forfeiture, by lapse of charter, is a different thing. Motions were subsequently

made to strike out the portions of the plaintiffs' complaint and plaintiffs' reply to defendants' counterclaim pleading the forfeiture of corporate existence, as not in issue and not a matter to be alleged by way of reply, but it is unnecessary to pass upon said motion for reasons hereinafter stated.

Plaintiffs' original complaint is in the statutory form to determine adverse claims, and recites tax deeds as the basis of title. The original answer of the corporation, interposed in 1910, before its dissolution, denied the title of the plaintiffs, alleged its source of title through deeds, and asked affirmative relief, that it be decreed to be the owner, and entitled to possession. The individual defendants, as stated, interposed no answer. Trial was had on the merits on April 30, 1912, and the parties rested except as to the depositions of officials of the state of Kansas, to be taken later and submitted, on the question of forfeiture of corporate existence by the corporation defendant. This was done in July, and a final hearing was had September 3, 1912, at which time both the purported corporation and the plaintiffs rested after having offered proof by depositions establishing the dissolution of the corporation on December 26, 1911. Before the close of the trial on September 3d, the officials and manager of the corporation dissolved moved that they be substituted as parties defendant in lieu of the corporation, and be permitted to defend and prosecute the action as trustees on behalf of themselves, stockholders, and creditors of the defunct corporation. The depositions establish this to be permissible under the laws of Kansas; that the parties petitioning are its officials and stockholders; that it has $2,000 of liabilities unpaid. No return was made on the motion to substitute, but was reserved, with all others, including the motions to strike. The court attempted to determine these questions in its findings and conclusions and order for judgment issued thereon, in which it was found that the petitioners were entitled to be substituted, and substitution was allowed, although no pleadings were filed other than the application for substitution and supporting affidavits, and the title of the action remained unchanged. On trial on April 30, 1911, counsel for plaintiffs gave notice in open court that the individual defendants served by substituted service, all of whom had appeared and were then appearing by counsel, would be considered as defaulting, and requested "that a default be entered against these

defendants for having not answered at this time, and that they are in default. We will present papers later." To this counsel for said defendants in default in answer replied: "We served notice of appearance, but no answer." A long discussion then ensued between the opposing counsel as to whether the action was against Jones T. Wilson or James T. Wilson, or the identity of the party meant, in which attorneys of record for the defendants stated the contents of a petition for intervention they desired to file on behalf of Jones T. Wilson, to which objection was made, and it was finally agreed that any pleadings desired to be either served and filed by either party might be offered, and then considered subject to objection, and the trial proceeded. After plaintiffs had rested on the proof of their title, defendants moved "that the plaintiffs' case be dismissed for the reason that now the plaintiffs having rested, it appears from the evidence offered that the plaintiffs have no interest, title, or estate in or to said premises whatever, upon which to base their cause of action." The ruling upon the motion was reserved. In August, after the depositions had been taken in July, but before the same were submitted in September at the final session of the trial, pursuant to the notice given orally March 10th on trial, that the individual defendants were in default in answer, plaintiffs secured from the court an order for judgment, reciting that the individual defendants named "are in default for want of answer, and plaintiffs are entitled to the entry of a judgment herein adjudging that said nonanswering defendants have no estate or interest in or lien or encumbrance upon the property involved in this action." Judgment in conformity therewith was entered August 22, 1912. Of the order and the judgment defendants' attorneys had no notice. This order and judgment were subsequently set aside by the findings and order thereon, as erroneously and inadvertently made. The findings and order bear date of January 9, 1913. In October and after submission of the cause on the merits September 3, 1912 the plaintiffs, having in August procured the default judgment against the individual defendants, and for the first time acting upon the assumption that there was no corporation party adversary, no order of substitution of its managers as trustees having yet been made, filed both their written dismissal and a motion to dismiss without prejudice, as against said corporation defendant, averring that all proceedings taken to that date

against it were void, but especially excepting from such dismissal those "defendants against whom judgment had been entered," the individual defendants. Plaintiffs thus sought to dismiss from the suit, in the face of a motion for substitution pending, the sole answering defendant, or would-be trustees in its behalf, and leave intact its judgment against the individual defendants appearing but not answering; and this, too, with the record made by themselves affirmatively disclosing an utter want of title or interest in them to the land in suit.

There is no question as to this corporation having become defunct in December, 1911. The proof offered by both parties, as well as the affidavits of the attorneys for both plaintiffs and those who would appear in the corporation's behalf on the motion to substitute the trustees in lieu of the corporation, state that fact. Hence, regardless of any subsequent necessity of pleading by answer or otherwise reciting that fact, or the necessity of changing the title of the action, the fact must be conceded that on September 3d the suggestion of and proof of the death of the corporation was before the court upon a proper motion to substitute, and that petitioners were entitled to substitution, they possessing the power to petition for substitution under the foreign statute, and in this jurisdiction through comity and practice as well. These petitioners and their counsel had moved with reasonable promptness, and were entitled to an order for substitution, and whatever delay occurred after September 3d and before the findings were made is chargeable to the court, and not to the petitioners. Nor were they responsible for the failure of the court to direct by separate order such substitution, with change of title accordingly. The court not only had power to make such an order, but it was its duty to make it. The date of the dissolution of the corporation having been established, the fact was brought to the court's attention that, during the trial and up to the time of the application for substitution, the corporation defendant was non-existent, dead, and could not appear except by representative, and then not in its behalf as a corporate entity, but, instead, such representative would be empowered to appear only for the purpose defined in the Kansas statute in evidence, *viz.*, as trustees of the stockholders and any creditors of the defunct corporation. As to the corporation itself, during this time it had not appeared, not acted, and was incapable of so doing. To the present time it has formulated no issue

by pleadings, other than as presented by the original complaint and the corporation's answer thereto, and which answer was of no avail when its corporate existence ceased, other than to prevent a default being taken by plaintiff for want of answer, it having complied with the statute by answering when it had the power to do so.

With this condition of affairs, the first question is to determine the position of the parties under the proceedings taken, including the order for a judgment entered, the default judgment prior thereto, and the attempted dismissal in the interval, the attempted amendment of pleadings, and the voluntary appearances of the individual parties plaintiff and defendant, including the proceedings taken by and against them in the trial and the submission of the cause on the merits, as was attempted without objection and in ignorance of the fact and the effect of the dissolution of this corporation.

The court had jurisdiction of person and subject-matter of all of the defendants, including a qualified jurisdiction to take steps that would bind the successors in interest of the corporation, its stockholders, and creditors. The trial was not one had without jurisdiction, but was a valid trial as to plaintiffs and all individual defendants. For the purpose of the case it can be assumed that it was no trial as to the successors in interest of the corporation. The plaintiffs were entitled to no judgment whatever, except one of dismissal, without affirmative proof made of their interest or estate in the specific real property described in the complaint. An action to determine adverse claims may be maintained only by persons possessing such an interest or estate. Sec. 7519, Rev. Codes 1905. In this peculiar statutory action "the court in its decision shall find the nature and extent of the claim asserted by the various parties, and determine the validity, superiority, and priority of the same." This is the command of § 7528, Rev. Codes 1905. It is true that said section also provides that "any defendant in default for want of an answer, or not appearing at the trial, or a plaintiff not appearing at the trial, shall be adjudged to have no estate or interest in or encumbrance upon the property." Sec. 7528. Plaintiffs took this default judgment vacated in the findings evidently on the supposition, as here contended and as indicated by the statements of their counsel March 1, 1912, on the trial, that, as the individual defendants had defaulted in answer, judgment by default could be taken

against them, notwithstanding their then and there appearance at the trial, and this without proof of the plaintiffs' title, or without establishing the paramount title or "the paramount claim to the property," in the plaintiffs as against all other parties. Sec. 7528. Such is not the law. Notwithstanding that a default in both answer and appearance may have existed, nevertheless, before judgment in an action of adverse claims can be entered in favor of the plaintiff, it must be established that plaintiff has the right to maintain that action by proof in it of an estate or interest in the specific real estate, and not only that, but in the findings as required by statute under § 7528 the court "shall find the nature and extent of the claim" asserted by the plaintiff, and "determine the validity, superiority, and priority of the same," to the extent at least of determining its validity as asserted. But in the proceedings here taken, the individual defendants defaulted only in answer. They had served notice of appearance, and were therefore entitled to be served with notice of trial required under § 7528 to be served upon "all other parties who have appeared." They could default in answer, but still possess the right to appear at the trial, the statute reading, "Any defendant in default for want of an answer or not appearing at the trial shall be adjudged to have no estate, etc." Here one of the conditions named preventing a default judgment being taken was present, to wit the appearance, by right of statute, of the defendants at the trial; which, without a consideration of the other provisions as to these statutory actions, would put plaintiffs upon their proof of title before judgment could be taken. These individual defendants had the right to do as they did do, appear by attorney, even though in default of an answer, and cross-examine, scrutinize, and challenge the sufficiency of the plaintiffs' proof offered, and on the record had the right to move, as they have done, for the dismissal of plaintiffs' cause of action as for a failure of proof thereof. Such a motion was the first step taken upon the plaintiffs resting their case. It was not a defunct corporation that made this motion. In the order for judgment, and in the judgment entered thereon in August, 1911, as of default against these individual defendants, on the contrary it is recited that they "have not answered and have made no appearance in this action," and again, "that there is no appearance on behalf of the other defendants," having reference to the individual defendants. Judg-

ment so ordered on such a basis was properly found by the court, in its findings and order thereon, to have been "erroneously and inadvertently authorized by the Court," and "that there was no basis in the evidence and the proofs sufficient to support such judgment."

This clears the way to a determination as to what was accomplished by the so-called trial, the default judgment having been properly set aside, and not standing a bar to a consideration of the rights of the plaintiffs and individual defendants. The first question, then, arising at the close of plaintiffs' proof of title, when they rested their case, was whether they have established prima facie title in them in the face of the motion made challenging it. This involves consideration of their case made as against these individual defendants appearing, as we may omit from present consideration whether any corporate defendant was there. Plaintiffs offered in evidence only some tax deeds. These disclose on their face a sale made under a statute requiring the sale to be on a basis of a reduction of interest accruing after sale, and, instead of being sold upon this basis, the sale was made in the manner prescribed by an earlier and repealed statute, as having been made upon a decrease in the amount of land sold. Such a sale as was made has been twice adjudged void by this court, in Youker v. Hobart, 17 N. D. 296, 115 N. W. 839, and State ex rel. Ebbert v. Fouts, 26 N. D. 599, 50 L.R.A.(N.S.) 316, 145 N. W. 97. The deeds are not voidable, but void. They are the only source of title pleaded, proven, and relied upon, and amount to no title or interest in the real property. At the close of the trial, then, instead of plaintiffs being entitled to a judgment by default or otherwise against these individual defendants named, such defendants were entitled to the only finding and judgment possible, that as to them "the plaintiffs had no title to or interest in the land" (Dever v. Cornwall, 10 N. D. 123, 86 N. W. 227); and having that right then, they have it now, as the situation has not been changed with reference to the individual parties plaintiff and defendant by any act or failure of the corporation to participate or make proof, and the trial as to these individual defendants is over, all steps subsequent to March 1, 1911, having been taken with reference to the rights of others.

We now approach the case from another angle, that of the rights of the respective plaintiffs and trustees ordered substituted instead of

the corporation to represent its stockholders and creditors. Their counsel has made the claim on rehearing that, inasmuch as an utter want of title and interest appears from the proof of the plaintiffs, the plaintiffs cannot on their appeal procure a further review of the purported trial and proceedings taken, but, instead, that the judgment, even though irregular, should be summarily affirmed, and not disturbed at the behest of parties having no interest in whether it was entered right or wrong. The contention seems plausible, but it overlooks the purpose of an action to determine adverse claims, as well as ignores the fact that affirmative relief has been granted to a purported party defendant and against these plaintiffs, with a writ of possession ordered against them. Assuming either that the corporation was in existence, or that these trustees are entitled to all rights it would have or has possessed during the trial, and that the evidence offered may be considered as had between parties and as binding upon these trustees and the defendants as well, the court could not have there terminated the case, because the defendants had counterclaimed and asked for affirmative relief. Such counterclaim and answer under the provisions of § 7526 is deemed denied, and thereby an issue is raised, as to which the counter claimant having the burden of proof is plaintiff, and all other parties against whom he seeks relief are defendants. "A defendant interposing a counterclaim shall for the purposes of trial be deemed plaintiff, and the co-defendants against whom relief is sought shall be deemed defendants as to him." Rev. Codes 1905, § 7528. Consideration must be given to the fact that our statutory action to determine adverse claims was, prior to chap. 5, Laws 1901, not inclusive of liens or encumbrances, they being held not to be estates or interests in land (McHenry v. Kidder County, 8 N. D. 413, 79 N. W. 875; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Buxton v. Sargent, 7 N. D. 503, 75 N. W. 811; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 83 N. W. 245; Dever v. Cornwall, supra; Larson v. Christianson, 14 N. D. 476, 106 N. W. 51; Dakota Sash & Door Co. v. Brinton, 27 N. D. 39, 145 N. W. 594); and that §§ 7526 and 7528 in large part were new enactments to broaden the scope of the statute, and to specifically define the matters thereunder covered, the legislature knowing that the interpretation of the court previously had been toward a narrow construction of the statutes

ment so ordered on such a basis was properly found by the court, in its findings and order thereon, to have been "erroneously and inadvertently authorized by the Court," and "that there was no basis in the evidence and the proofs sufficient to support such judgment."

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the corporation to represent its stockholders and creditors. Their counsel has made the claim on rehearing that, inasmuch as an utter want of title and interest appears from the proof of the plaintiffs, the plaintiffs cannot on their appeal procure a further review of the purported trial and proceedings taken, but, instead, that the judgment, even though irregular, should be summarily affirmed, and not disturbed at the behest of parties having no interest in whether it was entered right or wrong. The contention seems plausible, but it overlooks the purpose of an action to determine adverse claims, as well as ignores the fact that affirmative relief has been granted to a purported party defendant and against these plaintiffs, with a writ of possession ordered against them. Assuming either that the corporation was in existence, or that these trustees are entitled to all rights it would have or has possessed during the trial, and that the evidence offered may be considered as had between parties and as binding upon these trustees and the defendants as well, the court could not have there terminated the case, because the defendants had counterclaimed and asked for affirmative relief. Such counterclaim and answer under the provisions of § 7526 is deemed denied, and thereby an issue is raised, as to which the counter claimant having the burden of proof is plaintiff, and all other parties against whom he seeks relief are defendants. "A defendant interposing a counterclaim shall for the purposes of trial be deemed plaintiff, and the codefendants against whom relief is sought shall be deemed defendants as to him." Rev. Codes 1905, § 7528. Consideration must be given to the fact that our statutory action to determine adverse claims was, prior to chap. 5, Laws 1901, not inclusive of liens or encumbrances, they being held not to be estates or interests in land (McHenry v. Kidder County, 8 N. D. 413, 79 N. W. 875; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Buxton v. Sargent, 7 N. D. 503, 75 N. W. 811; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 83 N. W. 245; Dever v. Cornwall, supra; Larson v. Christianson, 14 N. D. 476, 106 N. W. 51; Dakota Sash & Door Co. v. Brinton, 27 N. D. 39, 145 N. W. 594); and that §§ 7526 and 7528 in large part were new enactments to broaden the scope of the statute, and to specifically define the matters thereunder covered, the legislature knowing that the interpretation of the court previously had been toward a narrow construction of the statutes

regulating actions to determine adverse claims. Hence full force must be given to the amendments as made, having reference to the cause therefor. And where the statute specifically says, as here, that these respondents are as to appellants plaintiffs, and where, as is held in Larson v. Christianson, a denial of title is sufficient upon which to compel proof thereof in the adverse party, failure to make which must cause a reversal as for failure of proof, the only conclusion that can be arrived at is that the defendant so-called corporation, having made the plaintiff a defendant as to it and thereupon asking affirmative relief to be granted it, has thereby conferred upon such plaintiff, its defendant, the right to exact a trial *de novo* on appeal on defendants' basis for judgment, its proof submitted. For aught that appears of record the plaintiff, though holding under void deeds, may, as against the defendant corporation not in possession, be entitled to retain possession. A void deed may warrant a claim in equity of possession as made under color of title, which possession equity will not disturb at the suit of an interloper or trespasser. No question of possession, however, is in the case under the proof, and what is said but illustrates the soundness of the rule hereby adopted, that requires a trial *de novo* of the counter claimant's side of the case on the plaintiffs' appeal, as well as a trial of the plaintiffs' title.

It might also be mentioned in passing that, irrespective of the merits, the proceedings had been regarded as a trial on the merits as to the corporation defendant and the plaintiffs, and not only a suggestion of dissolution of the corporation, but proof thereof had been offered and was before the court, establishing the fact that there was no defendant in existence in whose favor or against whom a judgment could be rendered, and this rendered it imperative that the court, before rendition of a judgment on the testimony, should determine not only who the proper party defendant should be to represent stockholders and creditors of a defunct corporation, but also required the court to determine from the record to what extent any parties had been bound by proceedings had on the trial. On appeal from the judgment so awarded, the same questions must be here present, even under the assumption that the merits are not otherwise before us on appeal. In any event, then, such matters must now be determined.

The dissolution of the corporate defendant, pending action, under

all the authorities stayed the power of the court to proceed until someone to represent the defunct corporation had been substituted as such defendant. 1 R. C. L. 51, note 11; Venable Bros. v. Southern Granite Co. 135 Ga. 508, 32 L.R.A.(N.S.) 447, 69 S. E. 822; Marion Phosphate Co. v. Perry, 33 L.R.A. 252, 20 C. C. A. 490, 41 U. S. App. 14, 74 Fed. 425; Nelson v. Hubbard, 96 Ala. 238, 17 L.R.A. 375, 11 So. 428; Mobile Transp. Co. v. Mobile, 128 Ala. 335, 64 L.R.A. 333, 86 Am. St. Rep. 143, 30 So. 645; Rider v. Nelson & A. Union Factory, 7 Leigh, 154, 30 Am. Dec. 495; and note in 15 L.R.A. 628. The corporation, as such, had ceased to exist, and its rights and liabilities had descended, under the law, upon its stockholders and creditors, or trustees for them, who were given rights, under the Kansas statute, to be substituted and to prosecute this action, had it been maintained in Kansas. Of course, the statutes of the foreign state, having no extraterritorial effect, can be respected or not, dependent upon the legislative will of this state and comity of its courts. In the absence of a statute forbidding the rights of the foreign trustees under the foreign statute to succession in the affairs of the foreign corporation (Dow v. Lillie, 26 N. D. 512, 525, L.R.A. —, 144 N. W. 1082; Cone Export & Commission Co. v. Poole, 24 L.R.A. 289, and note [41 S. C. 70, 19 S. E. 203]; National Teleph. Mfg. Co. v. Du Bois, 165 Mass. 117, 30 L.R.A. 628, 52 Am. St. Rep. 503, 42 N. E. 510; Cushing v. Perot, 34 L.R.A. 737, note), they will by comity be here recognized and enforced to the extent that they are not in conflict with the law of the forum, with the action as to procedure to be governed by the law of this forum, Sinnott v. Hanan, 156 App. Div. 323, 141 N. Y. Supp. 505; Baltimore & O. R. Co. v. Joy, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387, 5 Am. Neg. Rep. 760. Section 4233 has no application to foreign corporations, whose domicil is in a foreign state, and whose corporate powers and rights of stockholders and creditors are as defined by that foreign jurisdiction. Note in 32 L.R.A.(N.S.) 446; Sinnott v. Hanan, 156 App. Div. 323, 141 N. Y. Supp. 505. Hence, the provision of § 4233, governing the substitution of stockholders and members of domestic corporations on their dissolution, and providing also that, "and no action whereto any such corporation is a party shall abate by reason of such dissolution," can have no application. In the absence of proof

of a Kansas statute so providing for nonabatement, the action must in this, as in all other cases of corporate dissolution, abate, even where the cause of action may survive. But the Kansas statute is in evidence, and furnishes proof of the fact that its officials are entitled under the foreign law to substitution as trustees, and to continue the suit, and this right will be given effect through comity. A distinction is to be drawn between abatement of common-law actions and those of strictly an equitable nature. The former abate; the latter do not (note in 32 L.R.A.(N.S.) 446), but, instead, remain, as the Texas courts say, in a state of suspended animation, during which period action taken is voidable, instead of void, and permitting a revivor of judgment either by proceedings in the same equitable action or in a separate equitable action for that purpose. Kelly v. Rochelle, — Tex. Civ. App. —, 93 S. W. 164, 166. Here this application may be so regarded as the first step taken for that purpose, to be followed with service and filing of pleadings, if desired, and testimony on the issues thus framed. But from any aspect of the record, as between the plaintiffs and these trustees, neither is bound on the proceedings had, without further steps taken. The trial as to them is, at best, voidable. The trustees as yet have filed no pleadings, and there is nothing to prevent their disclaimer by answer of any interest in the land, the very contrary of which has been found the fact in the purported findings and judgment. With no pleadings binding them as yet, their rights cannot affirmatively be tried and determined, and there was nothing tried concerning them, and there is nothing here on appeal. If they are not bound, the proceedings have been at all times lacking in mutuality, and the plaintiffs, defendants as to them under the theory on which the case was tried, are not bound, as the judgment must bind both or neither. In speaking of the trial we do not include that portion of the proceedings then had relative to the proof of dissolution of the corporation, and petitioning for substitution of trustees, all of which proceedings were strictly regular. And the court should have ruled, immediately upon the motion being made to substitute, as determining the parties to the suit. And the order made as a part of the findings, substituting the persons therein named as trustees, should have relation back to and effect as of September 3, 1912, the date of the submission of said motion. The motion made by plaintiffs October

22d thereafter, to dismiss for want of an adverse party defendant, so far as the corporation or the parties representing it were concerned, was not well taken, and could not be granted in the face of the pending motion to substitute other parties, not ruled upon. And that portion of plaintiffs' brief challenging the authority of the attorneys, once those of the corporation, to appear on behalf of the officials as trustees, is not well taken, as their application on the substitution is made in behalf of such trustees, with authority presumed in them to appear. They petition as attorneys for the trustees. There is no reason to doubt their authority to so act.

Plaintiffs also assign error in the court in not dismissing their case on their written dismissal and separate motion therefor, purported to have been made under the provisions of § 6998, Rev. Codes 1905. As above stated, the trustees were entitled to substitution as successors in interest to the rights of the corporation defendant. That corporation had counterclaimed in this suit during its lifetime, and asked affirmative relief against plaintiffs, under a statute making it plaintiff as to it the plaintiff defendant, and, besides, a purported trial had been had. Had the corporation not dissolved, the plaintiff could not have then dismissed the action. The ground, as for want of an adversary party, is not well taken; the court did not err in denying said motion in effect, as the case, if covered by the statute at all, is within the 7th, instead of the 1st, subdivision of § 6998.

Having reviewed the proceedings had and the trial, so far as the same was valid, it is the decision of this court that the judgment, order, and findings entered be set aside and anulled, so far as the same purports to be a final adjudication of the rights of the parties hereto. The findings and order made thereon, so far as they relate to and order the substitution of the parties therein named as trustees on behalf of the corporate stockholders, and the creditors thereof, and set aside the default judgment rendered against the individual defendants, will stand as valid orders to that effect, and the trustees named ordered substituted will be and are regarded as such trustee defendants, substitution to relate back to and take effect as of September 3, 1912, the date of their application. As between the plaintiffs and the individual defendants not answering, but appearing at the trial had in March, 1912, as between them and plaintiffs, and which trial has as to them been

concluded, the action should be dismissed as for failure of proof of interest of plaintiffs in the subject-matter and want of any right to maintain the action as against them. That the title to this action be changed from the corporation defendant to the individual trustees as defendants for the foreign corporation dissolved, and that the action proceed according to law. That the final judgment take into consideration taxes paid by plaintiffs under their void tax deeds, but which deeds amount to color of title as the basis for payment of taxes so paid; that the cause is remanded that issue may be joined as aforesaid between the plaintiffs and the trustee defendants, and in so doing plaintiffs may, if they desire, serve and file an amended complaint within thirty days from the receipt of the remittitur by the clerk of the trial court, to which trustee defendants then may plead. Should no amended complaint be served and filed within said thirty-day period, the trustee defendants may, within sixty days from the date of the receipt of the remittitur by the clerk of the trial court, serve and file their answer and counterclaim or other pleading to the amended complaint of the plaintiffs now on file. District court costs and disbursements on all proceedings had heretofore in district court will, on the entry of judgment, be awarded in favor of the party finally recovering on the merits. Appellants, however, will recover their costs and disbursements on this appeal as against the trustee defendants, but judgment for such appeal cost and disbursements shall not be entered until the entry of final judgment, at which time the court may offset and adjust said appeal costs and disbursements awarded plaintiffs against any costs on trial or recovery awarde dto the trustee defendants as may be just and equitable.

As this opinion is written after rehearing had, substantially adhering to the views announced in the former opinion, remittitur will go forward at once. It is so ordered.

BURKE, J. disqualified, did not participate.

STATE OF NORTH DAKOTA v. FRANCIS BRUNETTE.

(150 N. W. 271.)

Bastardy proceedings — quasi-criminal — trial governed by rules of civil actions.

1. A bastardy proceeding which is brought under the provisions of chapter 5, Rev. Codes 1905, although quasi-criminal in its nature, is governed, in so far as its trial is concerned, by the law regulating civil actions.

Defendant — reputation — chastity — evidence of — not admissible.

2. In a bastardy proceeding which is brought under the provisions of chapter 5, Rev. Codes 1905, evidence as to the reputation of the defendant for chastity is not admissible.

Bastardy proceeding — evidence of promise of marriage — before intercourse — competent to show relationship — and is corroborative.

3. It is not error in a bastardy proceeding to permit the complaining witness to testify that the defendant, before the acts of intercourse complained of, led her to believe that they were to be married, as such evidence tends to show the relationship of the parties, and is corroborative in its nature.

Complaining witness — presents — given her by other men — not competent — too general — not confined to times in issue.

4. It is not error to refuse to permit the complaining witness to testify as to presents given her by other men, when the questions asked are general and are not confined to the times in issue.

Remarks of defendant's counsel — addressing jury — upon matters not in evidence — witness — character of, not in issue or questioned — improper — caution by court — not error.

5. Where counsel for defendant in his closing argument makes a statement: "This is M—, I could say more, I couldn't say less. He is an absolutely unreliable man, and an absolutely unreliable police magistrate,"—and there is no evidence in the record which tends in any way to question the general reliability of the witness, nor any which casts discredit upon his career as a police magistrate, and it is not error for the court to say: "I think you will have to be a little careful, Mr. H—, in the use of your words. You have a certain latitude, but beyond that, please don't go; . . . getting so close to the line it was dangerous."

Complaining witness — period of gestation — acts of, outside of such period.

6. It is not error in a bastardy proceeding to refuse to allow the complainant to testify on cross-examination as to whether she had, outside of the period of gestation, asked the defendant to go with her to a house of prostitution.

Complaining witness — testimony of — corroboration not necessary to convict.

7, It is not necessary to a conviction under chapter 5 of the Criminal Code of North Dakota (Rev. Codes 1905) that the testimony of the complainant should be corroborated by other evidence.

Charge of court — errors must be pointed out — taking advantage of.

8. Where counsel wishes to take advantage of alleged errors in the court's charge, he should point out the portion of the charge which is subject to criticism and wherein the defects, if any, consist.

Judgment in — maintenance of child — court may vacate or modify judgment — notice of — necessity for same — court must acquaint himself with the facts.

9. Sec. 9655, Rev. Codes 1905, which provides that in a bastardy proceeding and in cases of a verdict of guilty, the court "shall render such judgment as may seem necessary to secure, with the assistance of the mother, the maintenance and education of such child until such time as the child is likely to be able to support itself. . . . The court may at any time, upon the motion of either party, upon ten days' notice to the other party, vacate or modify such judgment as justice may require,"—presupposes that the court shall reasonably acquaint himself with the necessities of the case. It nowhere, however, provides for the method or how the information shall be obtained. The taking of testimony, therefore, upon such questions and before the rendition of judgment, is not necessary where the station in life, age, and occupations of all of the parties interested have been fully exposed upon the trial, and especially where the defendant takes no exception to the methods pursued by the trial court until after the rendition of the judgment.

Additional Syllabus on Rehearing.

Medical books — contents of — introducing in evidence — reading from, to jury — contradicting expert witness — must be relied upon, by witness — must have based testimony on same — attention must be called to same.

10. Before the contents of medical books may be introduced in evidence and read to the jury for the purpose of refuting the testimony of a medical expert, it is necessary that the attention of the witness shall be first called to such books, and that he shall have based his opinion upon the same; and it would be a mere evasion of the rule to allow counsel in the cross-examination of a witness who has not either based his opinion upon the specific book, nor upon the authorities generally, nor whose opinion in the nature of things must necessarily be based upon authorities, to read to such witness portions of a medical work, and to ask him if he concurs in or differs from the opinions therein expressed. Such a proceeding would be nothing more nor less than impeaching the witness by a text-book on which he has in no way relied, and

where no foundation for his impeachment has been laid, and by an authority who is not present in court and cannot be cross-examined.

Medical witness — opinion based upon medical authorities — books may be used — caution of court — as to evidence.

11. Where, however, a medical witness has, in his examination in chief, based his opinion upon the medical authorities generally, rather than upon the result of his own personal experience, it is permissible in cross-examination to read to him portions of medical works, and to ask if he concurs therewith or differs therefrom, and to thus test his knowledge and reading and accuracy, even though he has not, in his direct or cross-examination, referred to any specific work. Where this is done, however, the proper practice is for the court to caution the jury that it is the testimony of the witness, and not what is read from the book, that constitutes evidence in the case.

Opinion filed October 10, 1914. On Rehearing December 23, 1914.

Appeal from the District Court of Cass County. Prosecution for bastardy. Judgment for plaintiff. Defendant appeals.

Reversed and new trial ordered.

Statement by BRUCE, J.

This is an appeal from a judgment of the district court of Cass county, and from an order denying a motion for a new trial, and which judgment determined that the defendant was the father of a bastard child, and ordered him to pay for its support the sum of $120 a year, quarterly, until the 10th day of August, 1917, and $150 a year thereafter until the 10th day of August, 1928, and to provide a bond in the sum of $2,250, or on default to be committed to the county jail.

M. A. Hildreth, for appellant.

Quotations from medical works may be incorporated in questions used in catechising an expert as to his technical knowledge. Hutchinson v. State, 19 Neb. 262, 27 N. W. 113; Sale v. Eichberg, 105 Tenn. 333, 52 L.R.A. 894, 59 S. W. 1020; Hess v. Lowrey, 122 Ind. 225, 7 L.R.A. 92, 17 Am. St. Rep. 355, 23 N. E. 156; Cronk v. Wabash R. Co. 123 Iowa, 349, 98 N. W. 885; State v. Holter, 32 S. D. 43, 46 L.R.A.(N.S.) 376, 142 N. W. 657; Tompkins v. West, 56 Conn. 478, 16 Atl. 237; State v. Coleman, 20 S. C. 441; Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516; Williams v. Nally, 20 Ky. L. Rep. 244, 45

S. W. 874; Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862; Brown v. Sheppard, 13 U. C. Q. B. 178; Eggart v. State, 40 Fla. 527, 25 So. 144; Bloomington v. Shrock, 110 Ill. 222, 51 Am. Rep. 678; Clark v. Com. 111 Ky. 443, 63 S. W. 740; State v. Winter, 72 Iowa, 627, 34 N. W. 475; State v. Wood, 53 N. H. 484.

It is proper in such cases for defendant to offer evidence of his good character. Defendant is presumed innocent; he is entitled to every reasonable doubt, and sometimes such evidence may be very valuable to a person charged with such offense. Fields v. State, 47 Ala. 603, 11 Am. Rep. 771; 1 Green, Crim. Rep. 635; Lowenberg v. People, 5 Park. Crim. Rep. 414; Hall v. State, 40 Ala. 698; People v. Ashe, 44 Cal. 288; People v. Lamb, 54 Barb. 342; Stover v. People, 56 N. Y. 315; State v. McMurphy, 52 Mo. 251.

It is highly competent for defendant to show that complaining witness had been with other men at times within the issue, and the opportunities for intercourse with others. To refuse such evidence was very prejudicial to defendant. Richards v. Ann Arbor, 152 Mich. 15, 115 N. W. 1047; Hedlum v. Holy Terror Min. Co. 16 S. D. 261, 92 N. W. 31; Graham v. McReynolds, 90 Tenn. 673, 18 S. W. 272.

The evidence as to the relations of the complaining witness with other men was highly important; it was competent. Burris v. Court, 34 Neb. 187, 51 N. W. 746; State v. Woodworth, 65 Iowa, 141, 21 N. W. 490; State v. Karver, 65 Iowa, 53, 21 N. W. 161, 5 Am. Crim. Rep. 88; State v. Borie, 79 Iowa, 605, 44 N. W. 824, 8 Am. Crim. Rep. 87.

A. W. Fowler, for respondent.

It would be an evasion of the general rule to permit counsel on cross-examination to read to the witness portions of medical works, and to ask the witness if he concurred in or offered a different opinion from the one read. Marshall v. Brown, 50 Mich. 148, 15 N. W. 55; People v. Millard, 53 Mich. 63, 18 N. W. 562; Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 678; State v. Winter, 72 Iowa, 627, 34 N. W. 475.

Such practice is, in effect, the same as offering the book in evidence. Jones, Ev. §§ 578, 579 and cases cited in note 91; Abbott, Trial Brief, p. 329.

It is competent to prove a promise of marriage, or that defendant led complaining witness to believe they were to be married, either

before or at the time of the intercourse. Laney v. State, 109 Ala. 34, 19 So. 531; Woodward v. Shaw, 18 Me. 304.

In such a case, the character of defendant is not in issue. Walker v. State, 6 Blackf. 1; Low v. Mitchell, 18 Me. 372; Houser v. State, 93 Ind. 228; Sidelinger v. Bucklin, 64 Me. 371; Stoppert v. Nierle, 45 Neb. 105, 63 N. W. 382.

It is proper to contradict the testimony of an expert medical witness, by referring to and reading into the evidence on cross-examination the very book of work used and referred to by the witness. Jones, Ev. § 579, and cases cited.

Where a ruling is wrong, and counsel is thereafter given full opportunity to cross-examine complainant on the same subject, the error is cured. Langford v. Issenhuth, 28 S. D. 451, 134 N. W. 894; Friedenwald v. Welch, 174 Mich. 399, 140 N. W. 564.

Proof of other acts of intercourse must be confined to the period of gestation. 2 Enc. Ev. 248 and cases.

Complainant's character for chastity, and her acts of intercourse outside the period of gestation, are not within the issues of such a case as the one here. Jones, Ev. § 153 and cases; Davison v. Cruse, 47 Neb. 829, 66 N. W. 823; Bookhout v. State, 66 Wis. 415, 28 N. W. 179; State ex rel. Clifton v. Granger, 87 Iowa, 355, 54 N. W. 79; Force v. Martin, 122 Mass. 5.

The uncorroborated evidence of complainant is sufficient to sustain a verdict. 2 Enc. Ev. 255, and cases; State v. Peoples, 9 N. D. 146, 82 N. W. 749.

BRUCE, J. (After stating the facts as above). Counsel for appellant has made seventy-eight assignments of error in this case, and states in his brief that these various assignments "will convince every unprejudiced mind that the defendant did not have a fair and impartial trial, and that the rulings of the court were highly prejudicial." We cannot see any merit in any of these assignments, and yet we do not plead guilty to prejudice in this matter, nor can we find anywhere in the record any indication of prejudice on the part of the learned trial judge.

The first assignment of error claims that it was prejudicial error for the trial court to refuse to permit the defendant to introduce testi-

mony showing that his reputation as to chastity and virtue prior to being arrested was good. In the case of State v. Brandner, 21 N. D. 310, 130 N. W. 941, the court has held that a bastardy proceeding which is brought under chapter 5 of the Code of Criminal Procedure is quasi-criminal in its nature, but that the legislature has provided in § 9653, Rev. Codes 1905, and had the constitutional right to provide, that the trial should be governed by the law regulating civil actions. Such being the case, we seem to have no option but to hold that in such cases the civil rule as to the admissibility of character evidence prevails; and that according to such rule, and except in the case of libel and slander, such evidence is inadmissible, seems to be overwhelmingly, if not universally conceded. Jones, Ev. § 148; Stopperd v. Nierle, 45 Neb. 105, 63 N. W. 382; Walker v. State, 6 Blackf. 1; Houser v. State, 93 Ind. 228; Low v. Mitchell, 18 Me. 372; 5 Cyc. 662; Sidelinger v. Bucklin, 64 Me. 371; 3 Am. & Eng. Enc. Law, 884.

The cases cited by counsel for respondent, indeed, are all strictly criminal cases, involving offenses such as murder, larceny, and assault and battery; and though, in addition thereto we have been able to find the cases of Hawkins v. State, 21 N. J. L. 630, Dally v. Woodbridge Overseers, 21 N. J. L. 491, and Webb v. Hill, 115 N. Y. Supp. 267, which seems to hold to a contrary doctrine (and these are all which we can find), all of them treat the action as criminal, or at least quasi-criminal, and in none of them is to be found a reference to a statute such as ours, which provides that "the trial of such proceedings . . . shall be governed by the law regulating civil actions." Rev. Codes 1905, § 9653. The case at bar, indeed, seems to come squarely within the rule that in a civil action (and though quasi-criminal in its nature this action, as far as procedure is concerned, must be treated as a civil one), and except in the cases of slander and libel, the character of the defendant is not in issue, and that evidence in relation thereto is therefore inadmissible. Jones, Ev. § 148.

We find no reversible error in the rulings of the trial court on the cross-examination of the plaintiff's witness, Dr. Chagnon. It is argued that the doctor had testified on direct examination that the normal period of gestation is 270 days; that the medical authorities and physicians laid down as a minimum and maximum, 270, 260, and 265 days, or a few days over. He then testified, over the objection of the

defendant, that it was a fact that some of the physicians and text-books laid down a minimum as low as 249 or 285 days. He then testified that a child could be born at seven months, or eight months, and live, and that in his opinion, from the character of the child with respect to the quality of its nails and hair, it was a normal child.

On the cross-examination the following took place.

Defendant's counsel: Q. Let's see if you will agree with what I am going to read to you (reads). "The duration of pregnancy has an important bearing upon the questions of legitimacy and paternity. The signs of pregnancy, time of quickening, etc., have already been considered in another connection."

Plaintiff's counsel: Just a minute. If the court please, we object to this as not proper cross-examination. It doesn't seem to me counsel should read this. . . .

The court: Let's see the book, and I can see just what is coming. . . .

Plaintiff's counsel: Our objection is that it is not proper to use a medical book of this character on cross-examination.

The Court: Objection sustained.

Defendant's counsel: I would like to make a little offer of proof.

The Court: Well, all you want to do is to read from a book. You can ask him any question you have a mind to, bearing upon that subject, but the only extent of this rule is that you can't read from the book. . . .

Defendant's counsel: I can't use the book?

The Court: That is the point; you can't use the book. You can ask any question as to the subject-matter in controversy, but you can't read from the book.

Defendant's counsel: Then I understand, your Honor, it isn't permissible to examine an expert witness as to whether or not he agrees with certain language that is laid down in a treatise; is that the extent of your Honor's ruling?

The Court: You can ask that, but you can't read from the book.

Defendant's counsel: The defendant now offers to prove by questions to be put to this witness, based on the testimony of the other authors, that there isn't a case on record of a full-grown child where the period

of gestation was less than 265 days, and that in the case at bar the child was a full-grown child, and that the rule at common law and in the civil codes of the country fixes the period of gestation at 280 days, or, as some books say, 28 weeks, not less; and from that to 40 weeks; and I offer to read from a standard work on medical jurisprudence, and there form part of a hypothetical question to be put to the witness that the percentage as fixed by Athel's Table shows that the general rule is not less than 266 days, and that the maximum rule is 280 days, and that a child born at a period of 249 days would not and could not, according to medical jurisprudence, be a normal child, but would be an abnormal child; and I also in this connection maintain that in the direct examination of the witness by the state's counsel I am entitled under the rules of legitimate cross-examination to examine this witness thoroughly on that subject in the line that I have suggested to the court.

Plaintiff's counsel: Objected to upon the ground that it is not proper cross-examination, and irrelevant and immaterial, and that the rules of law do not permit the use of text-books in the manner sought to be used by counsel in his offer, and that the effect of the offer is to impeach the witness by the use of a text-book, and it comes squarely within the rule as laid down by all the authorities.

The Court: The court in ruling upon this question makes the following statement: At the time this objection was first interposed, counsel for the defendant, as will appear from the record, had in his hands a book entitled "Medical Jurisprudence, Student's Series, by M. D. Ewell," and had said book open at page 190, and was reading from ¶ 2 on said page, and, as stated by counsel, expected to read the balance of that paragraph, including what Dr. Tiddig said. The court believes that this method of procedure is contrary to the rule as laid down by Jones and other authorities, and especially as found in Jones on Evidence, 2d ed. p. 732, wherein the author states: "It would be a mere evasion of the general rule under discussion if counsel were allowed on cross-examination to read to the witness portions of such works, and to ask if he concurred in or differed from the opinions there expressed; hence this is not allowed." The same being supported by Marshall v. Brown, 50 Mich. 148, 15 N. W. 55; People v. Millard, 53 Mich. 63, 18 N. W. 562; Bloomington v. Shrock, 110 Ill. 219,

51 Am. Rep. 678; State v. Winter, 72 Iowa, 627, 34 N. W. 495, as appears by the note on said page 732. For the purpose of not being misunderstood, the court further states that he understands the rule will permit counsel for the defendant to ask the witness some of the questions which have been couched in his recent offer, with reference to the period of gestation,—as to the knowledge of the witness with reference thereto,—as based upon his study of the several works. That if he desires to offer any book in evidence the attention of the witness must be called directly to the statement of each author, and that the witness must have contradicted the author before the authority could be produced, and the same read to the jury. Now I think that it is also included within the rule.

Plaintiff's counsel: But I think the court has it wrong.

The Court: I don't so understand it.

Plaintiff's counsel: The rule is here stated, starting at the bottom of page 731 (reads). "But with reference to offering books in evidence the rule is that when an expert has given an opinion and cited a treatise as his authority, the book cited may be offered in evidence by the adverse party as impeaching testimony!"

The Court: That is what I intended to say.

Defendant's counsel: Counsel for the defendant desires to have the record show that he has no intention of offering this book in evidence; that his intention is to read from this book and from other like authorities, standard works on this subject, certain hypothetical questions to be put to this witness as applied to the case at bar, for the purpose of showing the jury that the child that is in controversy here was a full-grown normal child, and that under all the sound rules must have been begotten at a period of not less than 265 days and not to exceed 285 days, and that from the appearance of the child the witness is unable to state whether it was a 280-day child or 265-day child.

The Court: Well, I think that the record is complete enough. You don't misunderstand me, do you Mr. Hildreth?

Mr. Hildreth: No sir, I don't. I understand. I offer to examine this witness along the line above stated.

Plaintiff's counsel: This offer is objected to on the ground that the use of the text-books in the manner contemplated, namely, using them in framing hypothetical questions, is a mere evasion of the rule as

stated in Mr. Jones, and the effect is to use the text-book in impeachment of the witness on cross-examination, and that if any hypothetical questions are proper on cross-examination, or are to be framed and put to the witness, the counsel should not use, in the presence of the jury, the text-book in framing the questions, for the reason that it will necessarily and unquestionably have the direct effect upon the jury of leading them to believe that the text-book which the counsel is using and from which he frames his hypothetical questions are in direct conflict. Might just as well offer in evidence the text-book.

The Court: Objection sustained.

Counsel for defendant claims that he was unduly restrained in his cross-examination. We do not so hold, however, and have merely cited the proceedings at length because of the strenuousness of counsel's contention, and his constant imputation of prejudice on the part of the trial court. If counsel for defendant desired to refute the testimony of the witness by the use of the books in question, he should have first asked the witness if he based his opinion on any medical works, and, if so, on what; and then, and not till then, was he entitled to offer the book, or any book, in evidence for the purpose of impeaching this testimony. The rule is too well established to need amplification here. See Jones, Ev. § 578; Abbott, Civil Trial Brief, 329. And it is equally well established that it would be a mere evasion of the general rule if counsel were allowed on cross-examination to read to the witness portions of medical works, and to ask him if he concurred in or differed from the opinions there expressed. Marshall v. Brown, 50 Mich. 148, 15 N. W. 55; People v. Millard, 53 Mich. 63, 18 N. W. 562; Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 678; State v. Winters, 72 Iowa, 627, 34 N. W. 475. Such procedure, indeed, would be nothing more or less than impeaching the witness by a text-book on which he had in no way relied, and would be the same as offering in evidence the text-book read from. Jones, Ev. 2d ed. § 579.

But counsel for defendant further complains that in spite of this ruling the court permitted the plaintiff to introduce a certain work of Professor Edgar, upon the cross-examination of defendant's witness, Dr. Vidal. The ruling of the learned trial judge, however, was entirely correct, and it merely serves to illustrate the point under consideration,

and to make clear the distinction which is made by the authorities, and which was emphasized by the trial court; for in this instance the attention of the witness had been directly called to the book in question, and the matter came fully within the rule laid down by the authorities. A perusal of the record will, we believe, make this clear to all.

It is "Cross-Examination by counsel for plaintiff.

Q. Doctor, this question of the average period of gestation is a question concerning which there is a great deal of dispute in the medical profession, is there not? I mean by that, great deal of difference of opinion?

A. There is a few days. Matter of a few days in—between the best authorities; matter of two or three days one way or another. That is, some of the authorities lay down a lower average of gestation than others. That is true. I think I am familiar with a great number of authorities upon what the authorities hold upon this subject. I am familiar with what Professor Edgar holds. He is professor of Obstetrics in Cornell University. He is a leading authority on the subject in this country, and a very good authority.

Q. Do you recall what he lays down as the average period?

Defendant's counsel: Objected to as incompetent, irrelevant, and immaterial; improper cross-examination, and I assume that it is practically what I attempted to ask.

By the Court: Now, it just illustrates the objection. It is a perfect illustration of my rule. The objection is overruled. You may answer the question.

Exception by defendant.

A. I believe 274 days. I am not positive; but that would be my opinion. I am not positive that it wasn't 272, but that would be my impression.

Q. Well, to refresh your recollection, doctor, I will call your attention to the following language found at page 144 of Professor Edgar's work on the practice of obstetrics, 3d edition—1911 edition—which language reads as follows:

Defendant's counsel: Just a moment. I object to the counsel's using the book to cross-examine this witness. I haven't been permitted

to use any books, and I object to the testimony as being incompetent, irrelevant, and immaterial, and improper cross-examination. I haven't referred to this book in no way, and when I sought to ask him about this book, as I understood the Court to rule, I could not refer to it.

By the Court: Again the court holds with the rule laid down by Jones and others. This is cross-examination, and under the rule in cross-examination this is permissible. You may answer the question.

Plaintiff's counsel: I haven't quite finished. I didn't want to read until the court rules. (Continued reading): "We learn from experience that the average apparent duration of pregnancy is ten lunar or nine calendar months, or 40 weeks or 280 days from the beginning of the last menstrual period, or 272 days from the date of conception." Now, from that language, doctor, would you say that the average period of gestation from the date of conception, laid down by Professor Edgar, was 274 days or 272 days?

A. 272.

Counsel for defendant: Objected to—wait a minute, doctor. Objected to as incompetent, irrelevant, and immaterial; improper cross-examination.

The Court: Overruled. You may answer.

Exception by defendant.

A. 272. It reads from the book; it must be right. My impression was 274. I have a good many authorities; I haven't taken pains to look them up for a long time. Yes, the authorities differ. Some of them place it as low as 268 days; some 268 days; some 269 days; some 272 days. I testified that in my opinion the average number of days of gestation was 278. That is figuring from the first day of the last menstrual period. Assuming that a woman's menstrual period was November 16, 1911, you would figure this 278 days from that day. Now if the intercourse took place November 25th, or nine days later, then if I was going to figure the period of gestation from the date of intercourse, I would subtract 9 days from 278. That would make it 269 days from the period of intercourse to the date the child was born. But the 278 days I gave as a general rule dates from the first day of the menstrual period preceding, and if I was going to figure from the date of intercourse I would, of course, deduct the days between.

Q. And in the supposed case it would make it 269 days as the actual

period of gestation from the time of intercourse to the date of birth. Now, doctor, in arriving at this matter of average period of gestation, it is arrived at, is it not, by taking a number of cases and averaging them up?

A. Yes sir. That is all it amounts to. Supposing Professor Edgar in fixing his rule would take 1,000 cases of pregnancy and childbirth, there would be a number of cases that would be a great many days less than the average. Some of them, say, 250 days; some of them 252 days; some of them 254 days; some of them 258 days, and as you got up to the average the number of cases would increase at a given date. Some of them would run 274, 276, and so on, and he would take and add them all together, and divide it by the number of cases, and get the average.

We think there was no error in permitting the complaining witness to testify that the defendant had, before the acts of intercourse, complained of, led her to believe that they were to be married. This evidence tended to show the relationship of the parties, and was corroborative in its nature, just as much so in fact as evidence that the parties had been seen together at or about the times of the alleged intercourses.

There is no merit in the objection that defendant's counsel was not allowed to cross-examine the complainant in regard to her relations with the man Anderson. Even if the privilege was improperly denied in the first instance, the error, if any, was entirely cured by the granting of the privilege, and the full use thereof, later on in the trial, and when the plaintiff was recalled. Nor was there any merit in the contention that defendant was not allowed to question plaintiff as to presents alleged to have been given to her. The questions were very general, and hardly confined to the times in issue. There, too, must be some reasonable limit to cross-examination; and receiving presents is hardly in itself evidence of illicit relationship.

There is certainly no merit in appellant's contention that the trial court erred in his remarks to counsel during his argument to the jury, or that he thereby "emphasized his prejudice that he had manifested during the case." During counsel's argument he said to the jury: "This is H. F. Miller. I could say more. I couldn't say less. He is

an absolutely unreliable man, and an absolutely unreliable police magistrate." To this counsel for the state objects, saying: "Object to that statement. No evidence in the record to substantiate any such statement." The court thereupon said: "I think you will have to be a little careful, Mr. Hildreth, in the use of your words. You have a certain latitude, but beyond that, please don't go." Counsel for defendant then responded: "I didn't think I was going beyond the line," and the court continued: "Getting so close to it, it was dangerous." We really do not see what less the court could have said under the circumstances. In fact, we believe that he would have been justified in saying a great deal more. The remarks of counsel for the defendant were, indeed, entirely improper. There was, it is true, some question as to whether the witness Miller's version of what took place in the justice's court was the correct one, but there was absolutely no evidence in the record at all that he was *"an absolutely unreliable man, and an absolutely unreliable police magistrate."* Witnesses have at least some rights which counsel are bound to respect, and our legal system will soon break down if one subpœnaed in a lawsuit, and with no opportunity for a hearing or a defense, is subjected to the danger of not merely having his testimony in the particular lawsuit criticized and refuted, but of having his personal integrity and professional or business career assailed. The remarks of counsel, indeed, were not even "close to the line." They went far beyond it, and if the really restrained comment of the presiding judge was evidence of prejudice on his part, we might just as well do away with orderly court trials altogether, and return once more to the primitive but speedy and character-saving procedure of trial by battle. It is time, indeed, for all of us to cease imputing prejudice, and to realize that an honest difference of opinion can exist without prejudice and without ulterior motive.

It was not error to refuse to allow the complainant to testify on cross-examination as to whether she had asked the defendant to go over to Moorhead with her. The question in the first place was not proper cross-examination, as it did not touch upon any subject which was treated upon in the direct examination; in the second place, the time alleged was outside of the period of gestation, and the evidence could only have been asked for the purpose of injuring the plaintiff's

general reputation for chastity by proof of a specific act of unchastity, which cannot be done, for the simple reason that the very nature of the proceeding is at least to some extent an admission of unchastity, and such evidence would be merely diverting attention from the principal question to be tried. Jones, Ev. § 153; Rawles v. State, 56 Ind. 433; Davison v. Cruse, 47 Neb. 829, 66 N. W. 823. On the other hand, it was not improper to allow the witness to testify as to the giving of a ring by defendant to her, and the conversation relating thereto. Foundation for this evidence was not only laid in the cross-examination by defendant's counsel himself, but it was competent to show the general relationship of the parties.

We do not agree with counsel for appellant that the evidence is not sufficient to sustain the verdict. The plaintiff positively swore to sexual intercourse with the defendant on November 27th 1911; that she had a menstrual period on November 16th, and did not have it on December 16th, nor until after the child was born, on August 10, 1912. There, too, is corroborating evidence in the record, which, though not very strong or very conclusive, has yet some weight. We have no right to interfere with the verdict of the jury. State v. Peoples, 9 N. D. 146, 82 N. W. 749. It seems generally to be held, indeed, that in the absence of a statute it is not necessary to a conviction that the testimony of the complainant should be corroborated by other evidence. 2 Enc. Ev. 355.

Counsel next makes a general statement to the effect that the court's charge is erroneous. He, however, points out no particular portion of the charge which is subject to criticism. Nor does he give us any idea wherein its defects consist. This is nothing more or less than an abandonment of the objection. The same is true of the objection that the court erred in refusing to give the instructions asked for, and the assignment of error that "the court erred in denying the requests marked 1, 2, and 3" of the defendant, in the instructions to the jury. All that counsel says in his brief upon this proposition is that "these requests and instructions, when taken together, clearly indicate that the rights of the defendant were not safeguarded by instructions which the court should have given to the jury in a case of this character." It would certainly seem that this court should have something more

definite to pass upon, and that counsel for the respondent should have some specific allegations with which he could join issue.

Nor is there any merit in appellant's contention that no evidence was taken as to the earning capacity of the parties to the suit, nor of the "assistance" that the mother might be able to furnish in the maintenance and education of the child, and that therefore the judgment is invalid which orders the defendant to pay the sum of $120 a year until the 10th day of August, 1917, and $150 from that date to the 10th day of August, 1928. The statute (§ 9655, Rev. Codes 1905) expressly provides that the court, in cases of a verdict of guilty, "shall render such judgment as may seem necessary to secure, with the assistance of the mother, the maintenance and education of such child, until such time as the child is likely to be able to support itself. . . . The court may at any time, upon the motion of either party, upon ten days' notice to the other party, vacate or modify such judgment, as justice may require." This statute, of course, presupposes that the court shall reasonably acquaint himself with the necessities of the case, but it nowhere provides for the method nor how the information shall be obtained. Here the station in life, age, and occupations of all of the parties interested had been fully exposed upon the trial, and there was clearly no necessity for taking any further testimony. The sums ordered to be paid were certainly not excessive. So, too, not only did defendant's counsel, who appears to have been present at the time, take no exception to the methods pursued by the trial court, or make or ask permission to make any proof upon the subject, but the statute expressly provides "that the court may at any time, upon the motion of either party, upon ten days' notice to the other, vacate or modify such judgment, as justice may require."

The judgment of the District Court is affirmed.

On Rehearing.

BRUCE, J. We are now satisfied that our original opinion must be modified and the judgment be reversed, and that the learned trial court erred in its rulings as to the cross-examination of Dr. Chagnon, and failed to distinguish between the use of medical books for the purpose of cross-examination merely, and to test the knowledge and reading and

accuracy of the witness who is upon the stand, and the use of such books in the examination in chief or in rebuttal, or by reading them, directly or indirectly, to the jury upon cross-examination, and not for the purpose of testing the learning, reading, or accuracy of the witness, but in order to get their contents and the opinions of their authors before the jury.

Although there is some conflict in the authorities and much obscurity of thought therein to be found, the distinction seems to be very clear. It is that, where the expert has testified from his own experience, and from his personal experience alone, and has not based his opinions upon any specific authorities or upon the authorities generally, the scientific treatise may not be read, either directly or indirectly, to the jury or to the witness in the presence of the jury, so that in any way their authority may be obtruded upon them. Hypothetical questions may, of course, in all instances, be framed from the books, but the books themselves should not be paraded before the jury. Brown v. Springfield Traction Co. 141 Mo. App. 382, 125 S. W. 236.

Where, however, the witness has not testified as to the results of his experience alone, but of his reading also, or where the subject under consideration is of such a nature that his opinion must necessarily be based upon his readings and the data and conclusions of the scientific authorities, rather than upon his individual experience, the witness may be cross-examined as to the authorities generally, and may be asked if he agrees with extracts which are read to him therefrom. This method of examination is allowed in these cases, not for the purpose of rebuttal, but to test the learning of the witness and the reliability and the nature of his data, and is permissible, even though no specific book has been referred to by him. It is allowed under the liberal rule which governs cross-examination, and not for the purpose of refuting the testimony of the witness by reading such authors into the evidence, which can only be done where the witness admits either in his examination in chief or in cross-examination that he has based his opinion upon such specific authors. See MacDonald v. Metropolitan Street R. Co. 219 Mo. 468, 118 S. W. 78, 16 Ann. Cas. 811. Where this is done, however, the proper practice is for the court to caution the jury that it is the testimony of the witness, and not what is read from the book, that constitutes evidence in the case. Ibid.

A distinction must be made between the cross-examination of a witness for the purpose of showing his lack of reading and training, and an attempt to overcome his evidence by reading medical works to the jury. The distinction is pointed out in the case of State v. Moeller, 20 N. D. 114, 126 N. W. 568, in which we said: "The fifth and sixth assignments of error relate to the sustaining of the state's objection to the following questions, asked one of the experts: 'Q. Don't you know that the text-books dealing with obstetrics and gynecology lay it down as a fact of not uncommon occurrence for a woman in a pregnant condition to inflict injuries upon the walls of the uterus, and cause similar conditions to those which were presented by the uterus described in this case?' and 'Q. Does not Hearst say in his text-book that injuries to the internal walls of the uterus resulting in septicæmia may be inflicted, and in fact not uncommonly are inflicted, by the pregnant woman herself?' These questions were propounded to Dr. Larson, who conducted the autopsy. He was a most intelligent witness, but his experience was limited, and his testimony was *based very largely upon knowledge gained from reading rather than from experience.* Had these questions been submitted for the purpose of eliciting information as to the contents of text-books primarily, the ruling of the court might be, and doubtless would have been, correct; but it is now claimed that they were submitted solely for the purpose of testing the accuracy of the witness's knowledge and the correctness of his conclusions as an expert, that necessarily his opinions were based upon reading medical works, and that their bearing was upon the weight which should be given his testimony. If this was the reason assigned in the trial court, the ruling was error."

When we apply these principles to the case at bar we become satisfied that the learned trial court erred in regard to the examination of Dr. Chagnon. It is clear from the record that Dr. Chagnon based his opinion largely upon his reading and upon the authorities, although he referred to no specific book. Counsel for defendant, then, should have been allowed to read to him from and to question him upon the medical authorities. "We cannot conceive," says the supreme court of Nebraska in the case of Hutchinson v. State, 19 Neb. 262, 27 N. W. 113, "that it would be possible, by any rule of evidence, to base the testimony in chief of the witness upon his experience in obstetrics. For

instance, the normal period of gestation, the probability of conception in the first act of intercourse, the length of the period of gestation in case of the first as compared with subsequent children, the number of days that ill health caused by uterine disorders would shorten the period of gestation, if at all, and many other prominent elements in the case presented by the defense, would naturally and inevitably require the witness to go outside of the domain of experience as an obstetrician, and it seems to us that he very properly and truthfully answered that his testimony was based upon *medical authorities.* For the purpose, therefore, of testing his recollection as well as his knowledge, it was proper to interrogate him as to the teachings of those authorities, and, in case his testimony was incorrect, to confront him with them in order that he might be corrected, and the jury thus be rendered able to judge of the weight to which his testimony was entitled. It is insisted that the testimony was inadmissible because 'the testimony of the witness shows that his opinion on the point in question was opposed to these same medical authorities.' As we have shown, the testimony entered the domain of science, and the ground upon which the objection is founded appeals most strongly to the mind of the writer as cogent reasons why the cross-examination was proper."

It is, indeed, upon this fact, or absence of fact, of the witness having based his opinion in chief upon what he had learned from the books, that the cases may be distinguished. In the case of State v. Blackburn the court said: "He (the witness) had not alluded to any authorities on his direct examination, as the witness had in Cronk v. Wabash R. Co. 123 Iowa, 349, 98 N. W. 885; *nor had he based his opinion on what he had learned from the books,* as in State v. Donovan, 128 Iowa, 44, 102 N. W. 791, and for this reason asked, as in Hutchinson v. State, 19 Neb. 262, 27 N. W. 113, what the several authorities taught. . . . In Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 512, the expert had said that he had read text-books in order to be able to state why he had diagnosed the case as delirium tremens, and paragraphs were read to him, and inquiry was made as to whether he agreed with the authors. *This was approved on the ground that he had assumed to be familiar with the authors, and in no better way could his knowledge on the subject be tested.* . . . In the case at bar the physician *had based his opinion solely on his own experience and observation,* and therefore it

was error to cross-examine him on the state of the medical authorities, in order thereby to get their supposed teachings before the jury. . . . Moreover, the inquiry was not one depending so much on skill in the profession as upon observation in its practice."

In the case of State v. Winter, 72 Iowa, 627, 34 N. W. 475, the question was asked upon the examination in chief, and not upon cross-examination. "He, [the witness]" the court said, "was then asked the following question: 'Have you read the article by Dr. Casselman, in the American Journal of Insanity, in which the author says, Mania,—instantaneous, temporary, fleeting,—a disease which breaks out suddenly like the sudden loss of sense by some physical disease; the subject is urged in a moment to automatic action, which would not have been foreseen?" If you say you have read the above quotation, state whether the same agrees and accords with your knowledge and experience on the subject.' On the objection of the district attorney the court excluded the question. It is not claimed that the question was asked with the view of laying the foundation for the introduction in evidence of the article referred to, but the object was to elicit the opinion of the witness. It will be observed, however, that the answer of the witness (which we assume would have been in the affirmative) would have been but a reiteration, in another form, of the opinion he had already expressed. He had already testified to the existence of the very form of mania referred to in the article. The fact or theory sought to be established was material and important, but as the witness had already clearly expressed his opinion as to its truth, the court did not abuse its discretion in refusing to allow the question, which, as we have said, sought only to elicit a reiteration of that opinion. The same witness was asked the following question, which the district court ruled was incompetent: 'State whether delusion or transitory mania is a condition recognized by medical authorities.' *It would be admissible, perhaps, on the cross-examination of a medical expert,* to inquire of him as to the teachings of the authorities in his profession. The object of such examination, however, would be to test the accuracy of the expert's knowledge. But the question in this case was asked not with this view, but for the purpose of proving that the theory in question is taught by the authorities. But the works themselves were admissible in evidence, and they are the only competent evidence of what they teach."

In the case of Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516, the court on page 519 said: "On the other point made, no medical books were read to the jury as evidence or for any other purpose, and it will not be necessary to discuss the admissibility of such evidence. But on cross-examination of the attending physician, who made a diagnosis of the disease of which the assured died, and pronounced it delirium tremens, paragraphs from standard authors that treat of that disease were read to the witness, and he was asked whether he agreed with the authors, and that is complained of as error hurtful to the cause of defendant. The testimony of this witness was of the utmost importance, and certainly plaintiff was entitled to reasonable latitude in the cross-examination. The witness had given the symptoms of the disease with which the assured was affected, and pronounced it delirium tremens, and as a matter of right, plaintiff might test the knowledge possessed by the witness, of that disease, by any fair means that promised to elicit the truth. It will be conceded, it might be done by asking proper and pertinent questions, and what possible difference could make whether the questions were *read out of a medical book or framed by counsel for that purpose.* Ordinarily, the limits of cross-examination of a witness are within the sound discretion of the court, and usually the greatest latitude is allowable that can be consistently given, for the discovery of the truth. *The witness in this case stated that he had read text-books that he might be able to state why he 'diagnosed the case as delirium tremens.' Assuming to be familiar with standard works that treat of delirium tremens, it was not unfair to the witness to call his attention to the definitions given in the books, of that particular disease, and asking him whether he concurred in the definitions.* How could the knowledge of the witness, of such subjects, be more fully tested? That is, in no just sense, reading books to the jury as evidence, or for the purpose of contradicting the witness. The rule announced may be liable to abuse. Great care should always be taken by the court to confine such cross-examination within reasonable limits, and to see that the quotations read to the witness are so fairly selected as to present the author's views on the subject of the examination. That the cross-examination was in the presence and hearing of the jury could not, of course, be avoided, as the witness was examined in

open court. No material error appearing in the record, the judgment must be affirmed."

In the case of MacDonald v. Metropolitan Street R. Co. 219 Mo. 468, 118 S. W. 78, 16 Ann. Cas. 811, the court said: "In framing questions on the cross-examination of experts, counsel held in hand medical books, and formulated questions from their language. The books were not read to the jury, but the jury could see that the examiner read from them. This method of cross-examination was objected to. The court, over objections, permitted plaintiff's counsel to adopt the scientific terminology of the author, and put the propositions to witnesses obviously asserted by him, but repeatedly cautioned the jury that what was read from the book was not evidence, and the jury should pay no attention to it; that the only thing they could consider was the evidence that fell from the lips of the witness along the line of verifying the propositions put by the examiner. Samples of these cautionary instructions are as follows (The court): 'The jury will not give any more weight to anything Mr. Karnes reads from the books than they would to any other questions Mr. Karnes asks, unless the witness answers questions in the affirmative, thereby making it evidence in the case. . . . It is the answers of this witness, gentlemen of the jury, that is evidence in this case, and not the questions.' Error is assigned on this phase of the trial, but the point is without soundness. It has been said that it is within the discretion of the court to permit medical books to be read to the jury (State v. Soper, 148 Mo. 1, c. 235, 236, 49 S. W. 1007, but undoubtedly the better and generally accepted doctrine is that the contents of such books are not admissible as independent evidence. [17 Cyc. 421; Union P. R. Co. v. Yates, 40 L.R.A. 553, 25 C. C. A. 103, 49 U. S. App. 241, 79 Fed. 1. c. 587 et seq.] Judge Thayer in the last case puts the grounds of exclusion on, first, such evidence is not delivered under oath; second, there is no chance of cross-examining the author; third, medicine is not an exact science, doctors disagree, medical theories are subject to frequent modification and change. But while not independent evidence, and the question is a vexed one, yet there is a legitimate use of such books, at least on cross-examination, where the testimony has taken wide range and where skilled witnesses testifying as experts base their testimony on their knowledge derived from books as well as experience, as in this

case. Here, defendant's counsel had notified some of his witnesses that he was appealing to, and asking his doctors to draw from, their medical knowledge running back, say, two thousand years, and which could only be preserved, if at all, in book form, from the days when Socrates ordered a cock sacrificed to Esculapius, the god of medicine, and Hippocrates and Galen practised physic in Greece and Italy. Under such circumstances, we see no reason why counsel could not frame a proposition in medical science in the exact language of the author, and ask the witness whether he agreed to it, so long as this was done under the due guard of the cautionary instructions given by the court. Such is the doctrine of a learned and exhaustive note on § 440, Greenleaf on Evidence, 15th ed. p. 579, where it is said: 'Moreover, it is a proper method of cross-examination, in order to test the learning of a witness who testifies as an expert, to refer to books of approved authority upon the subjects under investigation, and question him in regard to them.' Mr. Justice Scott, in Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 1, c. 519, gives that proposition the indorsement of his strong pen, though stating that the rule is liable to abuse, and great care should be taken to prevent such abuse. He there says: 'Assuming to be familiar with standard works that treat of delirium tremens, it was not unfair to the witness to call his attention to the definitions given in the books, of that particular disease, and asking him whether he concurred in the definitions. How could the knowledge of the witnesses of such subjects be more fully tested? That is, in no just sense, reading books to the jury as evidence, or for the purpose of contradicting the witness.' To the same effect is Hess v. Lowrey, 122 Ind. 1. c. 233 et seq., 7 L.R.A. 92, 17 Am. St. Rep. 355, 23 N. E. 156. In State v. Wood, 53 N. H. 1. c. 494, 495, Sargent, Ch. J., speaking to the point, said: 'As to Dr. Ferguson's cross-examination, we see no reason for any objection to it. He had stated, as well he might, on direct examination, his knowledge of a particular subject, not from any experience or actual observation, but from what he had derived merely from reading and studying medical authorities. Then he was cross-examined as to that general reading, not by putting in the books, but by inquiries whether, in his general reading, he had not found particular theories laid down conflicting with the theory he had advanced as the result of his reading.' Collier v. Simpson, 5 Car. & P. 73, goes further than the present case.

There Tindal, Ch. J., in speaking of a medical expert, says: 'I think you may ask the witness whether in the course of his reading he has found this laid down.' And that was upon direct examination. The Chief Justice further says, 'I do not think that the books themselves can be read, but I do not see any objection to your asking Sir Henry Halford (the witness who was the president of the College of Physicians) his judgment and the grounds of it, which may be in some degree founded on books, as a part of his general knowledge.' We rule the point against defendant."

In the North Dakota case of Kersten v. Great Northern R. Co. ante, 3, 147 N. W. 787, and where an examination of the record discloses the fact that the doctor had expressly stated that he had based his opinion upon the medical writers, the court said: "The fourth complaint of appellant relates to the cross-examination of defendant's witness, Dr. Sihler. The doctor had given his opinion as to the effect upon the brain of a blow delivered directly above the injury. Upon cross-examination he was asked whether or not certain medical text-books and authorities sustained a doctrine contrary to that held by the witness. It appears that the text-book to which reference was made was offered to the witness, and that the author at that time was a teacher of surgery in Johns Hopkins University. Thus the cross-examination was evidently in good faith to test the accuracy of the conclusion given by the expert who was upon the stand. Great latitude should be allowed in the cross-examination of experts to test their credibility and knowledge. Dilleber v. Home L. Ins. Co. 87 N. Y. 79; McFadden v. Santa Ana, O. & T. Street R. Co. 87 Cal. 464, 11 L.R.A. 252, 25 Pac. 681; Jones, Ev. 2d ed. § 389; Davis v. State, 35 Ind. 496, 9 Am. Rep. 760. We think the cross-examination proper." See also State v. Moeller, 20 N. D. 114, 126 N. W. 568; MacDonald v. Metropolitan Street R. Co. 219 Mo. 468, 118 S. W. 78, and note thereto in 16 Ann. Cas. 810, 818.

In the case of Hess v. Lowrey, 122 Ind. 225, 7 L.R.A. 90, 17 Am. St. Rep. 355, 23 N. E. 156, we find the following: "Complaint is also made that the court erred in admitting in evidence extracts from certain books or treatises on surgery. It does not appear that extracts from the books were read in evidence, or admitted in evidence as such. In the cross-examination of a medical expert, the witness was asked

whether certain statements were not made by certain writers on surgery, the statement referred to being *read from a book held by counsel, as part of the question.* It is recognized as a proper method of cross-examination, in order to test the learning of a witness who testifies as an expert, to refer to books of approved authority upon the subjects under investigation. Ripon v. Bittel, 30 Wis. 614; Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516; Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862; State v. Wood, 53 N. H. 484; Rogers, Expert Testimony, §§ 181, 182. The opinion of a witness may be tested by a cross-examining counsel by reading from medical books. 2 Best, Ev. pp. 882–884. Medical books may be read to the jury, not for the purpose of proving the substantial facts therein stated, but to discredit the testimony of experts who refer to books as authority for or in support of their opinions. Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862."

In Fisher v. Southern P. R. Co. 89 Cal. 399, 26 Pac. 894, 9 Am. Neg. Cas. 104, we find the following: "On cross-examination of Woolsey, a witness called as an expert by defendant, plaintiff's counsel was allowed, against the objection of defendant, to read statements from medical works, and to ask the witness if he agreed with the authors. This is assigned as error. Plaintiff's counsel defends the ruling here, on two grounds: (1) That the witness, on his direct examination, testified to certain medical opinions and supported his statements by the assertion that they conformed to the authority of medical works; and he claims that the rule is that if the witness, either in direct or cross examination, relies in any manner upon the authority of medical works, generally or specifically, it is proper cross-examination to confront him with the works upon which he relies, to show that his understanding of them is incorrect, or to contradict him; and (2) that it is proper cross-examination to test the competency of the witness as an expert, or the value of his opinions. A careful examination of the evidence has convinced me that the rulings complained of cannot be defended upon either of these grounds, though the legal proposition be admitted. As to the first, it is plain that some of the extracts read have no reference to any opinions of the witness which he sought to sustain by a reference to medical writers, either generally or specifically, except in response to a direct question by plaintiff referring to such writers. As to the second ground, it is not so plain. The value of an effective

cross-examination as a means of showing the incompetency of a witness or his lack of integrity and the true value of his testimony can hardly be overrated; and this is true in a special sense as to expert testimony, where the party may choose from the body of a profession those whose opinions are most favorable. It is quite natural, and certainly common, for one called as an expert to enhance his authority by his power of self-assertion, and there is reason to fear that these opinions are not always as impartial and indifferent as a judicial utterance should be. While it is to be regretted if in the proper exercise of the right of cross-examination it shall appear that certain medical writers of repute differ from the witness, and so a party will get the benefit of unsworn testimony, *still this evil, unavoidable in the nature of things, is, in my opinion, not at all commensurate with that which would deprive a party in such a case of the best touchstone known to legal science, by which to estimate the value of testimony.* And if, on general principles, such questions are legitimate on cross-examination, I do not see how a party can be deprived of his right because such evil consequences may follow. All the works on medical jurisprudence which I have examined seem to sustain this position, and some cases, although they are not uniform. Brodhead v. Wiltse, 35 Iowa, 429; Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516; Ripon v. Bittel, 30 Wis. 614; Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862; State v. Wood, 53 N. H. 484. But since consequences are likely to follow which admittedly should be avoided if possible, *such examination should be strictly limited to this one purpose,* for which only it can be permitted. *I think no fair-minded person can closely study this record without being convinced that the evidence was not put in with any such purpose.* No doubt counsel offered it under the impression that it was justified as inconsistent with opinions which the witness had claimed were sustained by medical authorities. I have shown that the claim cannot be sustained on that ground. In fact, although the witness took issue with some statements read, they cannot fairly be said to contradict his evidence in any respect. *They were evidently intended as evidence for the plaintiff, to sustain his theory of the case, and not to affect the competency of the witness or the value of his testimony.* As it seems to me a new trial must be granted for this error, it becomes unnecessary to review the other assignments."

In Greenleaf on Evidence, 16th ed. vol. 1, p. 269, § 162K, we find the following: "It has been thought by some courts that an expert witness may be discredited by reading an opposite opinion from a professional treatise, or by being asked whether opposing views have not been laid down by writers, or whether he agrees with certain opposing opinions then read; . . . and it is generally held that it cannot be done, except that where a witness has referred to a treatise, *or to writers generally,* as agreeing with him, the treatise may be shown not to agree with him, just as any other assertion of a witness may be disproved."

In the case of State v. Wood, 53 N. H. 484, the witness (Dr. Ferguson) had several books upon the table during his direct examination, and was apparently about to read from them when he was prevented by the objection of the state. "Upon cross-examination, counsel for the state proposed several questions similar in form to the following: Have you found, in the course of your reading or study, this sentiment in regard to oil of savin (then reading from a sheet of writing paper in his hand): 'Death in an hour after taking it?' Have you also found this: 'A woman took one hundred drops of oil of savin every morning for twenty days and went full time?' or this: . . . 'Almost fatal consequences in producing abortion?' or this: 'Its properties to produce abortion have been denied by late authors, of weight and reputation?' or this: 'Has no action as an abortive except like other irritants?' The respondent objected that, if he could not be permitted to put in the books themselves, such questions were inadmissible; but the state were allowed to put the questions, subject to exception, and the witness answered several of them in the affirmative. Subsequently, upon redirect examination, the respondent asked several questions similar in form to the above, as to the existence in the books of statements tending to confirm the testimony of the witness on his direct examination."

The court on page 494 of its opinion said: "As to Dr. Ferguson's cross-examination, we see no reason for any objection to it. *He had stated, as well he might, on direct examination, his knowledge of a particular subject, not from any experience or actual* observation, *but from what he had derived merely from reading and studying medical authorities.* Then he was cross-examined as to that general read-

ing, not by putting in the books, but by inquiries whether, in his general reading, he had not found particular theories laid down conflicting with the theory he had advanced as the result of his reading. Collier v. Simpson, 5 Car. & P. 73, goes further than the present case. There Tindal, Ch. J., in speaking of a medical expert, says: 'I think you may ask the witness whether in the course of his reading he has found this laid down.' And that was upon direct examination. The chief justice further says: 'I do not think that the books themselves can be read, but I do not see any objection to your asking Sir Henry Halford [the witness who was the president of the College of Physicians] his judgment and the grounds of it, which may be in some degree founded on books, as a part of his general knowledge;' and see 1 Wharton, Crim. Law, 6th ed. § 50. It is settled, in Taylor v. Grand Trunk R. Co. 48 N. H. 304, 2 Am. Rep. 229, that a physician may give his opinion as an expert upon a subject concerning which he has had no practical experience, and where his knowledge is derived from study alone. This case, we think, fully sanctions the direct examination of this witness upon a subject where his knowledge was *derived from books alone;* and the cross-examination was *simply the testing of the* correctness of his opinion by the *same standard upon which the* opinion was founded,—*the authority of the medical books which he had read.* We think this ruling was right."

In speaking of this opinion, and in a case in which the general rule was announced that "an expert medical witness cannot be discredited by reading an opposite opinion from a text-book in the presence of the jury, and asking him whether it is correct, where he has in no way referred to the book to sustain his opinion or otherwise relied on it," the supreme court of North Carolina, in the case of Butler v. South Carolina & G. Extension R. Co. 130 N. C. 15, 40 S. E. 770, said: "The last one [the opinion in question] relates to a cross-examination upon matters which the witness testified he had learned from certain medical authorities, *not from experience or actual observation.* The books were put in evidence,—were excluded—and the court held that upon the cross-examination counsel could be allowed to ask if the witness had not found particular theories laid down conflicting with the theory he had advanced as the result of his reading."

In the case of Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862, the

court said: "The rule is acknowledged in this state that medical books are not admissible as a substantive medium of proof of the facts they set forth. But the matter in question was not adduced with any such view. The witness assumed to be a person versed in veterinary science; to be familiar with the best books which treat of it, and among others the work of Dodd. He professed himself qualified to give an opinion to the jury from the witness stand on the ailment of the plaintiff's horse and its cause, and the drift of his opinion was to connect the defendant with that ailment. He borrowed credit for the accuracy of his statement by referring his learning to the books before mentioned, and by implying that he echoed the standard authorities like Dodd. Under the circumstances it was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness, and enable the jury to see that the book did not contain what he had ascribed to it. The final purpose was to disparage the opinion of the witness, and hinder the jury from being imposed upon by a false light. The case is a clear exception to the rule which forbids the reading of books of inductive science as affirmative evidence of the facts treated of. Ripon v. Bittel, 30 Wis. 614; 2 Whart. Ev. § 666."

In the case of Byers v. Nashville, C. & St. L. R. Co. 94 Tenn. 345, 29 S. W. 129, the court said: "But we are of opinion that the objections to the use of the book as first made were not well taken. The admission of such evidence is a matter largely in the discretion of the court, as well as the mode of conducting the examination. The witness Fravel was testifying not only as to the facts connected with the running of his train when the killing occurred, but also as an expert engineer, acquainted with and competent to testify as to the running of trains generally. *When a witness is testifying as an expert, it is competent to test his knowledge and accuracy upon cross-examination by reading to him, or having him read, extracts from standard authorities upon the subject-matter involved, and then asking him whether he agreed or disagreed with the authorities,* and comparing his opinion with those of the writer. Hess v. Lowrey, 122 Ind. 568, 7 L.R.A. 90, 17 Am. St. Rep. 355, 23 N. E. 156; Fisher v. Southern P. R. Co. 89 Cal. 399, 26 Pac. 894, 9 Am. Neg. Cas. 104; Richmond & D. R. Co. v. Allison, 86 Ga. 145, 11 L.R.A. 43, 12 S. E.

352; 1 Greenl. Ev. 15th ed. § 440, note. *We think it therefore admissible for the attorney to use the book in shaping his questions,* and it was not error for him to require the witness to examine and *read portions of the book* with a view of testing his knowledge by proper questions; and this, so far as the record shows, is all that was attempted to be done in the first examination when the objection was made. *But reading the book to the jury as evidence of the facts therein stated,* and *as a general rebuttal of the testimony of the expert, stands on a different basis.* It does not appear that this was done during the examination and cross-examination of the defendant's witnesses, but after they were through. Then the book was introduced again by the plaintiffs' counsel, and several pages read to the jury, and no objection was at this time made. In the absence of such objection made when the book was thus offered and read for this purpose and in this way, there is no reversible error. See 1 Greenl. Ev. 15th ed. § 440, note e, in which the following propositions are laid down, and cases cited in support: 'The weight of current authority is decidedly against the admission of scientific books in evidence before a jury, and allowing such books to be read from to contradict an expert generally. *However, it is a proper method of cross-examination, in order to test the learning of a witness who testifies as an expert, to refer to books of approved authority upon the subject under investigation, and question him in regard thereto.* Scientific books may be used by the attorney in *framing his questions* for the witness. He may read the question from *such a book to the witness, either on direct or cross examination.* Thompkins v. West, 56 Conn. 485, 16 Atl. 237. And if an expert has *quoted* a book, it may be read to him to show that he has misquoted it. Underhill, Ev. § 189; Ripon v. Bittel, 30 Wis. 614."

In the case of Clukey v. Seattle Electric Co. 27 Wash. 70, 67 Pac. 379, the court said: "The sixth assignment embraced an objection to the manner in which the attorney for respondent conducted the cross-examination of the medical experts appointed by the court. The counsel asked the expert if such authorities did not lay down certain rules,—reading the language of the rule from the *author's work,*—and it is contended that it is an infraction of the rule of evidence against the admission of medical authorities. But we do not think the rule of law was announced to meet the practice of the kind complained of.

These questions were propounded *upon cross-examination for the purpose of testing the knowledge of the expert.* It would have been competent for the attorney to have stated suppositious cases to the experts. He could properly have stated the rule from memory, asking the expert if such an author did not lay down such a rule. It seems there could be *no tenable objection to his reading the rule to the expert. In fact, it is a more exact method, and less liable to make a wrong impression on the mind of the juror, than to cross-examine from memory.*"

In the case of Brown v. Springfield Traction Co. 141 Mo. App. 382, 125 S. W. 236, the court said: "From the MacDonald Case, as well as from authorities of other states, we glean the correct rule to be that an attorney may use a medical book to aid him in framing questions to be asked of a physician testifying as an expert, but it is not permissible to read from such books to the jury, and the court did not err in refusing permission to defendant's counsel to read from such books to the jury in this case."

Again in the case of Louisville, N. A. & C. R. Co. v. Howell, 147 Ind. 266, 45 N. E. 584, we find the following: "Some contentions made by appellant seem to be based upon a misapprehension of the facts disclosed in the record. Objection, for example, is made to the exclusion of certain evidence sought to be elicited from Dr. Murphy, one of appellant's witnesses. In the course of his re-examination this witness was asked by appellant's counsel what was said in a certain named medical authority as to the difference between necrosis and caries of the bone, with a view to determine which of these diseases was indicated by the discharges from appellee's wound; and counsel cited authority to show that on cross-examination, such questions are proper. There is no doubt that, in order to test an expert's knowledge, it is proper, on cross-examination, to read *statements from writers of repute,* who have treated of the subject concerning which the expert has testified, and ask him questions touching the views advanced by such text-writers. Hess v. Lowrey, 122 Ind. 225, 7 L.R.A. 92, 17 Am. St. Rep. 355, 23 N. E. 156. The trouble with appellant's contention is that the question here asked was not on cross-examination, and the evidence thus sought was but of a self-serving character."

Again, in the case of Sale v. Eichberg, 105 Tenn. 333, 52 L.R.A.

894, 898, 59 S. W. 1020, we find: "The third assignment is that the court erred in excluding, on cross-examination of Dr. Raymond, one of plaintiff's witnesses, the *reading of extracts from the standard work of* Dr. Hamilton as to diagnosis and treatment of fractures like that of Eichberg. . . . Counsel stated he did not propose to introduce the book itself as evidence, but simply wished to test the witness as an expert, and the accuracy of his opinion and statements. It was held by this court in Byers v. Nashville, C. & St. L. R. Co. 94 Tenn. 350, 29 S. W. 128, *viz.*, 'when a witness is testifying as an expert it is competent to test his knowledge and accuracy, on cross-examination, *by reading to him or having him read extracts from standard authorities upon the subject-matter involved, and then asking him whether he agrees or disagrees with the authorities,* and then by comparing his opinion with those of the writer.' See also, Stoudenmeier v. Williamson, 29 Ala. 558. It is true the witness, after having been examined at great length in chief, finally, on cross-examination, said he did not claim to be an expert. The witness was a practising physician, and had expressed his opinion quite freely in respect of good practice and proper treatment in such cases. The defendant was entitled, on cross-examination, to test the witness's knowledge in the manner indicated, and the court was in error in excluding the question propounded."

There can, indeed, be no doubt that the modern tendency, and certainly the tendency of this court is towards the freedom of cross-examination and quite a wide latitude therein. See Kersten v. Great Northern R. Co. ante, 3, 147 N. W. 787; State v. Moeller, 20 N. D. 114, 126 N. W. 568; State v. Apley, 25 N. D. 298, 48 L.R.A. (N.S.) 269, 141 N. W. 740. A distinction, however, must be made between legitimate cross-examination and an underhanded attempt to read the authorities to the jury. We think there was no such underhanded attempt in the case at bar, and that, though in the colloquy which afterwards ensued between court and counsel, and in a portion of the subsequent offer, counsel intimated that such could be done, it is clear to us that the primary purpose of the reading in the first instance was cross-examination, and cross-examination alone. If this was the case, and the ruling which prevented the reading in the first instance was incorrect, the rights of the defendant should not be jeopardized merely because, in addition to the reason which was first ad-

vanced therefor, others were subsequently asserted which were unsound. There can, we may add, be no distinction made between asking a physician if an author does not make some particular statement, and then asking the witness what he thinks of the statement, which we inferentially at least held could be done in the case of State v. Moeller, supra, and the reading of the statement to the witness directly from the book in the first instance, and asking his opinion thereon. Williams v. Nally, 20 Ky. L. Rep. 244, 45 S. W. 874; Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516.

The case at bar, then, comes within the permission, and not within the condemnation, of the decision. It is true that in his subsequent offer counsel asserted the right to use the books as evidence in themselves, but this was only in a part of his offer, and he closed by saying: "And I also in this connection maintain that I am entitled, under the rules of legitimate cross-examination, to examine this witness thoroughly on that subject in the line that I have suggested to the court." It is to be remembered, indeed, that he was interrupted as he was reading a statement from the work after the preparatory question, "Let's see if you will agree with what I am going to read to you," and though he seems in no way to have unnecessarily paraded the book, the court in answer to the question, "Then I understand, your Honor, it isn't permissible to examine an expert witness as to whether or not he agrees with certain language that is laid down in a treatise," answered, "You can ask that, but you can't read from the book." Counsel for defendant then said: "Counsel for defendant desires to have the record show that he has no intention of offering the book in evidence; that his intention is to read from other like authorities, standard works on this subject, certain hypothetical questions to be put to this witness as applied to the case at bar, for the purpose of showing the jury that the child that is in controversy here was a full-grown normal child, and that under all the sound rules must have been begotten at a period of not less than 265 days and not to exceed 285 days, and that from the appearance of the child the witness is unable to state whether it was a 280-day child or a 265-day child."

The door, indeed, seems to have been opened wide for cross-examination when on the direct examination of plaintiff's witness, Dr. Chagnon, the witness was allowed to testify that *"the medical authorities*

and physicians laid down as a maximum and minimum 270, 260, and 265 days, or a few days over;" and still further when he was allowed to correct himself, and in answer to a leading question, and over the objection of defendant's counsel, to state that "it was a fact that some of the physicians and text-books laid down in minimum as low as 249 to 285 days."

When we come to the testimony of Dr. Vidal, and for the reasons heretofore mentioned, we think the learned trial court committed no error. There was really no material difference in the two cases. Dr. Vidal had, it is true, on direct examination, referred to no particular authority, nor did he even on cross-examination agree with the authority read. He had, however, as in the case of Dr. Chagnon, based his opinion on the authorities generally, and it was merely proposed to examine him in regard thereto, and to read to him from them for that purpose. We now approve of the examination, not for the reason given in our original opinion, and of which we now entertain some doubt, but because the doctor had expressly stated that his opinion was based upon his readings and upon the authorities, and it was therefore perfectly permissible to show upon cross-examination that his memory of what those authorities held was inaccurate, and to generally test the accuracy and extent of his reading and research.

It is true, there are some authorities which hold to a contrary rule to that which we have herein expressed. They are, however, few in number. Among them is the case of Mitchell v. Leech, 69 S. C. 413, 66 L.R.A. 723, 104 Am. St. Rep. 811, 48 S. E. 290. In this case the court said: "The eleventh exception will next be considered. The record shows that the question arose in the following manner: 'Doctor, is Lydson a standard medical work on genitourinary and venereal and sexual diseases? (Mr. Hart: I object. Medical books are not evidence, except in cases of insanity. Medical books are not evidence in cases of this character.) Q. I will ask him if that is good authority? (Mr. Hart: I object to that. Mr. Brice: This is an expert witness, and the witness had stated that the authorities, medical authorities—that is what the witness means—state that a man can have an injury so slight as not to be noticed at the time, and yet serious results follow. I am not introducing the authority. I am simply asking him whether this is an authority. The Court: The object of the question is to

introduce the book? Mr. Brice: I am simply going to ask him if this is an authority, and read him a piece, and ask him if that is good authority or not? The Court: That introduces the book. You wish to contradict or qualify the opinion of the doctor on the stand. Otherwise it would be irrelevant. Testimony excluded. (Exception taken.)' The presiding judge simply ruled that you could not contradict or qualify the opinion of the doctor on the stand by showing what some author had said. In this there was no error."

The case of Butler v. South Carolina & G. Extension R. Co. 130 N. C. 15, 40 S. E. 770, seems also to more or less bear out the point contended by the plaintiff. In it, however, there is no proof that the doctor in his direct examination based his opinion *upon the authorities generally*. The same is true of the case of City of Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 678.

In the case of Chicago City R. Co. v. Douglas, 104 Ill. App. 41, the books were sought to be read *on the examination in chief,* and the case therefore is not in point. In the case of Hall v. Murdock, 114 Mich. 233, 72 N. W. 150, the books were actually read to the jury.

We, too, are not unmindful of the § 579 (595) of Jones on Evidence, on which the trial court based his conclusions, and which states that "it is generally conceded, however, that where experts are examined as to questions of science they may give their opinions and the ground and reason therefor, although they state that such opinions are in some degree founded upon treatises on the subject. But it has been held inadmissible for such a witness to read to the jury from books, although he concurs in the views expressed, or even to state the contents of such books, though he may refer to them to refresh his memory. . . . And when an expert has given an opinion and cited a treatise as his authority, the book cited may be offered in evidence by the adverse party as impeaching testimony. But unless the book is referred to on cross-examination, it cannot be used for this purpose. It would be a mere evasion of the general rule under discussion, if counsel were allowed on cross-examination to read to the witness portions of such works, and to ask if he concurred in or differed from the opinions there expressed; hence this is not allowed."

This section, no doubt, states the correct rule in regard to the examination in chief and rebuttal, and in regard to the actual reading of

books to the jury in all cases. It also states the correct rule in regard to cross-examination where the specific book has neither been referred to nor has the witness based his opinion upon the *authorities generally*, but, instead, upon his own personal experience, and where his knowledge of and understanding of the authorities, as well as the extent of his general reading, is not a fit subject of inquiry. It does not, however, express either the general or the correct rule in cases where these latter facts exist. The statement is too general. Only four cases, indeed, are cited by Mr. Jones in support of the proposition as made, and none of them bear out the contention of counsel for respondent, nor are applicable to facts such as are to be found in the one at bar. The cases cited are: Marshall v. Brown, 50 Mich. 148, 15 N. W. 55; People v. Millard, 53 Mich. 63, 18 N. W. 562; Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 678; State v. Winter, 72 Iowa, 627, 34 N. W. 475.

The first case, namely, that of Marshall v. Brown, supra, is more or less in point, but a reading of it will, we believe, disclose a quite apparent desire to read the book to the jury, rather than to test the knowledge of the witness. In the case of People v. Millard, 53 Mich. 63, 18 N. W. 562, the point was not merely not a decisive one in the case, but the readings which were under discussion appear to have been had on the *direct examination* of the witness, and their purpose to have been to bolster up his testimony, rather than to test his learning. The language of the opinion is itself a strong argument for the liberal examination of experts and the testing of their knowledge and information. The court, indeed, expressly states that *if the witness is not well read he is not entitled to any credence as an expert*, and yet the case is cited as authority for the proposition that the extent and thoroughness of that reading may not be probed into. The court in its opinion, in fact, merely says: "Another source of error quite as mischievous, and which the court evidently desired to prevent, but did not always do so, was the introduction of what is no more than hearsay evidence, in the shape of references to writers and books in such a way as to invoke their authority. As we have had occasion on more than one record to explain heretofore, expert evidence is only admissible on the theory that the jury cannot be supposed to comprehend the significance of facts shown by other testimony which needs

scientific or peculiar explanation by those who do comprehend it. But this does not permit hearsay testimony of the written or spoken opinions of other persons, whom the jury have no means of examining as to their learning, their honesty, or their sources of special knowledge. Every medical and scientific writer bases much of his conclusions upon what he believes to be true in the reported facts and opinions of other men of science. Those facts may be correctly stated, or they may be assumed on small or no foundation. Those opinions may be taken carelessly at second hand, or they may have been thoroughly weighed before adoption. No one can tell whether a medical book or opinion is reliable or not, until he has applied himself, with some fitting preparation, to its study and criticism. The book may be good in part and bad in part, and neither court nor jury can presumptively ascertain its quality. No one has any title to respect as an expert, or has any right to give an opinion upon the stand, unless as his own opinion; and if he has not given the subject involved such careful and discriminating study as has resulted in the formation of a definite opinion, he has no business to give it. Such an opinion can only be safely formed or expressed by persons who have made the scientific question involved matters of definite and intelligent study, and who have by such application made up their own minds. In doing so, it is their business to resort to such aids of reading and study as they have reason to believe contain the information they need. This will naturally include the literature of the subject. But if they have only taken trouble enough to find, or suppose they find, that certain authors say certain things, without further satisfying themselves how reliable such statements are, their own opinions must be of very moderate value, and, whether correct or incorrect, *cannot be fortified* before a jury by statements of what those authors hold on the subject. The jury are only concerned to know what the witness thinks, and what capacity and judgment he shows to make his opinion worthy of respect. If the opinion of an author could be received at all, it should be from his own words,—not in single passages, but in combination; and this, as has been heretofore held, cannot be done. It is excluded chiefly as both unknown as to value and as hearsay, and an attempt to swear to his doctrine orally would be hearsay still further removed, besides involving the other difficulty of needing interpretation and responsibility. A large

part of this scientific evidence consists of repeated references for support and confirmation to the statements of authors, and, as might be expected, the different witnesses have not always read through the same glasses. To settle their differences the only resort must have been to the very books, which no one claims were admissible. These references were not merely made on cross-examination to test the knowledge and veracity of the witnesses, but *came in as frequently on direct examination.* In Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862, a witness who had asserted that a certain book laid down a certain proposition was allowed to be contradicted by showing it did not. But it is questionable whether the original assertion was properly drawn out, *although when made it was proper to let it be contradicted.* It was distinctly held in Marshall v. Brown, 50 Mich. 148, 15 N. W. 55, that attempts to evade the excluding rule by examining or cross-examining in such a way as to get an opportunity to *get books before the jury* could not be permitted."

In the case of Bloomington v. Shrock, the opinion expressly approves of the case of Connecticut Mut. L. Ins. Co. v. Ellis, to which we have before referred, as an authority in support of the conclusions which we have herein arrived at, and differentiates the case under consideration by the Illinois case, from the case at bar, by the express statement that "in the present case, it has been seen, the course pursued was entirely different. The witness based no opinion which he gave, upon the *authority of books,* and they were only brought in to impair his evidence on cross-examination." In the case of State v. Winter, 72 Iowa, 627, 34 N. W. 475, the question was asked and the book sought to be read on the *direct examination* of the witness, and the authority therefore is in no way applicable here, nor in any way supports the proposition contended for by Mr. Jones.

Indeed, while further treating on the subject of the cross-examination of experts, Mr. Jones himself cites with approval the case of Hutchinson v. State, 19 Neb. 262, 27 N. W. 113, to which we have before referred, and announces a general rule which appears to be clearly in harmony with that opinion and with the present holding of this court. In § 389 (391) of his Commentaries on Evidence, he says: "Not the least important part of the cross-examination is that which sub-

jects the qualification on which the expert has been permitted to testify to a searching inquiry. He has placed himself in the position of one capable, by reason of his superior or peculiar knowledge, of announcing conclusions, which are of weight according to the thoroughness of the knowledge which prompted and is behind them. Therefore it is that the jury is entitled to know more fully the nature of his qualification, the sources of his knowledge, from which he assumes to speak with special authority, and the grounds and reasons upon which his conclusions and opinions are based. For example, a medical witness had stated that his testimony was based upon medical authorities, and he was then asked to state what the medical authorities at the time of the trial held upon the subject. The question was proper. Reese, J., said: 'If the witness had been testifying from his experience and observation from a long course of practice, it was yet proper, for the purpose of ascertaining his means of knowledge by a reference to the teachings of text-books of his profession, and the scientific works from which he had drawn the theories and principles to which he had testified. . . . For the purpose, therefore, of testifying as to his recollection, as well as to his knowledge, it was proper to interrogate him as to the teachings of those authorities; and, in case his testimony was incorrect, to confront him with them, in order that he might be corrected, and the jury thus be rendered able to judge of the weight to which his testimony was entitled. It is insisted that the testimony was inadmissible because "the testimony of the witness shows that his opinion on the point in question was opposed to these same medical authorities." As we have shown, the testimony entered the domain of science, and the grounds upon which the objection is founded appeal most strongly to the mind of the writer as cogent reasons why the cross-examination was proper.'"

For the reasons herein stated, we are now of the opinion that the judgment of the District Court should be reversed, and that a new trial should be had. It is so ordered.

WILL FREEMAN v. A. J. CLARK, George L. Lillie, Maxbass Security Bank, a Corporation, John D. Gruber Co., a Corporation, and Imperial Elevator Company, a Corporation.

(149 N. W. 565.)

Irregularity in the trial — party consenting and benefiting thereunder — cannot complain on appeal.

1. A party to a litigation who has consented to an irregularity in the trial, and is the beneficiary thereunder, cannot complain of the same upon appeal.

Seed liens — time of filing — statutory time begins to run from date of last bona fide delivery.

2. The last bona fide delivery of a part of a single purchase of different kinds of seed constitutes the date from which the thirty-day limitation for filing begins to run.

Amount in bushels stated in lien — mistake — unintentional.

3. Facts examined, and *held*, that the number of bushels stated in the lien was not intentionally misstated.

Filing lien against both tenant and landlord — does not vitiate lien.

4. The filing of the lien against both the tenant and the landlord in this case does not vitiate the lien.

Opinion filed October 13, 1914. On Petition for Rehearing November 24, 1913.

Appeal from the District Court of Bottineau County; *Burr*, J.

Affirmed.

Noble, Blood, & Adamson, for appellants.

As clearly appears from the complaint, there is no cause of action alleged against defendant bank. The complaint shows no right as against the bank, nor does it show an infringement of any rights or any wrong done by the bank. Marquat v. Marquat, 12 N. Y. 341; Atkinson, T. & S. F. R. Co. v. Rice, 36 Kan. 593, 14 Pac. 229; Clarke v. Ohio River R. Co. 39 W. Va. 732, 20 S. E. 696; Miller v. Hallock, 9 Colo. 551, 13 Pac. 541; Post v. Campau, 42 Mich. 90, 3 N. W. 272; Fields v. Daisy Gold Min. Co. 26 Utah, 373, 73 Pac. 521.

The lien being wholly statutory, a strict compliance with all of the provisions is required, or no lien will be created. 25 Cyc. 662, and cases there cited.

A statute requiring the notice to be filed a certain number of days after the materials are furnished protects or secures only to the amount furnished within such time prior to the filing. 27 Cyc. 142; Spencer v. Barnett, 35 N. Y. 94; Tiley v. Thousand Island Hotel Co. 9 Hun, 424; Goodale v. Walsh, 2 Thomp. & C. 311.

The sale of the wheat, and the sale of the flax, are divisible. The lien for the flax is separate from that for the wheat. Schlosser v. Moores, 16 N. D. 185, 112 N. W. 78.

Knowingly misstating the quantity or its value, or the name of the person to whom furnished, vitiates the lien. Lavin v. Bradley, 1 N. D. 291, 47 N. W. 384.

Christianson & Weber, for respondent.

The defendant Lillie was clearly a nominal defendant, having no interest in the controversy, and his appeal should be dismissed. It is prerequisite to the validity of an appeal that the party has an interest in the subject-matter of the suit. 2 Cyc. 628, and cases cited.

The theory adopted by the parties in the court below, and pursuant to which the trial was there conducted, cannot be disturbed for the first time in the supreme court.

Where irregularities occur on the trial, the parties who concur in them, and are benefited thereby, cannot complain on appeal. Ugland v. Farmers' & Merchants' State Bank, 23 N. D. 536, 137 N. W. 572.

The statute uses the word "furnished" to furnish means to supply or provide. Rev. Codes 1905, §§ 6271, 6272; Delp v. Bartholomay Brewing Co. 123 Pa. 42, 15 Atl. 871.

The rule obtaining in the case of mechanics' liens applies to seed-grain liens as to manner of filing with respect to time of delivery. The time allowed in which to file the lien begins to run from the date of the last bona fide delivery. Schlosser v. Moores, 16 N. D. 185, 112 N. W. 78; 27 Cyc. 145.

In the case at bar there was but one single contract for different kinds of seed grain. A lien for each kind might have been filed, but it was proper to include all in one statement for lien, properly itemized. Helena Steam-Heating & S. Co. v. Wells, 16 Mont. 65, 40 Pac. 78; Nye & S. Co. v. Berger, 52 Neb. 758, 73 N. W. 274; Frankoviz v. Smith, 34 Minn. 403, 26 N. W. 225.

BURKE, J. Defendant Clark was a renter upon a farm owned by the defendant Lillie. Under the terms of his lease, he had agreed to furnish the seed for the year 1911, but was financially unable to purchase the same. The landlord, Lillie, had seed wheat upon the farm, and flax seed near by, but was apparently unwilling to sell the same to his tenant. Under those circumstances, in the month of November, 1909, the tenant Clark went to the plaintiff Freeman, and solicited him to buy the seed grain from Lillie before the price should advance. An agreement to this effect was made, and Freeman purchased from Lillie 650 bushels of seed wheat at $1 per bushel, and 60 bushels of flax at $2.50 per bushel, it being agreed between the parties that Lillie should keep said grain until such time as the same should be needed for seeding in the spring of 1911, when Clark was to call for the same, help to clean the grain, and seed the same upon the land.

In the spring of 1911 Clark called for 545 bushels of wheat and 60 bushels of flax, and actually planted the same upon the land. Fifty-five bushels of the wheat were sold to a third party, and 50 bushels of wheat traded for seed barley, which he likewise planted upon the land. The first delivery of wheat was made April 11th, and the last on the 12th of June, and the flax was delivered between the 24th of May and the 3d of June. However, the last delivery of wheat planted upon the land in question was on the 5th of May, while the wheat that was traded for barley was taken on the 12th of June. The agreement between Clark and Freeman is not materially in dispute. Clark was to pay to Freeman the same price that Freeman had paid to Lillie, and, in addition, what Clark says was to be 12 per cent interest, and what Freeman says was 1 cent a month upon the wheat and 2 cents upon the flax.

Upon the 22d of June, Freeman filed a seed lien with the register of deeds upon said crops for 650 bushels of wheat of the value of $689, and 60 bushels of flax of the value of $159. It is agreed that the grain raised upon the land in question was about 1,000 bushels of wheat and 1,000 bushels of flax, all stored in the elevators of the defendant Gruber Company, Farmers Elevator Company, and Imperial Elevator Company. It is also agreed that the defendant Clark has paid no part of the said indebtedness, although demand was made therefor. Prior to all these transactions, and on the 1st day of October, 1910, the tenant Clark had executed a chattel mortgage upon this same crop, which indebted-

ness is likewise unpaid, and that on the 23d of December, 1910, the defendant Clark executed a similar chattel mortgage to the defendant Maxbass Security Bank. This action was brought by Freeman against Clark for a foreclosure of his lien, but all of the other parties mentioned were named as defendants, and, although the practice was irregular, no demurrer was taken to the complaint upon that ground, and the only defendants that answered were Lillie and the Maxbass Security Bank, who now appeal. The defendant Clark obtained permission to answer after he had defaulted, but failed to file an answer. The real controversy is between Freeman and the Maxbass Security Bank. The defendants not in court are in no position to urge the irregularity of the proceedings, and neither is Lillie, who has no interest in the litigation excepting possibly his costs. The trial court made an order that the grain grown upon the land be sold and the proceeds applied, first, to the payment of the indebtedness due upon the seed lien to Freeman, and then upon the indebtedness to the bank.

(1) The first ground for a reversal urged by appellants goes to the irregularity of the proceedings and the order of the trial court converting the foreclosure action into one "quieting title to personal property." Respondents admit the irregularity, which they explain was due to the ingenuity of previous counsel in the case, but insist that the appellant bank is in no position to take advantage of this technicality, being a beneficiary under the decree and a participant in all of the proceedings below. This is a view that appeals to us. See Ugland v. Farmers' & Merchants' State Bank, 23 N. D. 536, 137 N. W. 572, where it is said: "The theory adopted by the parties in the court below, and pursuant to which the trial was there conducted, cannot be disturbed for the first time in the supreme court."

(2) Appellant next alleges that the lien was not filed within thirty days after the furnishing of the seed grain in controversy. It is its theory that the grain was sold to Clark in the fall of 1910, but we do not believe the facts justify that conclusion. The wheat and flax together constituted the seed to be planted on the land in question, and the last bona fide delivery of the lot constitutes the date from which the thirty days' limitations started to run. This was June 3d. The lien was filed in time.

(3) A third objection to the judgment is that the kind and quantity

of seed is not accurately recited in the lien filed, the lien reciting the sale of 650 bushels of wheat, while only 545 were actually used. This is explained by the fact that 55 bushels were sold to another party, and 50 bushels traded by Mr. Clark to a neighbor for barley seed, and that the barley was actually planted. It is conceded that Mr. Freeman furnished 50 bushels of wheat, which was used in securing barley, but, no lien being asked for the barley, it is lost. This irregularity will not vitiate the lien.

(4) Appellant also insists that the lien is void because it is therein stated that the grain was furnished to Clark and Lillie. As Lillie was the owner of the land, this mistake might easily be made by a layman, but is not of a nature to vitiate the lien. The trial court made conclusions of law as aforesaid, allowing plaintiff $595 for the wheat, and $178.75 for the flax, with interest thereon at the rate of 7 per cent from the 1st of December, 1910, which conclusions have been accepted by the respondent in this case, although in fact the interest therein stated is too low. That part of the judgment is therefore adopted by us, and in all things affirmed. As no complaint has been made by either appellant or respondent as to that portion of the judgment which allows the Maxbass Security Bank the residue of the grain, it will not be disturbed by this court. The judgment of the trial court is in all things affirmed.

On Petition for Rehearing.

Appellant has filed a petition for rehearing, claiming that the opinion is inconsistent with the holding in Schlosser v. Moores, 16 N. D. 185, 112 N. W. 78. We do not think the inconsistency exists. In the earlier case it was held that where the contract was divisible the lienor must look to the crop raised from the particular kind of seed. In the case at bar the question is whether or not the lienor must file a separate lien for each kind of seed sold by him. We have held the contract entire and indivisible so far as filing of the lien is concerned, and that there need be but one lien filed. This clearly differentiates the case at bar from the Schlosser Case.

Petition for rehearing is denied.

STATE OF NORTH DAKOTA EX REL. A. P. LENHART v. L. B. HANNA et al.

(149 N. W. 573.)

Revenue — taxes — assessment — levy — educational institutions — constitution.

1. The legislative assembly by various acts has assumed to levy taxes to raise revenue for the maintenance of certain educational institutions and for other purposes, and by chapter 148, Laws 1913, it levied a tax of 1½ mills on each dollar of the assessed valuation of all taxable property in the state for the maintenance of certain designated educational institutions. Section 174 of the state Constitution directs the legislative assembly to provide for raising revenue sufficient to defray the expenses of the state for each year, not to exceed in any one year 4 mills on the dollar of the assessed valuation of the property in the state. Pursuant to such constitutional mandate the legislature, by §§ 1531 and 1538, Rev. Codes 1905 (§§ 2141 and 2148, Comp. Laws 1913), designated the state board of equalization as the agency for levying state taxes, but limited its powers to the "amount necessary to raise for the purpose of meeting the *appropriations made* by the legislative assembly and the estimated general expenses of the state as made by the auditor."

The state board of equalization at its 1914 meeing, which has not adjourned, assumed to levy 3 mills for the purposes designated in said statute, and but 1 mill in addition to meet the special levies made by the legislature in the various acts aforesaid, leaving but a fraction of a mill for the educational institutions. It is *held* that in doing so the board exceeded its powers in that it attempted to impose a tax to raise revenue greatly in excess of that required to meet appropriations made by the legislature and the estimated general expenses of the state. It is also held that such excess, if eliminated, will enable the board, within the 4-mile limit, to levy the full amount for the educational institutions provided for in chapter 148.

Statute — constitutionality.

2. The question of the constitutionality of chapter 148, Laws 1913, not decided for reasons stated in the opinion.

Limit of taxation — constitution.

3. Section 174 of the Constitution, fixing the limit of taxation for state expenses at 4 mills, was intended to thus limit the raising of revenue for all state purposes whatever, excepting for the purpose of paying the interest on the state debt.

Board of equalization — amount of state levy — past appropriations — anticipated appropriations.

4. Sections 1531 and 1538, Rev. Codes 1905 (§§ 2141 and 2148, Comp. Laws 1913), construed, and *held* to limit the state board of equalization, in making the state levy, to an amount necessary to meet past appropriations made by the legislature and the estimated general expenses of the state; and in assuming to make provision for meeting anticipated appropriations to be made in the future, the board exceeded the powers delegated to it.

Purpose for which a tax may be levied — legislative function — cannot be delegated.

5. Defining the purpose for which a tax may be levied is the exclusive function of the legislative assembly, and such function has not been, nor can it be, delegated to any board or person.

Additional Syllabus on Rehearing.

Facts assumed by counsel — erroneous — appropriations in excess of revenue — board of equalization — levy for taxation purposes — must be within limit — must reduce appropriations within limit.

6. It appearing on rehearing that the undisputed facts are the reverse of those which were by counsel, through error and inadvertence, assumed to be correct on the first hearing, and that in the light of such newly discovered facts the appropriations greatly exceed the revenue which can be raised by a levy within the constitutional limit of 4 mills, it is the imperative duty of the board, in levying the state taxes, to deduct from certain appropriations a sum sufficient to bring the total within the maximum limit thus fixed.

Reductions — rule for making — branches of state government — penal institutions — insane and feeble minded — other appropriations reduced pro rata.

7. In making such reductions from the various appropriations the following rule should be followed: In making such levy the board should provide in full only for those appropriations covering the expenses of maintaining the three co-ordinate branches of the state government, and those for the penal institutions and for the insane and feeble minded. All other appropriations, both standing and special, should be reduced on a *pro rata* basis to such sum as will bring the total appropriations within the constitutionanl 4-mill limit.

Opinion filed October 28, 1914. On Rehearing November 12, 1914.

Application for an original writ of mandamus, directed to the respondents as members of the state board of equalization, commanding such board to revise and correct its levy of state taxes so as to include in

such levy 1⅛ mills for the educational institutions, as prescribed in chapter 148, Laws 1913.

Writ granted.

Newton, Dullam, & Young, for relator.

Andrew Miller, Attorney General, *John Carmody, Alfred Zuger,* Assistant Attorneys General, for respondents.

FISK, J. Application on due notice is made to this court by a resident citizen and taxpayer for a writ commanding the respondents, as members of the state board of equalization, to correct and readjust its levy of state taxes so as to include therein 1⅛ mills for the educational institutions of the state, pursuant to the special levy for such purposes made by the legislative assembly in chapter 148, Laws 1913. Such board levied but 1 mill to meet all the special levies made by the legislature, leaving but a fraction of a mill for the educational institutions as apportioned by such board. The board attempts to justify its action in so doing upon the grounds:

1st. That the acts attempting to make such special levies are unconstitutional, and,—

2d. That such reduction was necessary in order to bring the total levy for state purposes within the constitutional limit of 4 mills as provided by § 174 of the state Constitution, which reads:

"The legislative assembly shall provide for raising revenue sufficient to defray the expenses of the state for each year, not to exceed in any one year four (4) mills on the dollar of the assessed valuation of all taxable property in the state, to be ascertained by the last assessment made for state and county purposes, and also a sufficient sum to pay the interest on the state debt."

We do not pass upon the constitutionality of such special levy statutes, for the reason that such point is not pressed by respondents' counsel, and at the oral argument was practically abandoned by them. Furthermore, all the beneficiaries under these statutes are not before the court, and it would be unfair to them to adjudicate such question in their absence. Moreover, some of these special levy statutes have been in operation for many years, and their validity has never been questioned. It is also, at least, doubtful as to the right of respondents, as members of

the state board of equalization, to raise such question at all, and especially in these proceedings.

Following the well-settled rule that courts will not inquire into the validity of a statute except when it is imperative so to do, we refrain from doing so in this case, but in passing we cannot refrain from observing that respondents' contention on this point is, in any event, apparently inconsistent with their action in levying a fraction of a mill for such purposes.

The petitioner, on the other hand, is, we think, clearly in error in his contention that the constitutional limit of 4 mills as fixed in § 174, supra, does not apply to levies for educational purposes. If such contention be sound, there is no limit to the rate of taxation except with reference to raising revenue sufficient to defray the expenses of the three co-ordinate branches of the state government, the executive, legislative, and judicial. In employing the language, "the legislative assembly shall provide for raising revenue sufficient to defray *the expenses of the state* for each year, not to exceed in any one year four (4) mills on the dollar," etc., the framers of the Constitution clearly intended to thus limit the raising of revenue for all purposes whatsoever, except that mentioned in the last clause of the section; and this is the holding of the Colorado court under a similar constitutional provision. People ex rel. Thomas v. Scott, 9 Colo. 422, 12 Pac. 608; Re Appropriations, 13 Colo. 316, 22 Pac. 464; People ex rel. State University v. State Board, 20 Colo. 220, 37 Pac. 964. It would, indeed, be strange if it was intended to limit the raising of revenue necessary for keeping the state government in operation, and yet leave a free hand as to all other purposes. Is the maintenance of the educational institutions more important than the maintenance of the state government itself? Clearly not.

Is respondents' second ground of justification, as above stated, tenable? A correct answer to this question involves a consideration of certain questions of fact as well as law. It is conceded that the actual and necessary expenses of maintaining the three branches of the state government, *viz.*, the executive, legislative, and judicial, must be taken care of in preference to all other expenses. In view of this concession, which is undoubtedly correct, and also in view of our holding as above stated, that 4 mills is the limit of taxation for all state purposes, it necessarily follows that the levy for other purposes, even though directed to be

made by specific and valid acts of the legislature, must be postponed or reduced to the extent, if any, that such specific levies would, when added to those necessary for raising the required revenue for the maintenance of the state departments, exceed the 4-mill limit. Is there any such excess to be thus dealt with?

This brings us to a consideration of the question whether in making such levy the board erroneously included items of revenue not necessary to be raised for the purpose of meeting the appropriations made by the legislative assembly and the estimated general expenses of the state as made by the state auditor. The power of levying taxes is, of course, a legislative power, to be exercised within the limits of the constitutional provision, § 175 of the state Constitution, which provides: "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

By §§ 1531 and 1538, Rev. Codes 1905, being §§ 2141 and 2148, Comp. Laws 1913, the legislature designated the state board of equalization as the agency for levying state taxes. The latter section, among other things, provides: "In levying said tax the state board of equalization shall be limited by the amount necessary to raise for the purpose of meeting the *appropriations made* by the legislative assembly and the estimated general expenses of the state, as made by the auditor, . . . provided, that if the amount is greater than the rate prescribed in the Constitution will raise, then the state auditor shall only certify the limited rate."

It will thus be seen that the authority of the board is limited by law, in making such levy, to an amount necessary to meet past appropriations made by the legislature and the estimated general expenses of the state. Such language is, we think, too clear for debate, and that thereunder the board has no power to include in its levy items deemed necessary to meet anticipated future appropriations. It is equally clear that the words "estimated general expenses" were intended to include merely the ordinary expenses pertaining to the maintenance of the three branches of the state government, and for which the legislature has provided standing appropriations. To otherwise hold would in effect be deciding that no limitation whatever, except the constitutional limitation of 4 mills, was intended to be imposed by the legislature. If 2

mills only were required to cover all appropriations, including standing as well as special appropriations, then if the defendant's contention is sound, the board could levy the additional 2 mills for no specific purpose, or for a purpose which it might deem proper, and the legislature could thereafter appropriate the revenue raised, to any purpose, or not appropriate it at all. This would be violative of § 175 of the state Constitution above quoted.

Defining the purpose for which a tax shall be levied is the exclusive function of the legislature, not the board of equalization or the state auditor; and this function cannot be delegated; and no tax can be levied unless the purpose therefor has been first specified by the legislature.

Tested by the above rules it is clear that the board exceeded its powers. The undisputed facts disclose that the board included one item of $171,800 to meet future contemplated appropriations of an extraordinary character, also other items of a similar nature. If such items are eliminated, the 4-mill limit will not interfere with the special levy of $1\frac{1}{8}$ mills made by chapter 148, Laws 1913, for the maintenance of the state educational institutions.

We are amply supported in the above views by the supreme court of Colorado in the following cases decided under constitutional and statutory provisions very similar to those in this state: People ex rel. Thomas v. Scott, 9 Colo. 422, 12 Pac. 606; Re Appropriations, 13 Colo. 316, 22 Pac. 464; People ex rel. State University v. State Board, 20 Colo. 220, 37 Pac. 964; Nance v. Stuart, 12 Colo. App. 125, 54 Pac. 867, and cases cited; Parks v. Soldiers' & S. Home, 22 Colo. 86, 43 Pac. 542; Denver v. Adams County, 33 Colo. 1, 77 Pac. 858; See also Chicago & N. W. R. Co. v. State, 128 Wis. 553, 108 N. W. at p. 576 of opinion.

The writ will issue as prayed for by the relator.

On Rehearing.

Fisk, J. A rehearing was granted herein upon the application of the attorney general, who does not question the correctness of the above opinion upon the facts there before us, but asserts that such facts were, through mistake and inadvertence on the part of respondents' counsel and the state auditor, accepted as correct, and that the true facts dis-

close that the existing appropriations, to be met by the state levy far exceed the constitutional limit of 4 mills, and that it is therefore imperative that some of such appropriations must be entirely omitted from consideration in making the levy, or that they must be materially scaled down. Upon such rehearing, further testimony was heard, from which it conclusively appears that the facts are as now contended for by the attorney general.

The perplexing question therefore arises as to the proper method to be pursued by the state board of equalization in dealing with this situation. Has the board the power to single out or select among the various appropriations in excess of those for the expenses of the three branches of the state government, which are preferred, such appropriations as in its judgment ought to be preferred and provided for in the levy, or must it, in making the forced reduction, either give priority to those first made in point of time, or make the necessary reduction in all such appropriations by a pro-rating method?

We are clear that it cannot do the first. This is purely a legislative function, which has not been, nor can it be, delegated to the board. The power of the legislature in the premises is plenary, but it has not spoken; hence one of the latter methods of dealing with the situation must be pursued by the board. Should preference be given to those appropriations which are prior in point of time? This is the holding of the Colorado court in People ex rel. State University v. State Board, 20 Colo. 220, 37 Pac. 964, from which we quote: "While no authorities have been cited upon the question, and none have been found by the court, we think that, where excessive levies have been made, the true rule is to allow the levies precedence in the order in which they were passed, giving preference, when necessary, to levies for the purpose of meeting appropriations for the support of the executive, legislative, and judicial departments of the government as indicated in Re Appropriations, 13 Colo. 316, 22 Pac. 464." The ground for such holding is not stated, but of necessity it must be predicated upon the theory, either that such was the legislative intent, or that, after exhausting the 4-mill limit, the legislative power to make appropriations was exhausted.

Neither of these grounds appeal to us as sound. We are wholly unable to see how such intention of the legislature is in the least reflected

by the dates of the appropriations, and it is manifestly inequitable to adopt such rule, for under it appropriations of the least urgency and importance to the general welfare might be given precedence over those of the gravest urgency and importance. The other theory is, we think, likewise fallacious, for the legislature cannot definitely know that the assessed valuation of the property of the state as subsequently fixed will not afford, within the 4-mill levy, sufficient revenue to meet all of its appropriations. We think the better and sounder rule is stated by Mr. Gray in his work, Limitations of Taxing Power, § 2025. He says: "It seems to the writer that if there are taxes especially ordained in amount by the Constitution itself, they should be collected in full. As to all other taxes of equal legislative grade, there seems to be no good reason why mere priority of enactment, as distinguished from mere priority of levy, should give preference. It may be said that the legislative power to tax is exhausted when the bills which lay the taxes up to the limit are enacted. But the constitutional provisions may generally be regarded as intended to protect the taxpayers from excessive burdens, and taxpayers are not burdened until the tax is actually levied, or in some way has become a liability. Viewed in this light the legislature's control over the rate is complete until the moment taxes equal to the prescribed limitations have actually been levied. The *pro rata* method of reduction seems to be the fairest rule to apply to taxes of equal legislative credit levied at the same time, when the aggregate of the levies exceed the prescribed limitations."

Again, in § 2031 this author, in speaking of the Colorado decision above cited, says: "This decision, it will be noticed, is in part at variance with the views heretofore expressed by the writer. There can be no doubt that the levy for the general expenses of government was entitled to precedence, but inasmuch as none of these taxes had yet been actually levied so as to become burdens on or liabilities of the taxpayers, the writer believes that the *pro rata* rule should have been applied to all the special taxes, regardless of the date of the enactment. Until the levies had been actually made, each successive act might well have been regarded as repealing so much of the earlier acts as was inconsistent with it. After the levies had been made, and the taxpayer's liability had actually accrued, of course the legislative power to lay further taxes was exhausted."

In this connection we deem it proper to say that, while the appropriations for the penal institutions and the state hospital for the insane, in which institutions the inmates are confined against their will for the benefit of society, as well as that for the feeble minded, do not fall strictly within the classification of appropriations for the expenses of the three co-ordinate branches of the state government, it is clear that they are of necessity entitled to priority over all appropriations in the second class, and it is eminently proper that they should be included by the board in the first class. Beyond this, we deem it unnecessary to classify the appropriations in detail. The respondents will, we believe, experience no difficulty in following the directions herein pointed out.

For the above reasons, briefly expressed, we reach the conclusion that it is the duty of the board in making the state levy to provide in full only for those appropriations covering the expenses of maintaining the three co-ordinate branches of the state government, the penal institutions, the hospital for the insane and the feeble minded, and that all other appropriations, both standing and special, should be reduced, on a *pro rata* basis, to such sum as will bring the total appropriations within the constitutional 4-mill limit.

We assume that the respondents will, without the issuance of any writ, revise and readjust the levy so as to conform with the views herein expressed.

Goss, J., concurring. My views of this case are that our decision should be along the following lines: (1) As the power to impose the tax is a legislative one, as to which all authorities seem agreed, the basis for this tax must be found in an expense authorized by the state legislature. The rate must be determined from this expense, and cannot exceed 4 mills. The expense to be applied to the existing valuation must be determined as provided by law (§ 2148, Comp. Laws 1913), and determined from two sources. These are: (1) Specific appropriations made. And in determining what are specific appropriations, that must be regarded as specific which can be made specific; under which rule an appropriation by a mill or portion thereof is a specific appropriation. The other source is found in the words of the statute (§ 2148), "and the estimated general expense of the state as made by the auditor." This general expense of state is limited to the three arms of government,

legislative, judicial, and executive, and again by the fact that such expense must have been expense authorized by some legislative act, and which expense must be met by taxation, as a tax cannot be imposed under such circumstances except to meet a legitimate expense.

With the basis for computation of the rate thus fixed, the question confronts us, as it did the board, of what to do when, as here, the total levy upon the above basis (inclusive as it is, of appropriations for specific amounts of the mill and one-eighth tax and of the necessary expense as thus computed by the auditor), far exceeds the constitutional taxation limit of 4 mills for such purposes, and beyond which the board cannot go.

Before proceeding further, it is well to here state that we are reviewing no act of a judicial tribunal, and therefore are not reviewing a judicial discretion. Strictly speaking, this board of equalization has no such discretion. It and the state auditor act ministerially in carrying out the mandate of the legislature, which is the only body having discretion in taxation purposes as to state taxes, and whose discretion is manifested and must be found in the appropriations authorized, and not elsewhere. The court then has authority to review the ministerial acts of this board, even though such acts may involve a certain amount or kind of judgment as to the method of following the law, and we must determine whether the method prescribed by the legislature has been followed. The question then resolves to whether this board has in so acting pursued the course prescribed by law in meeting the exigencies, passed up to it by the legislature, of determining either what items, or what parts of the total levy in the aggregate exceeding 4 mills called for by the appropriations, shall be provided for by taxation.

In casting about to find some rule to apply to the situation in hand, it is first necessary to determine whether any portion of the total levy to be made is of funds that are by law recognized as preferred over others. If so, the legislature must be deemed to have known such fact, and had it in mind in its appropriations of the total proceeds when they shall be raised. And here we find a recognized general division into preferred and nonpreferred items. Such amounts of this total levy as is necessary to pay what is strictly state expense, that is, disbursements necessary for maintaining and keeping in running the co-ordinate branches of our government, namely, legislative, executive, and judicial,

must be first met, and as such constitute a preferred class. This results from the fact that it is inconceivable, and contrary to all intents of the constitution as well, that for a moment the state government should cease. As the government is made up of its co-ordinate branches, neither one of these is to be considered singly or to be given preference over the other. Inherent in the taxing power, then, is the necessity for the exercise of the full powers of state government to levy, declare, and enforce the tax; and that portion of the total 4-mill levy necessary to run the state government as such is preferred over other agencies of government declared by the legislature or the Constitution to be necessary, but, from the nature of things, but of secondary importance. Included in and as a part of necessary state expenses as classified and defined must be such amounts as are necessary to care for the penal institutions, as it is necessary that they exist and be provided for to protect organized society, the state. For identical reasons the state insane asylum must be provided as state expense, strictly speaking. And the same is true as to the institution for the feeble minded, which institution, by the constitutional provision subdiv. 8, § 215, and the 6th constitutional Amendment, must be regarded as of the same class. But farther we do not care to go in classifying state institutions along this line.

Thus the general fund is first divided into the preferred and nonpreferred, according to the foregoing classification. The state board will determine the portion of the total 4 mills that, under the rule heretofore announced, should be necessary to care for the strictly state expense, and levy that amount without diminution or deduction whatever.

As to the balance over and above state expenses, in the absence of some legislative provision that a particular levy shall in all events have priority over others of its classification, I can see no reason why any specific appropriation, whether its levy be called for in specific amounts or by a mill apportionment, is to be preferred over any other. The fact that each is devoted to some object declared public and necessary by the legislature does not of itself say that one object so declared was of more importance than another to the legislative mind. Hence, there being no further apparent method of division or classification, one of two things must be done: (1) Either the appropriation given priority

according to time of enactment, or else (2) all appropriations be deemed equally meritorious and pro rated until in the aggregate they do not exceed, when combined with the necessary state expense as classified, the constitutional limit of levy of 4 mills. As to the first, it would seem as though we were without authority to determine an intent in the legislature that priority should occur according to priority of time of enactment. As is said in Gray on Limitation of Taxing Power, § 2031, why not regard each successive appropriation made "as repealing so much of the earlier acts as was inconsistent with it?" and thus validate and recognize all appropriations on a *pro rata* basis. And again, as mentioned by that author (§§ 2025, 2026), the appropriations are primarily to disburse moneys on the assumption that the amounts shall be legally raised, and to that extent the question of levy by taxation is not involved in the appropriation bills, and hence not within the intent of the legislature, thereby necessarily rendering it impossible to say that one appropriation of moneys should have precedence over another, there really being no legislative intent to be arrived at on the question. That authority says (§ 2026): "The *pro rata* method of reduction seems to be the fairest rule to apply to taxes of equal legislative grade levied at the same time, where the aggregate of the levies exceeds the prescribed limitation." The term, "levying it at the same time," has reference to the act of this board in laying the tax to raise the appropriations made. Hence, unless there be some specific contrary enactment, all said appropriations must be scaled down *pro rata*. And here we come to chap. 146, Comp. Laws 1913, providing for a levy of 1⅛ mills, to be computed by the county auditor, who shall forward the proceeds to the state treasurer, who in turn shall apportion the fund according to certain percentages and then disburse it according to the section of the act appropriating it. Does this act evidence a legislative intent to confer priority upon this appropriation over other appropriations because of the fact, peculiar to this bill alone, that it is both a legislative levy and an appropriation, and has attempted to direct in a special manner how the tax shall be spread and subsequently collected and distributed? It is noticeable that the act purports to be a legislative levy, but I do not believe the bill should be construed as an attempt to levy this tax without the instrumentality of the state equalization board, as would perhaps put the levy into a preferred class. The bill is not to be

construed as a direction to the county auditor to levy 1⅛ mills in any event and independent of the action of the state board of equalization. Every standing appropriation authorizes the constituted taxing authorities to meet it, and it is met by the action of the board authorized to levy. No opinion is expressed on the constitutionality of this particular statute. Whether it sufficiently appears from it as an entirety, when considered with the first bill of similar kind and phraseology as illustrated by chap. 156, Laws of 1901, that this bill (chap. 148, Sess. Laws 1913) when enacted was with the idea that § 174 of our state Constitution, limiting the rate to 4 mills on the dollar of taxation had application only to what we herein classify as technically "the expense of the state," and did not include all other expenses, such as taxation for educational institutions, and hence leaving them unlimited, it is unnecessary to decide. If so, when this bill was passed under said belief that, and with the intent that, it should be an appropriation in excess of the constitutional limit, the bill would be clearly unconstitutional, as the constitutional limit applies to all appropriations for whatever purpose except the levying of "a sufficient sum to pay the interest on the state debt." It is assumed, therefore, without deciding the question, that chap. 148, Sess. Laws 1913, is valid as an appropriation of moneys, and not unconstitutional; and that the tax to be levied thereunder, although specifically directed to be calculated by the auditor, is presumed to be a levy imposed in the usual way and subject to whatever authority the state board of equalization may have over all appropriations of that class. It may be noted that the 2d section of the bill, relative to the computation by the county auditor, loses its apparent significance when we remember that said official must in any event compute the tax. And the same is true as to its apportionment, contained in the 3d provision of the act, it being the duty of the state treasurer upon collection of the tax to credit it to the fund for which it is levied, and to disburse it according to the levy. So §§ 3 and 4 of the act add nothing to it, The same procedure would be carried out even though §§ 1, 2, and 3 were omitted altogether from the bill. The 1st section, although purporting to be a direct legislative levy, is no more direct and no different a levy from any other, every levy being a legislative act; as is said in Vallelly v. Park Comrs. 16 N. D. 25, 15 L.R.A. (N.S.) 61, 111 N. W. 615, at page 31 of the state report. "It is con-

ceded, and could not be reasonably doubted, that the power to levy taxes is a legislative power." And so it matters not that the bill provides for a levy and an appropriation thereafter, as the same thing would be accomplished by the usual appropriation bill, with the results the same in either instance. No sufficient reason appears for holding this appropriation bill to be a preferred one. Such being the case, this appropriation should be pro rated equally with all others of its class; and the fact that many of the appropriations are in specific amounts, while this is yet to be calculated on a mill basis, makes no difference. All should be pro rated on the principle that expenses of an equal class and having no preference one over the other should be equally cut in making the state's disbursements not overdraw the state pocketbook.

Among the items to pay for which provision must be made is an item of $6,000 for printing constitutional amendments for the election just passed. My understanding of this item is that § 2296, Rev. Codes 1905 (§ 3190, Comp. Laws 1913), furnishes sufficient basis for its inclusion in the auditor's estimate of strictly state expenses, and as such it is a preferred claim. We are not called upon to examine the various other appropriations made to determine the constitutionality of each of them, nor are we asked to do so.

What has here been said has been upon the conceded proof now before the court, that after all questionable items of appropriation are deducted there will not be remaining to exceed the proceeds of 1 mill upon the assessed valuation, so that when it is determined that the educational institutions must pro rate, it is also thereby decided that they can receive no more in the aggregate than 1 mill of the 4 mills levied. This in fact passes upon all questions necessarily involved. In my opinion the board should determine the amount of the preferred levy of state expense proper, and levy a rate sufficient to meet the same in full; that it should next compute the total valid appropriations made for the ensuing year, including the appropriation by the $1\frac{1}{8}$ mill tax for the educational institutions, and then pro rate all said appropriations and rate equally, so that a levy for each and all the items of appropriations shall bear the same ratio to the total fund possible to be raised over state expenses and within the 4 mill limit.

Per Curiam. Immediately after the filing of the above opinion

respondents' counsel made application to this court requesting that it add to or incorporate into its opinion or file a supplementary opinion herein designating the particular class to which each separate appropriation involved properly belongs. After such request was made a hearing was had by counsel and after duly considering the matter and deeming such classification by this court unnecessary in order to enable the respondents to comply with the rule announced by the court for their guidance, such request is hereby denied.

AUGUST SHOCKMAN and Nicholas Shockman v. LAURA LOUISE RUTHRUFF and Charles D. Dickinson.

(149 N. W. 680.)

From an adverse judgment in an action to determine adverse claims and to have decreed as established two deeds in their alleged title, plaintiffs appeal, demanding trial *de novo*.

Adverse claims — action to determine — lost deeds — existence of, established — title.

1. Testimony reviewed, and *held* to establish the existence of the deeds in controversy. The judgment appealed from is ordered vacated, and a decree will be entered establishing such lost deeds, and quieting title in plaintiffs, and adjudging defendants to have no interest in the premises in suit.

Appeal — motion to strike out matter therein — motion to vacate judgment — not part of statement of case.

2. Respondents' preliminary motion to strike certain matter from the appeal record is granted. A motion to vacate a judgment and reopen the case for further testimony is not properly a part of the statement of the case, but is a matter occurring subsequent to the judgment appealed from.

Appeal from judgment — subsequent order cannot be reviewed.

3. An appeal taken from such judgment alone does not authorize a review of the order made after judgment denying a vacation of said judgment.

Opinion filed October 29, 1914. Rehearing denied December 3, 1914.

From a judgment of the District Court of LaMoure County, *Coffey*, J., plaintiffs appeal.

Reversed and judgment ordered.

Davis & Warren and *Pollock & Pollock,* for appellants.

The sufficiency of the evidence to establish the existence of the deeds in question, and also the fact that they are lost, cannot be gainsaid. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; 25 Cyc. 1625, 1627.

If the court finds that the evidence as to the execution and delivery of the deed is not clear and satisfactory, then it certainly ought to remand and order the case reopened for further proof. 15 Am. & Eng. Enc. Law, 242; 23 Cyc. 889, 930; Duffy v. O'Donovan, 46 N. Y. 223; Sutherland, Code Pl. §§ 1696, 1717, 1718; Granger v. Roll, 6 S. D. 611, 62 N. W. 970; Gade v. Collins, 8 S. D. 322, 66 N. W. 466; Neeley v. Roberts, 17 S. D. 161, 95 N. W. 921; Gordon v. Kelley, 20 S. D. 70, 104 N. W. 605; 2 Cyc. 867.

M. A. Hildreth, for respondents.

On appeal from a judgment, no order made subsequent to judgment can be reviewed. Paulsen v. Modern Woodmen, 21 N. D. 244, 130 N. W. 231; Hedderich v. Hedderich, 18 N. D. 489, 123 N. W. 276; See Code Civ. Proc. § 7226.

On a motion for new trial on the ground of newly discovered evidence, diligence must be shown, competency of the new evidence must appear, it must also be shown that a different result can reasonably be expected or should be had. Code Civ. Proc. § 7063; Marshall v. Davies, 78 N. Y. 414; Bridger v. Exchange Bank, 126 Ga. 821, 8 L.R.A.(N.S.) 463, 115 Am. St. Rep. 118, 56 S. E. 97; Des Moines Sav. Bank v. Colfax Hotel Co. 88 Iowa, 4, 55 N. W. 68; Bissell v. Russell, 23 Hun, 659; Turner v. St. John, 8 N. D. 250, 78 N. W. 340; Second Nat. Bank v. First Nat. Bank, 8 N. D. 50, 76 N. W. 504; Goose River Bank v. Gilmore, 3 N. D. 188, 54 N. W. 1032.

The evidence fails to show that a warranty deed was ever executed by Laura Louise Ruthruff to Henry Ruthruff, and is lost. It must clearly appear that such deed was executed, acknowledged, and delivered; its conditions, must be shown, and the fact that it is lost must appear. Edwards v. Noyse, 65 N. Y. 127; Wakefield v. Day, 41 Minn. 344, 43 N. W. 71; Eiden v. Eiden, 41 Wis. 460; Metcalf v. Van Benthuysen, 3 N. Y. 430; McManus v. Commow, 10 N. D. 340, 87 N. W. 8; Garland v. Foster County State Bank, 11 N. D. 374, 92 N. W. 452.

In such cases, the greater the value of the instrument the stronger and higher should be the degree of proof required. Thomas v. Ribble, — Va. —, 24 S. E. 241; Clark v. Turner, 50 Neb. 290, 38 L.R.A. 441, 69 N. W. 843; Mays v. Moore, 13 Tex. 85; Chamberlaine's Best, Ev. pp. 213–215; Thayer, Ev. p. 729; 2 Moore, Facts & Weight of Evidence, p. 1037.

Where a person who seeks to establish rights under a lost or destroyed instrument by parol evidence as to the same, and as to its contents, his proof should be highly convincing,—especially where the rights are very valuable. Garrett v. Hanshue, 53 Ohio St. 482, 35 L.R.A. 321, 42 N. E. 256.

Goss, J. This suit is in equity to determine adverse claims. Preliminary to the merits, determination must be made of a motion by respondent to strike from the appeal record certain proceedings had upon a motion to reopen the case and vacate said judgment, the order of denial of which is not appealed from. The record facts on the motion to strike are that findings of fact, conclusion of law, and order for judgment made after a trial on the merits were filed, and a final decree thereon quieting title was entered December 7, 1911. One day before the entry of judgment, plaintiffs had served notice of a motion to reopen the case and to vacate any judgment that might be entered pending hearing, and that leave be granted to submit further testimony. This motion was denied February 5, 1912, to which ruling an exception was allowed, and notice of which ruling that day was served, together with a copy of the findings, order for judgment, and notice of judgment previously given, filed and entered. November 26, 1912, plaintiffs filed an undertaking on appeal, accompanied by a notice of appeal "from the judgment . . . herein entered on the 7th day of December, 1911." On January 31, 1913, hearing was had upon the settlement of a statement of the case, at which the trial court was asked to include, as a part of said statement, the motion and supporting affidavits, together with the order of denial thereon entered upon the previous application to vacate the judgment and reopen the case. The same were excluded from the statement of the case proper, to which exception was taken. The court, to facilitate a review of that order, made its certificate identifying the files used upon said motion as a part of the record

offered upon the application had for settlement of the statement of the case. Thereupon all of said proceedings, with the statement of the case as settled, appellants caused to be certified to this court as the record on appeal, contending that the same should have been settled as a part of the statement of the case proper, and that the order denying plaintiffs' application to reopen the case for further proof is reviewable on this appeal from the judgment entered prior to hearing on said motion, vacation of which was denied. It is met by respondents' motion to strike said matter, as something occurring subsequent to the judgment appealed from, and not embraced within the appeal taken and, therefore not before this court for review, and as to which the order of denial is conclusive.

Such motion must be granted. The appeal is from the judgment only. The appeal taken does not constitute an appeal from the order of denial of a vacation of judgment and reopening of the case. Only those errors reflected in the statement of the case, and those appearing on the judgment roll, could be raised on this appeal. The motion to vacate and reopen for trial was something wholly subsequent to judgment. It was not a part of the trial had, but, instead, constituted a direct attack upon the judgment. Being subsequent to judgment, the order made thereon was an appealable order, and that, too, independent of the appeal taken on the merits from the judgment. Plaintiffs might have appealed from the order denying a vacation and leave to present further testimony, without taking an appeal in the main case. It is appealable as a matter covered by the 2d subdivision of § 7225, Rev. Codes 1905, permitting an appeal from "a final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment." Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201, wherein it is held that this identical statute must be construed as "though its expression were a 'summary application in an action after judgment.'" Under § 7226, Rev. Codes 1905, "upon an appeal from a judgment the supreme court may review any intermediate order or determination of the court below, which involves the merits and necessarily affects the judgment appearing upon the record transmitted or returned from the district court;" but this statute does not authorize this court to review on an appeal from the judgment only, an appealable order made subsequent to and wholly independent of the

judgment, and not concerning the proceedings had on trial, but constituting an attack upon the judgment. If the propriety of an order denying a new trial, entered after the judgment, cannot be reviewed on an appeal from the judgment only (and it is settled in Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276, and Paulsen v. Modern Woodman, 21 N. D. 235, 130 N. W. 231, that it cannot be so reviewed in an appeal from the judgment only), "for the manifest reason that such order was made long after judgment, and the appeal is from judgment alone," then it follows this order for the same reasons cannot be here reviewed. See also Sucker State Drill Co. v. Brock, 18 N. D. 8, 118 N. W. 348, again on appeal 18 N. D. 598, 120 N. W. 757, and the same entitled case again in 18 N. D. 532, 123 N. W. 667. Had the application to reopen and for further testimony been made and decided in advance of the findings, it would have constituted part of the proceedings had on the trial, and been an intermediate order made during trial, and as such its incorporation within and as a part of the statement of the case would have been proper, and the propriety of a ruling thereon would have been reviewable upon an appeal from the judgment, which would invoke a review of all the proceedings contained in the statement of the case. Under the Sucker State Drill Co. v. Brock Cases, one appeal could have been taken covering both judgment and the subsequent order complained of, but this was not done. Kinney v. Brotherhood of American Yeoman, 15 N. D. 21, 106 N. W. 44, is also directly in point on that question of practice. The court properly excluded such extraneous matter in settling the statement of the case. It likewise followed proper practice in identifying the excluded matter by certificate as offered for settlement, thereby authenticating the record for appeal on the question submitted on this motion.

The merits are now reached for a trial *de novo* upon the testimony upon which the judgment was entered. Both parties plead title in themselves. Plaintiffs assert that defendant Laura Louise Ruthruff, by mortgage foreclosure sale of a $60-mortgage held by her, procured a certificate to be issued to her thereon January 24, 1898, and which was recorded three days later. Plaintiffs assert that such sale was completed by the issuance thereon of a sheriff's deed June 27, 1899, to said certificate holder. That she and her husband soon thereafter conveyed said land to Henry Ruthruff by written deed of warranty delivered to him.

In April, 1902, Henry Ruthruff and wife conveyed by deed to the Iowa Land & Trust Company, a corporation, which in March, 1905, deeded to August and Nicholas Shockman. Such alleged sheriff's deed and alleged warranty deed from defendant to her father-in-law, Henry Ruthruff, were not recorded, and are alleged to have been lost or destroyed. W. Edd. Ruthruff, husband of Laura Louise Ruthruff, and son of Henry Ruthruff, died June 28, 1902, an inmate of the state insane asylum. The alleged sale by Henry Ruthruff to the land company was conducted wholly by mail, and closed at a time when Ruthruff was sick, necessitating the assistance of a neighbor, F. D. Hall, and his examination of title papers to the land, and his making a memorandum of what was so sent with the deed to the company; and which memorandum, attested by Hall, was delivered to old man Ruthruff, and by him retained, is in evidence together with testimony explanatory thereof. The defendant Laura Louise Ruthruff concededly is the owner of the property if she did not, prior to April, 1902, deed the land to her father-in-law, as claimed by him. She has never seen the land, nor been in possession thereof, nor claimed rents or profits therefrom. In August, 1909, Shockman discovered that the supposed sheriff's deed on foreclosure, and the alleged deed of Laura to Henry Ruthruff, were both unrecorded, causing a break in their record chain of title. She was thereupon asked soon afterwards to quitclaim this land to Henry Ruthruff, who in turn was to quitclaim it to plaintiffs. This she finally refused to do. She subsequently made an affidavit before one Ernest Malmberg, dated August 31, 1909, reciting that "the said certificate of sale is lost, and cannot be found by this affiant; that this affiant has never sold, assigned, or transferred said certificate of sale, or in any way disposed of her interest in said land;" and thereon procured from the sheriff of La Moure county a sheriff's deed to her as grantee, dated December 23, 1909, upon the old foreclosure, upon which a sheriff's certificate of record had been issued January 24, 1898, or eleven years before. Upon this sheriff's deed she asserts title. It appears that on October 13, 1897, a receipt for $15.61 taxes for the year 1893 was issued in her name. Otherwise she had paid no taxes on said premises before recording her sheriff's deed August 31, 1911, about two months before the trial of this case. This action was begun by summons dated March 24, 1910.

These are the main facts reflecting the claims of the litigants. The issue is one of fact. Has Laura Louise Ruthruff ever deeded this land to her father-in-law, Henry Ruthruff? If so, plaintiffs own the land; if not, she owns it.

The circumstances determinative of the merits occurred from twelve to fifteen years ago. Time must dim the recollection, a fact important in weighing the testimony. Possession of the premises for ten years before the trial had been in the plaintiffs or their grantors. During such period defendant had never made even a claim of either possession or of ownership. During those years she has done no act to assert title and possession. Instead, she suffered what right she had to remain dormant while possession was enjoyed and title was claimed by others. The evidence is as convincing as it is overwhelming that she was ignorant of the fact that records of LaMoure county disclosed her to be the record owner of this property until after the plaintiffs themselves had discovered the absence of record of deeds in their chain of title, and had not only requested her for a quitclaim deed to bridge such deficiency in record title, but had informed her fully of why her deed was necessary. She had had much experience as a stenographer in law offices, is a woman of mature age, thirty-nine years, and from the record it appears from her own testimony that since she has possessed knowledge of her possible interest in this land she has ever been alert to safeguard her interests therein. Her recollection, especially of events transpiring during the year before the trial, as to visits made her to induce her to deed the land, ought to be clear, as that of one in the prime of life. But she has testified as one fully conversant with the issues in her case. Her father-in-law, Henry Ruthruff, was almost eighty-five years of age at the time of trial, and, needless to say, his testimony should be taken as more or less unreliable because of his extreme age, aside from his admitted interest in the outcome of his case as a grantor by warranty deed. The testimony given by Shockman must also be regarded as that of a party in interest. We must look elsewhere for corroborative circumstances in weighing the testimony of these parties and in determining facts.

The next important circumstance supporting the plaintiffs' contentions and antagonistic to the whole theory of defendants' case is that the evidence convincingly and conclusively establishes that on June 27,

1899, or ten years before defendant discovered that the records disclosed she had any interest in this land, a sheriff's deed thereof upon foreclosure had been in fact issued and delivered to her husband, presenting said certificate of sale. This is established by Ex-sheriff Stewart's testimony, supplemented by his sheriff's daybook in evidence, from which it appears that W. Edd. Ruthruff on June 26, 1899, produced said certificate, and received in lieu thereof a sheriff's deed to Laura Louise Ruthruff. The entries in the daybook are made under the caption of "Laura Louise Ruthruff, plaintiff, v. Henry Ruthruff and Armanda Ruthruff, defendant," followed by the memorandum record of "received from W. Edd. Ruthruff, June 26, 1899. When received: June 26, 1899,"—written under the words, "month," "day," and "year" respectively. And under the heading, "date of service," under the words, month, day, and year respectively, appears, "June 27, 1899;" and under the heading, "when returned," month, day, and year respectively, appears the date "June 27, 1899;" following which are the words, under the heading, "sheriff's fees, amt., costs," "issuing deed, $2.00," respectively, under "fees and costs;" after the words, "kind of process" are the words, "sheriff's deed;" after the words, "by whom served" are the words, "D. F. Stewart." On this important transaction the testimony of Stewart is explicit and positive to the fact that he was at the time sheriff of LaMoure county, was well acquainted with W. Edd. Ruthruff, who at one time had been a resident of that county, and that he recalled the transaction had with him, in which he as sheriff had received a letter from him inclosing a certificate of sale, with a letter of instructions to issue a sheriff's deed to Laura Louise Ruthruff, which he as sheriff had issued. Supporting his testimony he produces said "Sheriff's Daybook," his private record book, furnished him by the county, and testifies to the foregoing entries made therein by him as being in his own handwriting; that he canceled the certificate by writing across the same in red ink, "Deed issued on the within certificate," and signed the cancelation as sheriff of the county, and issued the deed, and returned it to W. Edd. Ruthruff, who paid him his regular fee therefor. That the reason the entries in the daybook were entitled as in an action was because Henry Ruthruff and wife were the mortgagors. Witness Stewart also produced "the Sheriff's Daybook of LaMoure County," an official county record

book, a page of which is in evidence as "exhibit H," and which is in the handwriting of Stewart, and made as his official record of his acts performed while in office. It contains all that is recited as entered upon his private record, naming the parties, designating the instrument as sheriff's deed, as received, served, and returned by himself on the same dates as given in the other memorandum, and containing the added entries, "sheriff's fees, earned $2.00, sheriff paid $2.00, plaintiff's attorney, W. Edd. Ruthruff;" remarks: "deed issued to Laura Louise Ruthruff, covering ¼ of 6–134–62." The land involved is the southeast quarter of section 6, township 134 range 62. This, together with the positive testimony of Henry Ruthruff and Frank D. Hall, together with the abstract in evidence as "exhibit C," purporting to be dated April 1, 1902, as a "memorandum of papers sent to R. A. McMichaels, LaMoure, N. D., April 1, 1902," accurately describing this land, the third entry of which is "sheriff's deed to same property," immediately following the description, and bearing all the car-marks of authenticity, —places the fact of the existence of an outstanding sheriff's deed on foreclosure to this property beyond all reasonable doubt. In addition to this, Ryan, who negotiated the purchase of Henry Ruthruff for the land company, and who examined the abstract of title and title papers he says accompanied them, testifies by deposition in advance of trial as follows:

I saw the sheriff's deed.

Q. What sheriff's deed?

A. The sheriff's deed to Laura Louise Ruthruff from the sheriff of LaMoure county.

Q. Covering what land?

A. Covering the southeast quarter of section 6, township 134, range 62.

Q. What other papers, if any, did you see and examine at that time?

A. A warranty deed from Laura Louise Ruthruff to Henry Ruthruff.

Q. On the same land?

A. Same land.

Q. Any other papers in connection with this deal?

A. It seems to me that there was a release of mortgage, but I am not positive.

Q. Did you examine the sheriff's deed to Laura Louise Ruthruff, and warranty deed from her to Henry Ruthruff, so as to know they had been filed for record?

A. I did.

Q. What is a fact as to them?

A. They had not been recorded.

Witness then testifies to having directed McMichaels for the land company to have them recorded, and that "he said he would have them recorded;" and Ryan testifies to circumstances showing the likelihood of the deeds having been burned in a fire in another state, destroying some of his records.

The fact of the sheriff's deed outstanding, though unrecorded, is especially important when the haste of the defendant in perfecting record title in herself upon the discovery of her opportunity to lay claim to this land is considered. Plaintiff August Shockman testifies to discovering the missing links in the record title between the 8th and 15th of April, 1908, resulting from an attempt to obtain a loan on the property, he being then informed that the title was bad, by Attorney Blackwell of LaMoure, since deceased. Sometime thereafter he went to Fargo, and saw Henry Ruthruff about it, and found out he did not have title papers in his possession, and was informed by Henry that he had once possessed a deed from the defendant. Shockman then went to see her about it, informed her of what he supposed to be the facts: "asked her first if she ever owned any land up in LaMoure county, and she said she did one time, and she said this land was sold by her to Henry Ruthruff, and all the papers in connection with this deal were turned over to him at the time the deal was made in 1899." "She was perfectly willing to deed (to give quitclaim deed), as she had no interest in the land. She said there might be some of the papers at Tilley's office, with Malmberg, to go down and see him about it." Shockman then testifies to going to Malmberg's office the following morning, and conversing with him about the matter, and "I did about the same as I had with Mrs. Ruthruff. I told him I was looking for the two deeds to Ruthruff. He made a search in the office for his papers, and could not find them. . . . "I told him the condition the title was in as near as I could." "Q. State what he said?" A. He said there would

be a good chance for her to come and claim the land." He found no papers in connection with the title, and witness went home to LaMoure. Independent of the details of the conversation, the defendant denying in the main the statement of the plaintiff, her denials are more or less qualified and indefinite as to such very recent occurrence. The fact of Shockman's first visit to her and statement of the object of his visit, and his request that she give him a quitclaim deed, stands virtually undisputed. Her testimony on that circumstance is: "Q. Did Mr. Shockman come to see you? A. Yes sir. Q. About when as near as you can recall? A. As near as I can recall, about the same time or previous, I could not say." The time in the answer has reference to the visits of Henry Ruthruff and Attorney Twitchell for the same purpose, of having her execute and deliver her quitclaim deed to Henry to cure the record title and to take the place of the alleged lost deeds. Reference to the dates filled in quitclaim deed blanks taken by said witnesses for such purposes at the time of the visits discloses the date, both in the body and acknowledgment, to be September, 1909, as appears from "exhibit B," in evidence. With the blank quitclaim deed there was also prepared for her signature and verification a form of affidavit reciting the loss of the sheriff's certificate of foreclosure sale, and that no sheriff's deed thereon had been issued, and a request for the issuance of a sheriff's deed on the old foreclosure. This blank form of affidavit is in evidence as "exhibit A," with the date typewritten in the instrument, of September, 1909. There is also in evidence an original affidavit admittedly signed by Laura Louise Ruthruff upon the note-head of J. W. Tilley, lawyer, purporting to have been subscribed and sworn to August 31, 1909, before Malmberg as notary, with his notarial seal affixed, the seal plainly bearing the imprint of his name. The deed is material in that it purports to antedate the visits of Twitchell and Henry Ruthruff, and, their visits being after that of August Shockman, who first informed the defendant of these missing papers, establishes that, very soon after learning of the state of affairs, she was preparing to assert title to the premises, something that she had not done for the dozen years immediately preceding and after foreclosure sale. The only reasonable inference to be drawn from such delay under the circumstances is that of ignorance on her part of her interest, if any she had, in this land. And her said affidavit is corroborative of Shockman's testimony, indicating

that Malmberg was also alive to the situation and to the possibility of an advantage to be secured by her under a claim of title, just as Shockman says he was when he testifies, Malmberg "said there would be a good chance for her to come in and claim the land." This purported affidavit recited that a sheriff's certificate of sale was issued to her January 24, 1898, on foreclosure; that the period of redemption is long past, and the certificate is lost and cannot be found; that she has not disposed of her interest in the land, nor assigned the certificate of sale; and that it is made "for the purpose of securing a deed to the above-described premises from the person making the sale, or his successor in office." If this certificate was sworn to August 31, 1909, as it purports to have been, it was very soon after she had learned of the possibility of laying claim of title to this land. Notwithstanding the purported date of the affidavit, there is in evidence ("exhibit 1") Dickinson's letter, dated December 18, 1909, to the sheriff of LaMoure county, applying for issuance of sheriff's deed. The sheriff testifies to receiving this letter about December 18, 1909, and to having complied therewith by issuing sheriff's deed December 23, 1909, to Laura Louise Ruthruff, mailing the same to Dickinson. Defendant bases her claim of title upon this deed. It is noticeable that, taking the affidavit at its face, nearly four months elapsed after its execution before its presentation for deed, or else the affidavit is dated back to show a date earlier than its true date. It would seem also, from the testimony of the defendant, that at least a loss of memory exists of Malmberg's connection with the matter, and also an endeavor to give prominence to that of Dickinson, while at the same time defendant admits that the latter never obtained any interest in the land. She was called for cross-examination, under the statute, as the first witness in plaintiffs' case, and while we know from experience that some witnesses under such circumstances manifest, aside from undue reluctance to testify, the disposition to be evasive in spite of the merit of their case afterwards developing, yet her testimony in this instance is unusually so as to all matters of vital importance subsequently testified to by Henry Ruthruff and August Shockman. She evinces an anticipation on her part of what they would testify to, which in itself presupposes her knowledge of something under her testimony not occurring or contrary thereto; and her answers as then given

are, strange to say, as indefinite as those given by her to substantially the same questions, near the close of the trial, are definite and to the point. As illustrating, as part of her cross-examination under the statute, these questions and answers appear:

Q. Did he (Shockman) come to see you to ascertain if you had some papers affecting the title to this land?

A. In fact he got but very little response from me, as I did not know the man.

Q. Did you in response to that question tell him you had no such papers?

A. I told him I knew nothing about it. I did not think it was necessary to talk my business over with him.

Q. Did you tell him in substance or in words to the effect that all the papers affecting the title to the land described, being the land involved in this suit, had been turned over to your father-in-law, Henry Ruthruff?

A. No sir.

Q. Did you not talk freely, and tell him all the papers were turned over to your father-in-law, Henry Ruthruff?

A. *I don't think so.*

Q. Will you swear that you did not?

A. *No, sir.*

And later in the same examination the following appears:

You recollect the visit of Shockman you were talking about?

A. Yes, sir.

Q. After that Henry Ruthruff requested you to make a quitclaim deed, and did not you say, I haven't any of the papers, and for him to ask Malmberg?

A. *I cant' swear to that.*

Q. Isn't it a fact that Malmberg advised or suggested to you to tell Ruthruff that you did not wish to sign the affidavit and quitclaim deed?

A. *I certainly did not have anything to do with this Mr. Malmberg.*

Q. Did you not instruct him to tell Ruthruff that you would not sign the papers?

A. *I couldn't swear to that.*

Q. Did not you say to Henry Ruthruff that you would look into the matter, and that he (Malmberg) was looking after this matter?

A. *Not that I recall,* Dickinson was looking after my business.

Q. Did not you send Henry Ruthruff, after leaving the papers with you, to see Malmberg as to whether or not you would sign those papers, namely the affidavit and quitclaim deed?

A. *I don't think so.*

Q. Did not you keep that paper (the affidavit blank) after Ruthruff brought it to you, and give it to Malmberg?

A. *I don't remember.*

Q. Did you tell Malmberg to tell Ruthruff that you would not sign it?

A. *I have no recollection of it.*

Q. Will you say that Henry Ruthruff did not bring that paper and affidavit "exhibit A" to you?

A. *I have no recollection of it.*

This well illustrates the character of her testimony on her first examination. Contrasted therewith is the following toward the close of the case, given with the understanding of the issues and after hearing the testimony of her father-in-law, Shockman, and others:

Tell the court what was said and what you said to him (Shockman).

A. He came to my house, and introduced himself, and told me his name was Shockman. He said he was trying to clear up the title to some land he was going to sell. I understood he was going to sell it. Something was wrong with the title. I told him it was not my land and I never sold it. I did not know what he was talking about. He said Henry Ruthruff had done the business and had handled it. I gave him the old gentleman's address, and *gave him Malmberg's address.* I told him my papers were in Tilley's office, and *that he could go there and find some information, and I did not know anything of it.*

Q. Did you at any time in that conversation say in effect that you did not own that land in LaMoure county, and did not claim to own any land there?

A. No sir.

Q. When did you first discover that the sheriff's certificate was missing or taken from the files and papers?

A. *When I got the papers* after Tilley's death, *in the fall of 1908.*

Q. I will ask you if you are very positive and clear in your mind as to whether or not you have at any time or under any circumstances executed a deed to this land to your father-in-law, Henry Ruthruff?

A. *I never did.*

Q. Did you, during the conversation with Shockman, state in substance, or anything like it, that you had transferred this land to your father-in-law?

A. No sir.

Q. Was there any conversation like that?

A. No sir.

Q. Did you ever authorize your husband to make a deed to your father-in-law?

A. No sir, *I told Shockman I did not know but the land was sold.*

Her testimony is in flat contradiction to that of Shockman and her father-in-law. On the whole, the probabilities under the admitted facts as strongly corroborate the plaintiffs' theory of the case, as under the circumstances it tends to condemn the defense. Her case rests solely on her testimony, without a supporting circumstance.

But it is strenuously contended that there is no substantial testimony that defendant ever deeded this property to her father-in-law. The testimony of Henry Ruthruff is naturally more or less indefinite as to time and the occasion and circumstances of such transfer of title, but no more so than would be expected where a man of his age testifies to occurrences a dozen years in the past. Had it been explicit in such particulars, undoubtedly it would have been open to question as being too definite to be credible. But the testimony of the witness Hall impresses with its straightforwardness and apparent truthfulness. Besides, it has a written basis in fact in "exhibit C," heretofore referred to, and which from its importance is fully set forth. It reads:

A memorandum of papers sent to R. A. McMichaels, LaMoure, N. D., April 1, 1902.

1. Warranty deed from Laura Louise Ruthruff to Henry Ruthruff.

2. Abstract of title to S.E. ¼ of 6–134–62.

3. Sheriff's deed to same property.

4. Statement of taxes on same property dated 2–27–1900, from the treasurer of LaMoure county.

5. Statement of taxes on same property from LaMoure county auditor, dated 12–28–1900.

6. Treasurer's redemption receipt, No. 1349, on same property dated 12–28–1900.

7. Letter from C. J. Allister, LaMoure county auditor, to W. E. Ruthruff, dated 12–17–1900.

8. Letter from State Bank of Edgely to W. E. Ruthruff, dated 12–18–1900.

9. Mortgage note for $400 from Henry Ruthruff to Fargo Loan Agency to Omar W. Folson, Docket C, page 325.

10. Mortgage deed for $400 from Henry Ruthruff and wife to Fargo Loan Agency, Docket C, page 325.

11. Assignment of mortgage note No. 11,944, from Fargo Loan Agency to Omar W. Folson to Henry Ruthruff.

12. Satisfaction of mortgage from O. W. Folson to Henry Ruthruff.

Attest:

F. D. Hall,
4–1–1902.

Hall testifies to having written this memorandum, in reality and effect an abstract of title of certain very important instruments. He says:

I was requested by either Ruthruff or his wife to mail the number of papers which are listed to R. A. McMichael, of LaMoure. Ruthruff had been quite sick for some time. At that time he was feeling some better, but I talked the matter of the papers over with him, and made this list; as I observed the papers being considerably of value, I made it partially for my own protection, and partly for his so I would know exactly what I had mailed.

Q. State from what you made up the list?

A. Made it from the papers themselves.

Q. How did you make it from the papers themselves?

A. I got the title from the papers after examining the papers to see what the title indicated.

Q. I will ask you to what extent you examined the papers?

A. Merely to see if what was indorsed as a warranty deed was a warranty deed, so with all the other papers, to see if they were what they were purported to be.

Q. State if they were what they purported to be from what examination you made?

A. *There was a warranty deed from Laura Louise Ruthruff to Henry Ruthruff*; there was an abstract of title to the land involved in this action; there was a sheriff's deed to the same property.

Q. State what you did with the list, "Exhibit C" after you made it?

A. Gave it to Henry Ruthruff.

Q. When did you last see it?

A. I think you showed it to me last August. . . . May have seen it in the hands of Mr. Ruthruff once between that time. Don't remember exactly, rather seems as though I did.

Either this exhibit is fabricated evidence offered on wholly perjured testimony as a basis, or it is exactly what it purports to be, an abstract executed contemporaneously with the first sale after defendant had deeded the land. Our conclusion is that this exhibit is genuine, and, taken with his testimony, carries conviction. It strongly tends to establish as an ultimate fact that an instrument, in form a warranty deed of Laura Louise Ruthruff and of this land, was outstanding and *in the possession of Henry Ruthruff*, April 2, 1902, thereby raising the presumption of its having been previously delivered to him. Nothing in the cross-examination of this witness or in the circumstances surrounding the making of this exhibit and the cause for its existence casts any doubt as to its authenticity or his truthfulness. This testimony, with that of the circumstances of the subsequent transfer for value and use of these title papers by the purchaser in the consummation of the sale then in progress by Henry Ruthruff to the land company, makes it a reasonable as well as natural and unavoidable conclusion that the purchasing land company did the usual thing of relying upon an abstract of record title down to the break in the chain of title, showing the fore-

closure certificate issued to defendant, which, supplemented with the two title deeds unrecorded but delivered to them by Henry, completed the title. The abstract, together with sheriff's deed and the warranty deed, both mentioned in "exhibit C," would place full knowledge of the condition of the title before the purchaser. And this is exactly what Ryan testifies was the situation and the documents acted upon in the purchase. He was then the manager of this company, engaged in buying and selling land, and testifies he received the deed of Henry Ruthruff and defendant's deed to Ruthruff and sheriff's deed to her, all unrecorded, together with the abstract of record title, and approved the title tendered, and *directed the recording of the unrecorded instruments.* To this he testifies positively and unreservedly, and that he caused the abstract to be delivered to the Shockmans after the company had sold them the land. That there never was any question as to the title of this land being in his company or its grantees until recently. Ryan testified by deposition, was cross-examined at length, during the course of which he testifies: "I am absolutely sure that I had that conversation" (with McMichael about recording these documents and the title under them), "and about these papers" (referring to these deeds). There is also in evidence another record corroborating circumstance that Henry Ruthruff had an interest in this land the next year after the issuance of the sheriff's deed to Laura in 1899. It is one of the tax records of LaMoure county containing the following recitations: "Tax sale record, December 7, 1897, delinquent tax of 1896, of southeast ¼ of section 6, township 134, range 64, E. R. Davidson, sold to State Bank of Edgely for $16.61, *redeemed by Henry Ruthruff, December, 28, 1900,* for $29.40." The same record book for 1894 for the tax of 1893 on this land shows it to have been "redeemed at 7 per cent by Laura Ruthruff *August 13, 1897,* amount, $15.61." The foreclosure record as disclosed by the abstract of title in evidence shows that this redemption by defendant was preparatory to her foreclosure proceedings by advertisement following soon thereafter, the first publication of which was December 17, 1897, with sale had January 24, 1898. Again, these circumstances coincide with and tend to prove the possession of an interest in the land by Henry Ruthruff arising between these two dates. Another circumstance appearing from the record is also significant; $800 of the $1,200 consideration for the sale by Henry Ruthruff to the company was paid

by a mortgage back given by the company to Henry Ruthruff for said amount, maturing, $400 in three years, and $400 in five years after the sale in April, 1902. Either Henry was selling land, title to which he believed he possessed, or he was giving his warranty deed when he must have known he had no title. That he sold on long time is strong evidence of his belief in ownership back in 1902, as it is grossly improbable that had he known that he had no title, and that he was therefore perpetrating a fraud by the sale, he would have given the purchaser such a sufficient length of time to discover it before he, Henry, could realize the proceeds of such fraud. The record discloses he did not assign this mortgage of record, but that the same was paid when due, April 5, 1907. Other incidents showing care in this purchase are that before closing the deal with Henry the company required satisfaction of a prior existing mortgage on this land, which satisfaction was filed of record April 7, 1902, and on May 21, following, the company also redeemed from outstanding taxes. The presumption is rather that the title to this land was carefully passed upon, examined, and approved, than the contrary, before said purchase. And it seems very improbable that the absence of two such documents as a sheriff's deed consummating a foreclosure title, and the next deed in the direct chain of title, would be overlooked.

McMichael, who assisted in the negotiations and sale of Henry to the land company, has testified, and counsel for the defendant has made much of the fact that he has no positive recollection of the record title or of the exact deal. He recollects that the company had a transaction with reference to this land in the spring of 1902, with Henry Ruthruff, conducted entirely by correspondence. He does not remember whether it was a cash deal, or whether a mortgage was taken back in part payment, nor the amount of the sale, but he does recollect Ryan having made a deposit on the purchase; "Ryan examined the title in closing the deal." That Ryan was somewhat personally interested in this purchase, and because of that "suggested that he was concerned and that he ought to examine the record. I thought that ended it." That he has made search for files, papers, and correspondence, and has been unable to find any after a thorough search. Witness was sixty-one years old at the time of trial, and testifying to matters occurring approximately ten years previously. His testimony in some respects is corroborative of the contention of the plaintiffs. That he does not recollect the state of

the title at the time of purchase is a circumstance entitled to no great weight as against all the evidence supporting plaintiffs' position.

A careful review of all the evidence convinces that beyond any substantial doubt this defendant, between June 27, 1899, and December 28, 1900, and probably soon after the date of the sheriff's deed, June 27, 1899, did deliver her warranty deed of this land to Henry Ruthruff. That there were dealings between her husband and his father, Henry, and that an indebtedness existed of over $2,000, of son to the father, is established by the written declaration of trust dated February 19, 1902, in evidence. A consideration easily could have passed, as Henry says it did, for this transfer. The death of W. Edd. Ruthruff, June 28, 1902, in the Jamestown asylum, where he received treatment for six weeks immediately prior to his death, raises no presumption that he was insane on or before December 28, 1900, prior to which date the tax redemption record shows the father had an interest in this land. Besides, defendant must have deeded, and if her husband had been mentally deficient she would in all probability have been more cautious in what she signed at his request. She does not defend on the ground of having been induced to deed by fraud or mistake, but she claims never to have deeded at all. No importance can be placed on the circumstance of her husband's insanity. It is mentioned, however, that nothing may be taken as overlooked. While she challenges the consideration for her alleged deed, it may be remarked that it is doubtful if any sufficient consideration existed for her own claim of title. True, she testifies to the general statement that her husband gave her this land, but the fact, nevertheless, she was ignorant of her ownership of it for seven years after his death, during which time others had undisputed possession under a belief and claim of title, amply justified under the evidence, does not evince much of a pecuniary investment in fact, or it would have been thought of and looked after, instead of remaining unknown and abandoned. We are constrained to find that she has no title and is defending without merit. This and other courts have held that, before title can be found in this plaintiff, this lost link in the chain "must be established by clear and satisfactory evidence." McManus v. Commow, 10 N. D. 340, 87 N. W. 8; Garland v. Foster County State Bank, 11 N. D. 374, 92 N. W. 452, and Young v. Engdahl, 18 N. D. 166, 119 N. W. 169. But these holdings are likewise authority to the fact that,

where the transfer is so established, the court should not hesitate to find such to be the fact. And the lost deed when established is, of course, as sufficient to transfer title as though the deed whose once existence is decreed never had been lost. 25 Cyc. 1614. Counsel for the respondent here contends, as he did below, that to establish this deed plaintiff must prove that defendant signed said deed, if it is shown one existed, and duly acknowledged and delivered the same, or caused its delivery, to her father-in-law. Upon this point the trial court, from remarks in the record, evidently considered the proof insufficient and unsatisfactory. It is not as conclusive as the showing that such a deed existed, or as that establishing the original sheriff's deed issued. But the proof that defendant both signed and acknowledged this deed is as certain as could reasonably be expected when the circumstances are considered. No more than a reasonable degree of certainty is required under these conditions. "All that parties in such cases can be expected to remember is that they made a deed, to whom, and about what time, for what consideration, whether warranty or quitclaim, and for what property. To require more would in most instances practically amount to an exclusion of oral evidence in the case of a lost or destroyed deed." Perry v. Burton, 111 Ill. 138, 140; Chamberlayne, Ev. § 1009. And it may be established by circumstantial evidence. 8 Enc. Ev. 348. "The execution of a lost instrument may be sufficiently established, as against him, by the subsequent acts and admissions of the party charged to have executed it." 8 Enc. Ev. 362. That the defendant has had no knowledge of an interest as now claimed, for these many years, during which time she has been out of possession, raises a presumption that she had parted with it, and is likewise evidence that she had signed this deed and acknowledged it as well, the acknowledgment being a material part of the act of transfer. August Shockman and Henry Ruthruff both testify of her recent statements that she had transferred this land and delivered all papers to Henry in 1899, and this is strong evidence against her on these points. Her own testimony taken altogether, indefinite at first, but positive at the conclusion when elicited under almost if not quite leading questions of her own counsel, discredit her denials, and with it her claim of title.

Henry testifies as follows: "Laura Louise Ruthruff, she signed a

warranty deed. . . . She signed the papers, everything necessary, the deed." On cross-examination he states:

Q. The deal was made with your son?

A. Yes sir, the deal was made with my son.

Q. Will you swear she was present any of the time?

A. She was in once. She told me if it was in her name, she was willing to sign the deed.

Q. Did you ever take more than one deed of any kind, leaving out the sheriff's deed?

A. But one.

Q. Do you know who took the acknowledgment when you got this deed from Laura?

A. No, I can't think.

Q. Do you know who witnessed it?

A. No.

Q. What did you do with it when you got it?

A. Kept it in my box with my private papers.

Q. Where was Laura Louise when she signed this deed?

A. I could not just say if it was at Lawyer Tilley's office or at the house.

Q. Will you swear you saw her sign the deed?

A. Her name signed to it, of course.

Q. Will you swear that you saw her sign her name to the deed?

A. Well I don't know. I think it was done when I was right present.

Q. Will you swear you saw her sign her name to the deed?

A. I know she signed it, yes.

Q. Will you swear you saw her sign her name to the deed?

The Court: Can you answer that question?

A. I will not be positive about that.

Q. And you took it home and put it in the tin box?

A. Yes sir. I know where I actually took it.

Q. You took the deed home and put it in the tin box?

A. Yes, took it and put it with all the papers.

Q. You can't tell who drew the deed, can you?

A. I think Tilley did.

Q. You think, that is all, you don't know so?

A. I think it was in his office.

Q. Will you swear that he drew that deed?
A. No.
Q. You can't tell before whom it was acknowledged?
A. No.
Q. You can't tell who the witnesses were?
A. No.
Q. All you know about that deed business is that your son brought you a deed purporting to be signed by Laura?
A. No, not purporting, signed right in the office.
Q. You say it was signed in an office?
A. No, I can't say signed, it was handed to me right in the office?
Q. Did she sign it?
A. Yes, sir.
Q. You did not see her sign it, did you?
A. No, I would not say.

Much more similar testimony by Ruthruff is in the record.

Witness Hall testifies he examined this deed when making "exhibit C;" that "this document purported to be a warranty deed to the property involved in this action, and it was in the ordinary form and signed by the name Laura Louise Ruthruff. I don't remember if the middle name was in it or not. It was signed by the name of Mrs. Ruthruff, I don't know if it was both names or not." Cannot now state whether the instrument was acknowledged or not. On cross-examination, he testifies:

Q. You don't mean to testify there was a warranty signed and acknowledged by Laura Louise Ruthruff, signed and acknowledged by her here by your own personal knowledge?
A. A deed that purported to be signed by her.
Q. And that is as strong as you want to put it?
A. Yes sir.
Q. How much time did you spend altogether in looking over these papers?
A. Perhaps an hour or an hour and a half.

Twitchell testified that he, either later in the fall of 1909, or February 1910, had visited defendant with Henry Ruthruff, "I told her I came up to see her with reference to the LaMoure county land, and ex-

plained to her what I understood the conditions was, that there had been an instrument, or sheriff's deed, or warranty deed, that had been lost, and that I thought in fairness to her father-in-law she ought to give a quitclaim deed. She said at first there had been one. She said at first that the land had been deeded by her, and I asked her who it was to, and she said to a man named Dickinson. . . . I asked her if she had deeded the land, and she said she had; and I went on to explain the result of her doing that, and explained that it might be that the old gentleman would be up against a suit on his warranty deed, and I said, 'Mrs. Ruthruff, you don't want your father-in-law to be in trouble;' and she said these people got title to the whole land when the deed was prepared to protect her father-in-law,—rather protect Malmberg." She also stated that she had not received her money on the deed which she had given to Dickinson; that her husband had given her to understand that this was her land; that she refused to quitclaim; that the reference to protecting Malmberg, witness concluded, was because he had stated during the conversation that Malmberg and Dickinson would "have to make good on the warranty." Witness showed her "exhibit C," and that it showed from the list that she had deeded the land and turned over the sheriff's deed to her father-in-law, and she said she had no recollection of it.

That an instrument bearing the purported signature of this defendant, covering this land and in form a warranty deed, given for a valuable consideration, and delivered by defendant to her father-in-law, is established beyond substantial doubt. That diligent search has been made for it is shown by the testimony of all in whom possession might be had or imputed. In view of the acts and admissions of the defendant, and of the written memoranda, and those reasonable probabilities and presumptions applying in the business dealings had with reference to this land, we are inclined to hold the proof sufficient as to the genuineness of the purported signature of the defendant to said deed, and that the same was acknowledged by her. The reason for extreme caution in decreeing the existence of lost deeds and establishing title thereunder is to prevent fraudulent assertion of titles. But here all acts of plaintiffs and their grantors reaching back to when the circumstances of the issuance of the sheriff's deed and the deed to Ruthruff must have been recent are all consistent with good faith and the actual existence of such

instruments. The conduct of the defendant is not, but, instead, is contrary to all human probabilities, and very inconsistent with her claims so recently first asserted. The case of the plaintiff is free from any badge of fraud, and wholly consistent as pleaded and proven. The defendant's denials are easy to make but hard to believe to be the facts under all the evidence, much of which is written. Many authorities have been reviewed in weighing the facts of this case. Each case of this kind is to be dealt with largely on its own proof as one mainly of fact.

It is therefore ordered that the judgment appealed from be vacated, and that in lieu thereof a decree be entered that a sheriff's deed on foreclosure was issued and delivered June 27, 1899, as heretofore stated, and that the grantee therein, defendant Laura Louise Ruthruff, soon thereafter conveyed said land by her deed of warranty to Henry Ruthruff; that through oversight said deeds were not recorded, and have been lost or destroyed, and cannot be produced to perfect record title, but that both of said deeds are established as having existed, and that the same passed title to said tract to the Iowa Land Company, which in turn has conveyed to these plaintiffs, in whom title thereto should be and is quieted and confirmed. Judgment for costs will follow in favor of the plaintiffs and against defendant. It is so ordered.

STATE OF NORTH DAKOTA ON RELATION OF JOHN H. TRIMBLE, J. H. Cook, and W. R. Banks, Drain Commissioners of Bottineau County, and S. E. Brady, A. W. Gantz, and H. T. Lee, Drain Commissioners of McHenry County, All Together Forming the Joint Board of Drain Commissioners of the Counties of Bottineau and McHenry v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation.

(150 N. W. 463.)

Mandamus — drainage commission — railway company — unnavigable stream — removal of bridge — to enable contractor to navigate his dredges and flatboats along said stream.

1. Mandamus will not lie at the suit of a drainage commission appointed

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Note.—The general question of the obstruction of the waters of a stream by a railroad bridge is the subject of a note in 59 L.R.A. 863.

and created under the provisions of chapter 23, Rev. Codes 1905, to compel a railway company to remove a bridge from an unnavigable stream, merely that a contractor appointed by the commissioners to improve such stream in order to drain adjacent lands may proceed with his work by navigating his dredges and flatboats along said stream and past said bridge.

Railway company — bridge across unnavigable stream — must not obstruct passage of water in said stream — reasonable and natural flowage — continuing duty.

2. A railway company which builds a bridge across an unnavigable stream must, however, accommodate itself to and provide for the undisturbed passage along said stream of all of the water which is or may be reasonably anticipated to drain therein; and this duty is a continuing duty.

Additional Syllabus on Rehearing.

3. A finding of fact by the trial court in a mandamus proceeding will, if supported by at least some creditable testimony, not be set aside by the supreme court on appeal.

Opinion filed November 2, 1914. On Rehearing January 8, 1915.

Mandamus to compel the removal of a bridge from the channel of an unnavigable stream. Appeal from the District Court of Bottineau County, *Burr*, J. Judgment for petitioner. Defendant appeals.

Reversed and remanded with directions.

Statement of facts by BRUCE, J.:

This is an action in mandamus to compel the defendant to remove its bridge from the channel of the Mouse river. The relators, who are the respondents on this appeal, are members of the drainage board of Bottineau and McHenry counties. They are engaged in opening the Mouse river, under the drainage laws of this state. The work of cleaning out and dredging the stream is being done by the France Dredging and Construction Company, and by means of a steam dredge, which is floated in the channel of the stream. The defendant owns a right of way 100 feet wide, which crosses the said stream, and upon which, in 1905, it constructed a track, and since that time has been operating its trains. At this crossing of the above river and on the above land the defendant constructed a trestle or bridge about 1,300 feet in length. The dredge will not pass under the bridge. The plaintiffs have obtained no right to go upon the defendant's premises by purchase or condemnation, and have no right of entry unless it is given them by statute or the common law. The plaintiff prosecuted these proceedings by

mandamus, in which, among other things, it is alleged that "said trestle and bridge is built upon piles and timbers driven into and sunk in the bed of said river; that said trestle and bridge so built as aforesaid is now owned, controlled, and operated by the said defendant as a part of its said line and as the means and method of crossing said river; that the said piles and timbers so placed, sunk, and driven in said river and the bed thereof constitute an obstruction to the flow of said stream, diminish its fall and current, causing deposits of sediment and material in the bed thereof, and materially interfere with, obstruct and diminish the drainage of the territory tributary thereto by said river." It further alleges that the work of deepening the channel is "done by means of large steam dredges located and constructed on large flatboats which float in the channel of said stream, and that in connection therewith the contractors used houseboats for the boarding of their men, and steamboats to carry provisions, fuel, and supplies, and to move the said dredges. That the said work began at the southern point and at a point south of the said bridge so constructed, owned, and maintained by the defendant herein; that in the performance of said work, said dredges and boats are working north, and it is necessary to pass the said bridge, and also to excavate, widen, deepen, and straighten the channel of the river at said bridge; that said work cannot be done, nor can said boats pass down said Mouse river without the removal of said bridge."

The petition therefore prayed that the defendant be compelled to remove the bridge at its own expense. The facts in the case which are found by the trial court, and which seem to be conceded by both parties, are as follows: The Mouse river enters the United States from Canada, and after running south turns north and re-enters Canada, and its waters finally reach Hudson's Bay. It is a natural water course, furnishing natural drainage for portions of Bottineau and McHenry counties. It is non-navigable, but runs the entire year. Its normal depth in the bed of the stream is from 1 to 6 feet. It is winding, runs through a level country, and is not subject to sudden freshets or increase of volume, and its current is about ¼ of a mile per hour. The bridge was constructed by the railway company in 1905, rests upon piles driven into the river or its adjacent banks. All of the land upon which the bridge is constructed, and all of the land on which it bridges the river, is owned in fee by the railway company. The bridge consists of piling,

and a superstructure which consists of stringers laid on caps on the top of piles, which said stringers support the ties, rails, and other materials and substances which may be called the superstructure and constitutes the roadway proper; that the piles forming the support of the superstructure are set in rows of five each, the rows being 14 feet and 6 inches apart. They are driven 22 feet into the ground. The greatest depth of water in the stream under the bridge is approximately 4 feet, the stream under the bridge is approximately 125 feet wide. It is 11½ feet from the surface of the water to the bottom of the superstructure. The bridge and trestle is 199 feet and 9 inches long; 100 feet of it must be removed to permit the dredge to pass through. Six rows of piling will have to be taken out. The estimated cost of the drainage improvement will be $141,827.84. The estimated benefits are $342,-539.44. The improvement will restore to cultivation approximately 125,000 acres of land which are practically valueless for want of drainage. This land, when drained, will be worth from $50 to $100 per acre. The work contemplates only draining such land as naturally drains into the Mouse river, and the sole and only purpose of such work and improvement is to create and maintain such a current in the stream as will promptly carry off the water naturally draining therein. The drainage board contracted with the France Dredging & Construction Company for doing the work in accordance with the plans and specifications of the engineer. The proposed drain is 42 miles long. The work is being done by means of a large steam dredge located on flatboats which float in the channel of the stream. Work was commenced south of the bridge, and the contractors are working north. It will be necessary to pass defendant's bridge to complete their work north of it under their contract, if this method is pursued, this method being the only practicable and least expensive one, taking into consideration the magnitude of the work. The earth excavation from defendant's roadway and under its bridge can be had at an expense of $500 by using men on small boats or wading in the channel. The six rows of piling in the channel, and the sawed off piles, can be removed and other piling put in which will conform to the engineer's requirements, at an expense of $700. The superstructure can be removed and replaced upon the piling for $800. The dredge can be moved from one side of the bridge to the other after taking down and removing the super-

structure, as well as the pilings and support. It would cost about $5,000 to take the dredge apart and remove it to the north side.

The superstructure of the bridge has never obstructed the natural waterflow. It is supported by eighty-seven rows of piling, which leave a large opening underneath, so that all the water in the river has always passed under it without interference other than by the rows of piling. The additional flowage resulting from the proposed improvement will flow under the superstructure without interference therefrom. The defendant has now six rows of piling upon the 100-foot strip which will constitute the proposed new channel, which have been cut off about the surface of the water. It will cost the drainage board about $50 to remove this abandoned piling, which constitutes an obstruction to the opening of the channel as provided in the engineer's plan. Its removal is necessary to obtain the flow which the plans contemplate.

These facts seem to be conceded. The only facts, indeed, which seem to be in dispute are those covered by the fifth finding of the trial court, which is as follows: "That said trestle and bridge, including the piles and other timbers thereof, sunk, driven, or extending into or through the water and into the bed of the Mouse river, constitute, are now, and have been since their construction, an obstruction and obstacle to the flow of said stream, and by reason thereof have impeded and diminished the natural drainage accomplished thereby; that they retard and restrain the ice in the spring of the year, and by reason whereof there is deposited considerable amounts of dirt, silt, and *débris* in the bed of said stream, thereby further obstructing the flow thereof and impairing its usefulness for drainage purposes."

Watson & Young, for appellant (Geo. A. Kingsley, of counsel).

The stream over which defendant's bridge is built is unnavigable. Defendant owned the banks and soil; it had the possession of the water flowing over it and the right to make reasonable private use of same. All such streams, within a reasonable degree, are private property. 38 Cyc. 995, 996, and cases cited; Rev. Codes 1905, § 4707; Stur v. Beck, 6 Dak. 71, 50 N. W. 486, affirmed in 135 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350.

The drainage board may only acquire a right of way for drains either by purchase or condemnation. It has no right to authorize its

dredging contractor to enter upon such private property until the right of entry has been secured. Laws 1907, chap. 93, amending §§ 1819–1823, 1827, 1829, 1831, 1832, 1835, 1840, 1849; State ex rel. v. Soo R. Co.

The defendant's bridge and piling were lawfully built, and defendant had the right to use the same and the same could not be taken away, or the bridge removed, even by condemnation proceedings, without full pay for same. St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Stenger v. Tharp, 17 S. D. 13, 94 N. W. 402.

The right of defendant to use such stream is not an easement, but an incident to and a part of the land itself, and can only be lost by adverse right, grant, abandonment, or prior legal appropriation. Hanford v. St. Paul & D. R. Co. 43 Minn. 104, 7 L.R.A. 722, 44 N. W. 1144; Brisbine v. St. Paul & S. C. R. Co. 23 Minn. 114; Carli v. Stillwater Street R. & Transfer Co. 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205; Union Depot, Street R. & Transfer Co. v. Brunswick, 31 Minn. 297, 47 Am. Rep. 789, 17 N. W. 626; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Bell v. Gough, 23 N. J. L. 624; Delaplaine v. Chicago & N. W. R. Co. 42 Wis. 214, 24 Am. Rep. 386.

Such property is subject to the law of eminent domain. Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 93, 40 L. ed. 85, 87, 15 Sup. Ct. Rep. 991; Society for establishing useful manufactures v. Morris Canal & Bkg. Co. 1 N. J. Eq. 157, 21 Am. Dec. 41; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Fitzh. Nat. Brev. 184; Moore v. Browne, 3 Dyer, 319b; Luttrel's Case, 4 Coke, 86; Glyn v. Nichols, Comb. 43, 2 Shower, K. B. 507; Prickman v. Trip, Comb. 231.

Where such property is sought to be taken or used in an adverse manner to the rights of the owner, just and full compensation must be made. Martin v. Tyler, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Const. § 210; Rev. Codes 1905, § 2947, subdiv. 3, § 5958, subdiv. 1; 1 Rorer, Railways, 444; Old Colony & F. River R. Co. v. Plymouth County, 14 Gray, 155; Johnson v. Jordan, 2 Met. 234, 37 Am. Dec. 85; St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659; Rumsey v. New

York & N. E. R. Co. 133 N. Y. 79, 15 L.R.A. 618, 28 Am. St. Rep. 600, 30 N. E. 654.

These plaintiffs were trespassers, because they had not acquired the right to enter upon defendant's property. "Every unauthorized entry upon the land of another is a trespass." 38 Cyc. 985, 995, and cases cited; Wood v. Snider, 187 N. Y. 28, 12 L.R.A.(N.S.) 912, 79 N. E. 859; 30 Am. & Eng. Enc. Law, 308–400, 454; 40 Cyc. 542–846; United States v. Sears, 55 Fed. 268; United States v. Debs, 65 Fed. 210.

The fee owner of land has the right to use the surface, and everything permanently situated beneath or above it. Rev. Codes 1905, § 4798; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; State Const. § 210; United States Const. art. 14, § 1; Rev. Codes 1905, §§ 1837, 1838, 7574, 7575; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; State ex rel. Fadley v. Henry County, 157 Ind. 96, 60 N. E. 939.

Geo. A. Bangs and *Geo. A. Robbins,* for respondents.

The fact that a ditch is constructed over and along a natural course, so that the waters are confined in the artificial channel, does not change its character as a water course. 30 Am. & Eng. Enc. Law, 350; Schwartz v. Nie, 29 Ind. App. 329, 64 N. E. 619; Walley v. Wiley, — Ind. App. —, 104 N. E. 318.

The owner of the bed of such a stream is no more the owner of the water in it than he is of the air around and above it. He may use both in a reasonable manner. Rev. Codes 1905, §§ 4787–4709, § 4798, subdivs. 5, 9, 11; Chicago & N. W. R. Co. v. Drainage Dist. 142 Iowa, 607, 121 N. W. 193; 14 Enc. Laws of Eng. 604; Embrey v. Owen, 6 Exch. 353, 20 L. J. Exch. N. S. 212, 15 Jur. 633, 10 Eng. Rul. Cas. 179; Gaved v. Martyn, 19 C. B. N. S. 732, 34 L. J. C. P. N. S. 353, 11 Jur. N. S. 1017, 13 L. T. N. S. 74, 14 Week. Rep. 62; Roberts v. Gwyrfai [1899] 2 Ch. 608, 68 L. J. Ch. N. S. 757, 64 J. P. 52, 48 Week. Rep. 51, 81 L. T. N. S. 465, 16 Times L. R. 2, 25 Eng. Rul. Cas. 401.

The natural rights of a riparian proprietor impose corresponding obligations on all others; and thus it is wrongful for a lower riparian owner to pen the water back and obstruct the flow. Robinson v. Byron,

1 Bro. Ch. 588; 1 Wood, Nuisances, 94, 609; Gould, Waters, § 212, p. 416; 1 Lewis, Em. Dom. § 67; State v. Close, 35 Iowa, 570; Abbott v. Kansas City, St. J. & C. B. R. Co. 83 Mo. 276, 53 Am. Rep. 581; Hayes v. St. Louis & S. F. R. Co. 177 Mo. App. 201, 162 S. W. 266; Veazie v. Dwinel, 50 Me. 486; McCleneghan v. Omaha & R. Valley R. Co. 25 Neb. 531, 13 Am. St. Rep. 508, 41 N. W. 350; Fairbury Brick Co. v. Chicago, R. I. & P. R. Co. 79 Neb. 854, 13 L.R.A.(N.S.) 542, 113 N. W. 535; Smith v. Chicago, B. & Q. R. Co. 81 Neb. 186, 115 N. W. 755; Mills v. Hall, 9 Wend. 315, 24 Am. Dec. 160; Chicago, B. & Q. R. Co. v. People, 212 Ill. 109, 72 N. E. 219; Chicago & N. W. R. Co. v. Drainage Dist. 142 Iowa, 607, 121 N. W. 193; Cary v. Daniels, 5 Met. 238; Pollock C. B. in Dickinson v. Grand Junction Canal Co. 7 Exch. 282, 21 L. J. Exch. N. S. 241, 16 Jur. 200; Lord Wensleydale in Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, 1 Eng. Rul. Cas. 729, 5 Hurlst. & N. 989.

The riparian owner has the right to protect his easement, and to remove obstructions which interfere with the flow of the water in its natural state, whether they be natural or artificial. Gould, Waters, §§ 365, 366, pp. 671, 672; 2 Farnham, Waters, 464, 464a, 480, 812; Darlington v. Painter, 7 Pa. 473; Dyer v. Depui, 5 Whart. 584; Kauffman v. Griesemer, 26 Pa. 407, 67 Am. Dec. 437; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; Rockland Water Co. v. Tillson, 75 Me. 170; Pico v. Colimas, 32 Cal. 578; Ware v. Walker, 70 Cal. 591, 12 Pac. 475; Ames v. Dorset Marble Co. 64 Vt. 10, 23 Atl. 857; Treat v. Bates, 27 Mich. 390; Prescott v. Williams, 5 Met. 429, 39 Am. Dec. 688; Prescott v. White, 2 Pick. 341, 32 Am. Dec. 266; White v. Chapin, 12 Allen, 521; Cobb v. Massachusetts Chemical Co. 179 Mass. 423, 60 N. E. 790; Scriver v. Smith, 100 N. Y. 471, 53 Am. Rep. 224, 3 N. E. 675; Roberts v. Roberts, 55 N. Y. 275; Chapman v. Thames Mfg. Co. 13 Conn. 269, 33 Am. Dec. 401; Legg v. Horn, 45 Conn. 409; Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 735; Manteufel v. Wetzel, 133 Wis. 619, 19 L.R.A.(N.S.) 167, 114 N. W. 91; Mason v. Fulton County, 80 Ohio St. 151, 24 L.R.A.(N.S.) 903, 131 Am. St. Rep. 689, 88 N. E. 401.

Nature has already granted all such rights with respect to a natural stream, such as the one obstructed in this case. Chicago, B. & Q. R.

Co. v. Appanoose County, 31 L.R.A.(N.S.) 1117, 104 C. C. A. 582, 182 Fed. 291; Cache River Drainage Dist. v. Chicago & E. I. R. Co. 255 Ill. 403, 99 N. E. 635; People ex rel. Peeler v. Chicago & E. I. R. Co. 262 Ill. 501, L.R.A.1915B, 486, 104 N. E. 381.

The drainage laws are enacted and enforced under the police power of the state. Our law, as an exercise of such power, is constitutional. 2 Farnham, Waters, § 170, p. 900; 14 Cyc. 1025; Erickson v. Case County, 11 N. D. 494, 92 N. W. 841; Soliah v. Cormack, 17 N. D. 393, 117 N. W. 125; Soliah v. Heskin, 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103; Freeman v. Trimble, 21 N. D. 1, 129 N. W. 83.

Mandamus is a common-law remedy; it has no connection with equitable jurisdiction; it is a special proceeding of a civil nature. 3 Enc. Pl. & Pr. 491; 26 Cyc. 140; Rev. Codes 1905, §§ 6741–6746, 7808, 7809, 7832, 7833, 7841; State ex rel. Bickford v. Fabrick, 16 N. D. 94, 112 N. W. 74; Oliver v. Wilson, 8 N. D. 590, 73 Am. St. Rep. 784, 80 N. W. 757; State ex rel. McGregor v. Young, 6 S. D. 406, 61 N. W. 165; Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50.

On appeal the court will sustain the findings upon disputed questions of fact; the findings are the same as a verdict; if there is any evidence to support the findings, they will be sustained on appeal. 15 Cyc. 166; Schuman v. Sanderson, 73 Ark. 187, 83 S. W. 940; Williams v. Buchanan, 86 Ark. 259, 110 S. W. 1024; Trafton v. Quinn, 143 Cal. 469, 77 Pac. 164; Hannah v. Green, 143 Cal. 19, 76 Pac. 708; Vigil v. Garcia, 36 Colo. 430, 87 Pac. 543; Moorhead v. Arnold, 73 Kan. 132, 84 Pac. 742; McCormick v. Jester, 53 Tex. Civ. App. 306, 115 S. W. 278.

The presumption of the law is that officials do their duty in a regular manner. Rev. Codes 1905, § 7317, subdiv. 15; State ex rel. Little v. Langlie, 5 N. D. 603, 32 L.R.A. 723, 67 N. W. 958; Fisher v. Betts, 12 N. D. 209, 96 N. W. 132; Pine Tree Lumber Co. v. Fargo, 12 N. D. 376, 96 N. W. 1036; Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 398, 127 N. W. 499; Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co. 22 N. D. 615, 47 L.R.A. (N.S.) 965, 135 N. W. 189; State ex rel. Johnson v. Ely, 23 N. D. 619, 137 N. W. 834; Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed. 552; Knox County v. Ninth Nat. Bank, 147 U. S. 91, 37

L. ed. 93, 13 Sup. Ct. Rep. 267; Nofire v. United States, 164 U. S. 657, 41 L. ed. 588, 17 Sup. Ct. Rep. 212; Delaney v. Schuette, 49 Wis. 366, 5 N. W. 796; State ex rel. Anderson v. Kempf, 69 Wis. 470, 2 Am. St. Rep. 753, 34 N. W. 226; Barber Asphalt Pav. Co. v. Denver, 19 C. C. A. 139, 36 U. S. App. 499, 72 Fed. 336; People ex rel. Hayes v. Bates, 11 Mich. 368, 83 Am. Dec. 745; Zeiler v. Chapman, 54 Mo. 502; Motley v. Wilson, 26 Ky. L. Rep. 1011, 82 S. W. 1023; Sullivan v. Orange County, 59 Fla. 630, 52 So. 517; Harris v. Whitcomb, 4 Gray, 433; Taylor v. Cundriff, — Ky. —, 118 S. W. 379; Powers v. Hitchcock, 129 Cal. 325, 61 Pac. 1076; Dooley v. Van Hohenstein, 170 Ill. 630, 49 N. E. 193.

The question of the necessity for the drain is one for the drainage board, and not for the courts. Missouri P. R. Co. v. Omaha, 117 C. C. A. 12, 197 Fed. 516.

The purpose in granting to the drainage board power to say what is necessary to be done, as well as to determine the best way to do it, was to provide means to carry the law into effect and accomplish the results sought; and riparian owners must adapt themselves to the situation, and use their property so as not to obstruct or prevent the board from doing lawful acts in removing obstructions to the reasonable use of this water course. Elliott, Railroads, 2d ed. 788–b; Angell, Watercourses, 7th ed. 465–b; Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219, affirmed in 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Chicago & N. W. R. Co. v. Drainage Dist. 142 Iowa, 607, 121 N. W. 193; Mason City & Ft. D. R. Co. v. Board of Supervisors, 144 Iowa, 10, 121 N. W. 39, 116 N. W. 805; Chicago & E. R. Co. v. Luddington, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273; Wabash R. Co. v. Jackson, 176 Ind. 487, 95 N. E. 311, 96 N. E. 466; State ex rel. Hutter v. Papillion Drainage Dist. 89 Neb. 808, 132 N. W. 398; Chicago, B. & Q. R. Co. v. Appanoose County, 170 Fed. 665, 31 L.R.A.(N.S.) 1117, 104 C. C. A. 573, 182 Fed. 291; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; Union Bridge Co. v. United States, 204 U. S. 364, 395, 399, 401, 51 L. ed. 523, 537, 539, 540, 27 Sup. Ct. Rep. 367; United States v. Monongahela Bridge Co. 160 Fed. 713, 216 U. S. 177, 54 L. ed. 435, 30

Sup. Ct. Rep. 356; Bacon v. Walker, 204 U. S. 311, 317, 51 L. ed. 499, 502, 27 Sup. Ct. Rep. 289; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; St. Paul, M. & M. R. Co. v. Minnesota, 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 Sup. Ct. Rep. 400; St. Louis Southwestern R. Co. v. Miller Levee Dist. 197 Fed. 815.

The rule of damages here is the same as in cases of lowering tracks, opening streets, etc. Grafton v. St. Paul, M. & M. R. Co. 16 N. D. 313, 22 L.R.A.(N.S.) 1, 113 N. W. 598, 15 Ann. Cas. 10; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A. (N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; Chicago, M. & St. P. R. Co. v. Minneapolis, 115 Minn. 460, 51 L.R.A.(N.S.) 236, 133 N. W. 169, Ann. Cas. 1912D, 1029, affirmed in 232 U. S. 430, 58 L. ed. 671, 34 Sup. Ct. Rep. 400; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364; Wabash R. Co. v. Railroad Commission, 176 Ind. 428, 95 N. E. 673; Morgan v. Schusselle, 228 Ill. 106, 81 N. E. 814; People ex rel. Thompson v. Gunzenhauser, 237 Ill. 262, 86 N. E. 669; People ex rel. Smerdon v. Crews, 245 Ill. 318, 92 N. E. 245; Highway Comrs. v. Lake Fork Special Drainage Dist. Comrs. 246 Ill. 388, 92 N. E. 902; People ex rel. Parmenter v. Fenton & T. R. Co. 252 Ill. 372, 96 N. E. 864; Jones v. Sanitary Dist. 252 Ill. 591, 97 N. E. 210; Strange v. Cleveland, C. C. & St. L. R. Co. 245 Ill. 246, 91 N. E. 1038.

The rights for which the board here contends existed at common law, and do not depend upon statutory provisions. Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

A railroad company in constructing its road over water courses must make suitable bridges and culverts for carrying off the water. This duty is imperative, and rests upon a railroad just the same as upon a private owner who interferes with a water-course. Kankakee & S.

R. Co. v. Horan, 131 Ill. 308, 23 N. E. 621; Cleveland v. Augusta, 102 Ga. 233, 43 L.R.A. 638, 29 S. E. 584; Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743; Lake Erie & W. R. Co. v. Smith, 61 Fed. 885; Indiana ex rel. Muncie v. Lake Erie & W. R. Co. 83 Fed. 287; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 35 Minn. 114, 59 Am. Rep. 313, 28 N. W. 3.

There is a distinction between an incidental injury to private property rights, lawfully and reasonably exercised, and the taking of private property for public use, within the meaning of the Constitution. Northern Transp. Co. v. Chicago, 99 U. S. 635, 642, 25 L. ed. 336, 338; Mugler v. Kansas, 123 U. S. 623, 669, 31 L. ed. 205, 213, 8 Sup. Ct. Rep. 273; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567–571, 38 L. ed. 269, 272–274, 14 Sup. Ct. Rep. 437; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 979, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Gibson v. United States, 166 U. S. 269, 271, 276, 41 L. ed. 996, 998, 1002, 17 Sup. Ct. Rep. 578; Scranton v. Wheeler, 179 U. S. 141, 164, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Mills v. United States, 12 L.R.A. 673, 46 Fed. 738; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Bedford v. United States, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 472, 24 L. ed. 527, 530; Patterson v. Kentucky, 97 U. S. 501, 503, 24 L. ed. 1115, 1116; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 464, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114; Hennington v. Georgia, 163 U. S. 299, 309, 41 L. ed. 166, 171, 16 Sup. Ct. Rep. 1086; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 631, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418.

The adequacy of the bridge and the opening under it for the passing of the water of the creek at the time the bridge was built, does not determine the obligations of the railroad company to the public for all time. The railroad company must use the stream so as not to injure others; and this is a continuing obligation. Cooke v. Boston & L. R. Corp. 133 Mass. 188; Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743; Indiana ex rel. Muncie v. Lake Erie

& W. R. Co. 83 Fed. 287; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471.

The law touching damages for crossing highways in existence is applicable here. 1 Elliott, Roads & Streets, § 48, pp. 62, and 243, note; 2 Elliott, Roads & Streets, §§ 1010, 1011; 3 Elliott, Railroads, 2d ed. 1092, 1105.

Mandamus is the proper remedy to compel the performance of a duty. 1 Elliott, Railroads, 639; 2 Elliott, Railroads, 698; 3 Elliott, Railroads, 1106; Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219, affirmed in 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

It is the duty of a railroad company crossing a highway or a stream to preserve the same in a condition of usefulness and safety. Chicago & E. R. Co. v. Luddington, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273 and authorities cited; 3 Elliott, Railroads, 2d ed. 1092, 1105; Elliott, Roads & Streets, 2d ed. 779, 780; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; State ex rel. Duluth v. Northern P. R. Co. 98 Minn. 429, 108 N. W. 269, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Chicago, M. St. P. R. Co. v. Minneapolis, 115 Minn. 460, 51 L.R.A.(N.S.) 236, 133 N. W. 169, Ann. Cas. 1912D, 1029, 232 U. S. 430, 58 L. ed. 671, 34 Sup. Ct. Rep. 400.

The police power of the state extends to all matters where the general public welfare, morals, and health of the community are involved. Old Orchard Beach R. Co. v. York County, 79 Me. 386, 10 Atl. 113; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; Chicago, B. & Q. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. 78, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Chicago, M. & St. P. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118; State ex rel. St. Paul, M. & M. R. Co. v. District Ct. 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7; 3 Elliott, Railroads, 1105, 1106, 1092; Angell, Watercourses, 7th ed. 465–b; Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219; Grafton v. St. Paul, M. & M. R. Co. 16 N. D. 313, 22 L.R.A.(N.S.) 1, 113 N. W. 598, 15 Ann. Cas. 10; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; 2 Farnham, Waters,

§ 221, p. 1065; Chicago, B. & Q. R. Co. v. Appanoose County, 31 L.R.A.(N.S.) 1117, 104 C. C. A. 573, 182 Fed. 291; Cache River Drainage Dist. v. Chicago & E. I. R. Co. 255 Ill. 403, 99 N. E. 635; People ex rel. Peeler v. Chicago & E. I. R. Co. 262 Ill. 501, L.R.A. 1915B, 486, 104 N. E. 831.

BRUCE, J. (after stating the facts as above). We have carefully examined the evidence as to the fifth finding, and are fully satisfied that the obstruction furnished by the bridge is negligible. T. R. Atkinson, the state engineer who made the original survey, and who has since been in charge of the work, testifies that no change has occurred in the channel since 1907; that no excavation will be required under the bridge; that he never saw an ice gorge at the bridge; that under the bridge and over the right of way the water is swifter than for a considerable distance either above or below the bridge; that the pilings, in fact, increase and accelerate the flow of water at the bridge and increase its velocity.

These facts are borne out by the testimony of several other witnesses, and all that can be derived from the testimony of the other witnesses is that stated in defendant's proposed findings Nos. 18, 19, and 21, and which are as follows: "That the Mouse river varies in width from 150 to 200 feet; that it is a shallow stream, varying from about 2 inches to about 3 feet in depth; that it has a mud bottom on which grow, during the summer season, weeds, grass, reeds, and rushes. During the winter season it freezes in many places to the bottom, freezing the earth and weeds and frequently earth in the ice; that when the snow and ice melt in the spring the ice breaks up; the most of it follows the course of the stream, some of it lodges upon the banks where the ice melts, (and no doubt, according to our view of the evidence, but not according to the proposed finding, some of it is impeded by the piles, and tends to temporarily, at least, obstruct the flow of the water). The melting ice leaves more or less *débris* in the stream and on the banks where the ice melts. The bottom of the stream is of varying elevation. The bottom of the stream across defendant's right of way is lower and the current is swifter there, and the water has a greater depth, than at any point for more than half a mile above the bridge and for more than a mile below the bridge; that is, there is less deposit

in the stream across defendant's right of way than within the distances just stated. The said stream has a fall of 1.65 feet in the 5 miles above the bridge, and the same fall in the 5 miles below the bridge.

In the spring of 1906 or 1907 when the ice broke up, it lodged against the piling, and backed up for about a quarter of a mile, and remained there for about a week. In a later year the ice lodged against the piling, and backed up for a few yards, and remained there for a day or two. The last three years it has not blocked against the piling; that no complaint has been made to the railroad company of ice jams; that where bridges supported by piling such as this bridge are in danger from ice jams, they are protected by driving a piling above each row up stream for protection; that it has never been found necessary to drive such a protecting piling in this stream; that the piling bears no marks of having been jammed by ice; that ice obstructions are readily removable by breaking the cakes of ice, or, in case of an extensive gorge, by dynamiting the same; that one of the chief purposes of the proposed drain, if not its chief purpose, is to remove from the channel of the stream the *débris* left in the channel of the stream by the ice and from other causes; that the earth under the bridge as it now is could be removed without impairing the strength of the bridge, and without imposing any additional expenses upon the railway company to strengthen its bridge.

One cannot, indeed, read the record in this case without being impressed with the belief that the action at bar is one for the benefit of the contractor, and not of the drainage board or of the counties interested, and that the proceedings were brought not for removing the nuisance of the alleged obstructions to the stream as a drainage conduit, but to allow the dredge and houseboats of the contractor to pass under the same. It is to be remembered, indeed, that the river is not navigable, and that the right of way of the railway company is owned in fee by that company. It is also to be remembered that the railway company is engaged in an important public service and in the carriage of not only intra, but inter, state passengers, freight, and mail. The question, indeed, is an important one. It is extremely necessary to the public that streams shall be crossed by railways, and that the bridges and approaches shall be as thoroughly and permanently constructed as is possible. The right of both the lower and upper riparian owners to the

unimpeded passage of the water, as far as the water is concerned, is of course, conceded, even in unnavigable streams, as well as the right of the public to condemn property for drainage purposes if such condemnation is necessary. Where, however, the natural flow is not to any material extent impeded, and where, as we believe is the fact in this case, a comparatively small expenditure in the removal of piling could remove the obstruction without requiring the removal of the railroad bridge, and where, indeed, the only purpose of the order seems to be to allow the dredges and machinery which are used in digging or deepening the channel to pass by,—in other words, where the only purpose of the proceeding is to lessen the cost of a portion of the digging and to benefit the contractor,—it seems hardly right to interfere with the property rights of private owners. The case, indeed, is no different than if the railroad bridge had been a municipal bridge, a mill, a farmer's bridge, or some other similar structure.

It is stipulated, indeed, in this case, that the earth can be removed across the right of way under the bridge for $500 without disturbing the piling. The piles can be removed at a cost of $350. If other piling must be put in, it is stipulated that this can be done for $350. In other words, the evidence seems to show that the railway company for an expense of $850 could remove the dirt so that the channel would be in conformity with the rest of the drainage, and also remove the piling so that there would be no obstruction to the ice, if obstruction there ever was. It has, however, been ordered to remove the whole superstructure at an additional cost of $800, not in order that the stream may be free from obstruction and that the adjacent country may be drained, but that the particular dredges and flatboats of the contractor may be accommodated. Where, indeed, will be the limit?

The distinction between a navigable and an unnavigable stream has been long recognized. The adjacent property owner must take into consideration the unnavigability, and the duty of accommodating himself to that unnavigability. He has the right, however, to assume that in the case of an unnavigable stream the rights of the riparian owners are the only ones which he must respect. If, for instance, the railroad bridge was 300 feet above a stream, would it be necessary to remove such bridge merely because some contractor had constructed some modern derrick whose mast projected hundreds of feet into the air?

We find, indeed, no case in the books where any such high-handed procedure has been tolerated, except those in which the railroad company was assessed for benefits on account of the construction of improvements, and on such assessment was given credit for the injury to its property. Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743.

The case of State ex rel. Fadley v. Henry County, 157 Ind. 96, 60 N. E. 939, is very much in point. In it it was held that "mandamus will not lie at the suit of the drainage commissioner against the county commissioners and township trustees to compel them to remove iron bridges over a water course in the county, in order that a contractor appointed by the commissioners to drain the water course may proceed with his work, though the necessary dredging machines cannot pass under or around the bridges." "If their removal," said the court, "became necessary in order to enable the contractor to successfully carry out his contract, it certainly was no more the duty of the board of commissioners or township trustees to incur the expense of their removal than it would have been to cause the removal of trees or other obstructions along the course or route of the proposed drain. Counsel for appellant relies in support of his contention upon the decision of this court in the case of Lake Erie & W. R. Co. v. Cluggish, supra. In that case the commissioner of drainage, together with the contractor, sought to enjoin the railroad company from interfering with or preventing them from removing a bent supporting a bridge belonging to the railroad company. It was not contended in that appeal that the company should remove the bent and open the bridge at its own expense in order to accommodate the contractor in dredging in or along the stream spanned by the railroad bridge. No question of that character was presented or decided in that cause. The claim of the drainage commissioner and the contractor was that they had the right, in the construction of the drain, to go through the bridge, and whatever damages resulted therefrom to the railroad company must be considered as satisfied by reason of a certain reduction which had been made in the amount of benefits assessed against the company in the proceedings to establish the ditch. The question presented and decided on the facts in that appeal, and the one here involved, are materially different, and consequently that decision lends no support to appellant's contention.

The petition does not state a cause of action against appellees, or either of them. Therefore the demurrer of each was properly sustained."

We have carefully read the case of Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, and in which case it was held that the railway company could be compelled to pay for the cost of removing and reconstructing its bridge, but could not be compelled to pay for the cost of removing the soil and widening the channel. That case, however, is materially different from the one at bar. It was shown that the bridge would materially interfere with *the increased flowage of the stream,* and it was held that it was the duty of the railway company crossing a natural water course to adjust itself to the proper uses of that water course, and that this was a continuing duty. In the case at bar we believe that it has been shown that the removal of the bridge as a whole, and especially of the superstructure, is not necessary to the accommodation of the increased flowage of the stream, but that such can be accommodated in a much cheaper manner, and, at the most, by the removal of some dirt and piles.

We are ready to concede the propositions that if a railway company constructs its tracks over a highway it must restore the same, and the duty is continuing, and that if a railway crosses an unnavigable stream which serves for the drainage of any given area of land it must accommodate itself to the drainage that may be reasonably anticipated, both present and prospective. It by no means follows, however, from these concessions, that a railroad which crosses an unnavigable stream is held to the same liability as if the stream were navigable, and that it must accommodate itself to the traffic of barges and dredges. It may not, in short, obstruct the flow of the water and of the drainage area, even though that flow is the result of modern improvements and the draining into the stream of areas which, though belonging to the general district, did not formerly flow readily into the stream, and for the accommodation of which the improvements are made. This, however, is as far as its duties go, and all that can be required of the company in this case is that it shall remove its obstructions to the flow of the water. It is not its duty to make the stream navigable. It is perfectly clear to us, though, that the removal of some of the piling may be necessary, and this work the defendant seems to be ready to do.

The removal of the superstructure, however, is not necessary to the free flow of the waters of the river nor to the efficiency of the drainage project.

It is really difficult to see how this small overflowage of upper lands, if overflowage there was, would entitle the drainage commissioners to proceed against the defendants in the present proceeding. It is true that the obstructing the flow of a running stream, whereby land of other riparian owners is injured, is the creation of a nuisance, which may be abated by proper proceedings and by the interested parties; but the proceedings in the case at bar are not of this nature nor are the plaintiffs the proper parties to bring them. The commissioners, in short, are not public health officers or agents of the riparian owners, but constitute a particular board which is created for a specific purpose, and whose duties are defined and limited by the statute which creates them.

The judgment of the District Court is reversed, and the cause remanded, with directions to quash the writ.

On Rehearing.

BRUCE, J. A petition for a rehearing has been filed, which calls our attention to a specific finding of the trial court that the piles of the bridge in question did in fact impede the natural flowage of the river, and which insists that since the proceeding before us is one in mandamus we are bound by such finding of fact upon this appeal. Counsel is entirely correct in this contention, and to that extent we erred, and must modify our original opinion, as there was at least some evidence in support of the finding.

Counsel also complains of our statement that the action was brought for the benefit of the contractors, rather than of the drainage board, and calls our attention to the fact that in its original contract the board had agreed to be responsible for the removal of the bridges. In this also he is correct, and our language was, perhaps, unfortunate. Instead of saying, as we did, that it was our belief that the action was brought "for the benefit of the contractor, and not of the drainage board or of the counties interested," we should have been content with the latter portion of the statement, which was "that the proceedings were brought

not for removing the nuisance of the alleged obstructions to the stream as a drainage conduit, but to allow the dredge and houseboats of the contractor to pass under the same."

Although these concessions do not materially affect our ultimate conclusions, they must and should result in a modification of the writ, rather than in the quashing thereof, which we heretofore ordered.

Counsel also further emphasizes the cases of Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, affirming 212 Ill. 103, 72 N. E. 219, and Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743, together with other additional cases and claims that the easement of drainage along and through an unnavigable water course carries with it the easement of navigating dredges and barges on such course and through bridges which are lawfully built and which otherwise are adequate and accommodated to fully carry off the waters of the drain, and to tear down such bridges at the expense of the owner in order to allow the boats and dredges to pass, even though they accommodate such waters, provided that the use of such dredges and barges is reasonably necessary to the economical construction of the drain.

We have carefully examined the cases cited by counsel for respondent, and in none of them do we find authority for the whole contention of counsel; that is to say, that it is the duty of the railway company not only to make provision for the drainage of the stream, but for its navigability also. It may be true that drainage is an exercise of the police power, and that under that so-called power, and in the promotion of the public health and interest, the public may require the removal of all artificial obstructions to the drainage of non-navigable rivers. It by no means, however, follows that it may compel one property owner to bear a cost of the improvement of the stream or of the drain, which is not borne by others. It may be conceded that the use of the flatboats was economical and intended to reduce the cost of the improvement of the stream to all of the property owners who were assessed for the improvement. Why, however, a railway company or a municipality should be compelled to remove at its own expense valuable property which is not an obstruction to the stream, so that the cost of the improvement may be reduced to these others, it is difficult for us to see. None of the cases cited by counsel in fact bear out his proposition. The case

of Chicago, B. & Q. R. Co. v. Illinois, supra, on which much reliance is placed, certainly does not. In this case it was shown that the buttresses of the bridge and the foundations of the bridge obstructed the drainage, and were themselves an obstruction in the stream. They bore the same relation in that case that the piles do in the present case. All that was attempted to be done was to compel the removal of these obstructions, not that the boats might pass the bridge, but that the drain itself might be cleared and excavated. It was never intended or claimed that, if the buttresses could have been removed and the channel broadened without tearing down the bridge, the removal of the whole bridge could or would have been ordered; that is to say, that the removal of the whole bridge could or would have been ordered, not because the buttresses interfered with the drainage or themselves created or constituted an obstruction to the stream, but because the superstructure of the bridge prevented the passage of the dredges and boats.

The case of New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 452, 49 L. ed. 831, 25 Sup. Ct. Rep. 471, is also not in point. In that case gas pipes were constructed in the street of a city, the fee of which was in the public. The removal of these gas pipes was necessary in order that a drain might be constructed. In other words, the gas pipes were in the channel of the drain. All that the court held was that the gas company could be compelled to remove its pipes.

The case of Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48, is also not in point. In this case navigation was involved. All that was held was that a pier which is erected by the United States on land submerged under *navigable water,* the title to which is owned by the riparian proprietor, and which permanently destroys such proprietor's "access to the navigable waters, does not entitle him to any compensation, under U. S. Const. 5th Amend. prohibiting property to be taken for public use without just compensation, since the title to the land, whether owned by the riparian owner or by the state, was acquired subject to the rights which the public have in the navigation of such waters."

The case, too, of Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743, on which counsel for respondent bases so much of his argument, in no way supports his proposition. Counsel ignores the fact that this case was commented on and explained in the later case of

State ex rel. Fadley v. Henry County, 157 Ind. 96, 60 N. E. 939, and that in this later case the court said: "After giving the required notice the drainage commissioner is by the statute authorized to let the construction of the ditch to the lowest and best bidder. Burns's Rev. Stat. 1894, § 5626. In this case, however, for some reason, it appears, it was stipulated in the contract that the contractor should be relieved of the expenses and duty of removing these bridges. But conceding, without deciding, that the relator had the authority to embrace such a stipulation in the contract, he certainly by so doing could not cast the burden and duties upon the appellees, or either of them, of removing the bridges at the expense of the public. The mere fact that the highways of which the bridges were essential parts may have been assessed with benefits in the drainage proceedings would not make it the duty of appellees, or any of them, to remove these bridges. If their removal became necessary in order to enable the contractor to successfully carry out his contract, *it certainly was no more the duty of the board of commissioners or township trustees to incur the expense of their removal than it would have been to cause the removal of trees or other obstructions along the course or route of the proposed drain.* Counsel for appellant relies in support of his contention upon the decision of this court in the case of Lake Erie & W. R. Co. v. Cluggish, supra. In that case the commissioner of drainage, together with the contractor, sought to enjoin the railroad company from interfering with or preventing them from removing a bent supporting a bridge belonging to the railroad company. *It was not contended in that appeal that the company should remove the bent and open the bridge at its own expense in order to accommodate the contractor in dredging in or along the stream spanned by the railroad bridge.* No question of that character was presented or decided in that cause. The claim of the drainage commissioner and of the contractor was that they had the right, in the construction of the drain, to go through the bridge, and whatever damages resulted therefrom to the railroad company must be considered as satisfied by reason of a certain reduction which had been made in the amount of benefits assessed against the company in the proceedings to establish the ditch. The *question presented and decided on the facts in that appeal, and the one here involved, are materially different, and consequently that decision lends no support to appellant's contention"*

The case of State ex rel. Fadley v. Henry County, supra, indeed, holds fairly and squarely against the contention of respondent. Its holding is: "Mandamus will not lie at the suit of the drainage commissioner against the county commissioners and township trustees to compel them at public expense to remove iron bridges over a water course in the county, in order that the contractor appointed by the drainage commissioner to construct the ditch may proceed with the work, though the necessary dredging machines can neither pass under nor around the bridges." The case, it is true, is one against the county commissioners, and involves a municipal bridge, but it must be clear to all that if the drainage board is held by this court to have the power to compel the removal of a railroad bridge at the expense of the railway company under circumstances such as those before us, it must also be conceded to have the power to compel the removal of municipal bridges at the public or municipal expense.

The riparian owners whose rights were injuriously affected would undoubtedly have had the power to require the company to remove the artificial obstructions to the flow of the water, and, if it refused to comply with the request, the power to do so themselves at the expense of the company. The commissioners, perhaps, had the same right where the obstructions were artificially created, that is to say, to require the removal of artificial obstructions, though the removal of the dirt itself should have been done at the expense of the drainage fund, as it was for that very purpose that the fund was created. Where, however, is there authority for holding that the company should or can be compelled to remove at its own expense a structure which was lawfully erected in furtherance of a quasi-public undertaking, and which does not in any way impede the passage of the water?

An examination of the record in the case at bar can indeed lead to but one conclusion, and that is that what the commissioners principally desired was the removal of the bridge to allow the dredges to pass, and not the removal of the bridge to accommodate the flowage of the river. The stipulated facts show conclusively that the removal of the superstructure was not necessary to the removal of the obstruction to the flowage, and that the railway company could, if left alone, have removed that obstruction to the flowage for at least $800 less than the cost of the removal of the whole bridge. The stipulated facts are as

follows: "That said trestle and bridge is built upon piles and timbers driven into and sunk in the bed of the said river and in the banks thereof adjacent thereto; that said trestle and bridge so built as aforesaid is now owned, controlled, and operated by the said defendant as a part of its said line and as the means and method of crossing said river; that said bridge and trestle consists of the following parts, that is to say: (1) The piles and other timbers sunk, driven, or extending into and through the water and into the bed of the stream or other ground adjacent thereto; (2) the superstructure consisting of stringers laid on caps on top of said piles, which said stringers support the ties, rails, and other materials and substances which may be called the superstructure, and constitutes the roadway proper upon which the trains of the defendant are operated; that said superstructure has no support other than, and could not stand or exist or serve any purpose without, the support of the piling referred to in No. 1 *unless otherwise supported.* That said piles forming the support of the superstructure are set in rows of five each, with 14 feet 6 inch centers, that is, the centers of the piles in said rows are 14 feet and 6 inches from the center of the closest adjacent row; that said piles average from 9 inches to 18 inches in diameter, and are sunk or driven approximately 22 feet into the ground; that the greatest depth of water in the stream at the bridge is approximately 4 feet, and that the surface width is approximately 125 feet." It is further stipulated "that the piling now supporting the bridge are driven to such a depth that the removal of the earth across the right of way, under the bridge, without removing or disturbing the piling to the depth and width, could be done by the joint drainage board, and not impair its strength or carrying capacity, and would not impose any expense on the railroad company in repairing or maintaining the bridge. . . . That it would be possible to excavate earth material in the channel of said stream underneath and about the bridge of the defendant at an expense of $500, such work to be done by men upon small boats or wading in the channel, or other methods; that it would be possible to remove the piling and other supports for said bridge at an expense of $300, and substitute therefor piling and supports which would conform to the requirements of said drainage board, at the expense of $350; that the cost of removing the superstructure and replacing it upon the piles and supports placed as required by the said board

is the sum of $800. . . . That the defendant's *superstructure over the Mouse river at the point in question is so located that it never has obstructed the natural water flow* of said river at any time; that said superstructure is supported by a large number of boats or rows of piling, eighty-seven in number; that by reason of the manner of supporting said superstructure a large opening is left underneath the same, so that all water which accumlates in said river *can and always has passed under said superstructure without interference other than by said rows of piling;* that all the additional flowage resulting from the proposed improvements can and will flow under said superstructure freely and without interference therefrom."

Much is said by counsel concerning the right of the drainage board to use economical means of construction, and to thus lessen the cost of such construction to those who would be assessed for the improvement. Why, however, in the case of a drain which is primarily for the benefit of the lands of the abutting owners, and to enhance the value thereof, and for the benefit only of those abutting owners, a common carrier engaged in both intra and inter state commerce should be compelled to pay for the cost of the economical method, and to remove a structure which is not only property, but which is constructed in furtherance of its franchise and of its public duties, and which is for the benefit of the public as much as for itself, it is difficult to see. Expenses involved by reason of an economical improvement should, it would seem, be borne by those benefited thereby. Any other rule would put a stop to the construction of durable bridges across all of our water courses, not merely by railway companies, but by municipalities as well, as in such case the municipalities would and could never know what future machinery might not be invented and become economical and necessitate the tearing down of the improvements which they might make.

The title of the railway company in the stream and in the land over which the stream runs is a title in fee, subject only to the right of the upper riparian owners to the free flowage of the water thereover, and of the lower riparian owners also to have that flowage unobstructed. The rule is laid down in the case of Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570, where it is said: "Section 210 of the Constitution does not prohibit the diversion of a portion of a non-navigable water

course, where such diversion is needed for a public use, the substantial integrity of the stream not being thereby impaired. Under the statute of this state, the right of the riparian owner to have a natural stream flow over his land is such property as may be condemned for railroad purposes." "It is next urged that the statutes relating to eminent domain do not authorize the condemnation of the riparian rights of the owner of land through which flows a water course. The provisions of our statutes on this subject do not sustain this contention. Rev. Codes, § 5958, Subdiv. 6, declares that 'all classes of private property not enumerated may be taken for public use when such taking is authorized by law.' Rev. Codes, § 2947, subdiv. 3, provides that railroad corporations authorized to operate or maintain railroads in this state shall have power to acquire, under the provisions of the chapter on eminent domain, all such real estate and other property as may be necessary for the construction, maintenance, and operation of the road, etc. Here is distinct authority to condemn any kind of property that is necessary. See also 1 Rorer, Railways, 444; Old Colony & F. River R. Co. v. Plymouth County, 14 Gray, 155. Surely, it will not here be claimed that the riparian rights of these defendants do not constitute property. If they are not property, on what principle can the defendants claim damages for their destruction? Indeed, there is eminent authority for the doctrine that such a right is real estate. Johnson v. Jordan, 2 Met. 234. See also St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659. That real property may be condemned does not admit of question. Rev. Codes, § 2947, subdiv. 3; Id. § 5958, subdiv. 1. Under statutes similar to ours, riparian rights have been condemned. St. Helena Water Co. v. Forbes, supra. See also Rumsey v. New York & N. E. R. Co. 133 N. Y. 79, 15 L.R.A. 618, 28 Am. St. Rep. 600, 30 N. E. 654. . . . That the company could, under our statute, condemn the riparian rights without also taking the fee of these lands, does not admit of doubt. See St. Helena Water Co. v. Forbes, supra. It is also contended that if our statute permits the diversion of a water course, such a statute is repugnant to the state Constitution. Section 210 of the Constitution provides that 'all flowing streams and natural water courses shall forever remain property of the state for mining, irrigation, and manufacturing purposes.' It was conceded in the argument of this case that this section

of the original law does not impair the property rights of a riparian owner in the waters of a natural stream. At common law the owner of land through which a non-navigable stream flowed was possessed of the title to the bed of the stream, as well as the right to a reasonable use of the water. The land under the water was his. The right to a reasonable use of the stream was as much his property as the land itself. The course of the stream could not be so diverted as to cause it to cease to flow in its accustomed channel upon his property. Gould, Waters, § 4; Angell, Watercourses, §§ 1–4; Green Bay & M. Canal Co. v. Kaukauna Water Power Co. (Patten Paper Co. v. Kaukauna Water Power Co.) 90 Wis. 370, 28 L.R.A. 443, 48 Am. St. Rep. 937, 61 N. W. 1121, 63 N. W. 1019 and cases cited. These doctrines of the common law were in force in the territory of Dakota at the time of the adoption of the Constitution of this state. By virtue of them, the riparian owners in the territory were vested with the specified property rights in the bed of all natural water courses, and in the water itself. Such rights were under the protection of the 14th Amendment to the Federal Constitution, which protects property against all state action that does not constitute due process of law. It follows that § 210 of the state Constitution would itself be unconstitutional in so far as it attempted to destroy those vested rights of property, if it should by construction be given a scope sufficiently wide to embrace such matters. For this reason we feel constrained to hold, despite its broad language, that § 210 was not framed to devest the rights of riparian owners in the waters and bed of natural water courses in the state."

In addition to this we have § 4808, Rev. Codes 1905, which provides: "The owner of land in fee has the right to the surface and everything permanently situated beneath or above." Section 210 of the state Constitution provides: "All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes." Section 1837, Rev. Codes 1905, provides: "Drains may be laid along, within the limits of, or across, any public road, and when so laid out and constructed, or when any road shall thereafter be constructed along or across any drain, it shall be the duty of the board of county commissioners, or township supervisors, as the case may be, to keep the same open and free from

all obstructions. A drain may be laid along any railroad when necessary, *but not to the injury of such road;* and when it shall be necessary to run a drain across a railroad it shall be the duty of such railroad company, when notified by the board of drain commissioners to do so, to *make* the necessary opening through said road, and to build and keep in repair suitable culverts or bridges."

Paragraph 3 of § 7575, Rev. Codes 1905, seems clearly to provide that the right of eminent domain can be used for draining any county, incorporated city, village, or town, raising the banks of streams, and removing the obstructions therefrom, and widening, deepening, or draining their channels.

It may be conceded that the drainage board had the right, as agents of the parties interested and perhaps of the state as a whole, to require the removal of any material and artificial obstructions to the flowage of the water in the stream. It may also be conceded that the upper riparian owners would have had the right, in case of an obstruction which was injurious to them, or in case of the failure of the railway company to remove the same, to themselves enter upon the land of such company, and to remove it at its expense. Beyond this, however, the law does not seem to go.

The order of the district court, therefore, which required the removal of the entire bridge, went altogether too far. After considering the petition on rehearing, we are constrained to withdraw what we said in the principal opinion as to the obstruction offered by the piles of the bridge to the flow of the river, as the trial court found the issue against the defendant and appellant, and we must be governed by this finding, as there was at least some creditable evidence in support thereof. All, however, that the court should have ordered, and could have legally ordered, was the removal of these artificial obstructions to the flowage of the water. It had no right to order the removal of "the 100 feet of its *trestle and bridge,* and the piles and timbers supporting the same at the point thereof, *where said removal is necessary and required to permit the passing down the Mouse river of the dredge and boats of the France Dredging & Construction Company.*" We are by no means sure that in the case at bar the removal of the piles constituting the obstruction to the flowage would not necessarily involve the removal of the superstructure also, and that there could be

no other means adopted to support that superstructure during the necessary changes, but this, however, is a matter of detail which we cannot well here determine. All that the record shows, indeed, is that the superstructure is now supported by these piles, and it is silent upon what procedure would be necessary or possible in the case of the making of the improvements, and whether temporary supports could be furnished or not. The important thing, anyway, is the rule of law, and that we have endeavored to announce.

The judgment of the District Court is reversed, and the cause remanded, with directions to enter a judgment and to modify its writ in conformity with the conclusions of this supplemental opinion.

STATE OF NORTH DAKOTA v. ISHAM HALL.

(149 N. W. 970.)

Opinion filed December 3, 1914.

Appeal from District Court, Burleigh County; *W. L. Nuessle,* J.

From a judgment of conviction of the crime of keeping and maintaining a common nuisance, defendant appeals.

Reversed and a new trial ordered.

T. R. Mockler for appellant.

Andrew Miller, Attorney General, *Alfred Zuger,* Assistant Attorney General, *H. R. Berndt,* State's Attorney, for respondent.

PER CURIAM. Appellant was convicted of the offense of keeping and maintaining a common nuisance, and has appealed from the judgment of conviction. His fourth assignment of error challenges that portion of the instructions to the jury as follows: "So if, in this particular case, gentlemen of the jury, you should first determine to your satisfaction, beyond a reasonable doubt, that a common nuisance was in fact kept at the time and place charged in the information, and you should further be satisfied, beyond a reasonable doubt, that this defendant in fact did keep the same, or aid or assist the owner or proprietor or keep-

er thereof in keeping it in any way, *whether by acting for him in the sale of intoxicating liquors thereon, or otherwise,* then you should find this defendant guilty, regardless of his particular interest in the business there being carried on."

Following the recent decision of this court in State v. Dahms, 29 N. D. 51, 149 N. W. 965, which is controlling of the case at bar, such instruction constituted prejudicial error, necessitating a new trial.

We deem it unnecessary to consider the other assignments of error, as it does not appear that the alleged errors there complained of will arise on another trial.

Judgment reversed, and the cause remanded for a new trial.

BURKE, J.: I concur in this opinion only because it is controlled by State v. Dahms.

INDEX.

Decisions Appealable.

1. An order refusing to enjoin the foreclosure of a mortgage by advertisement is appealable. Laws of 1907, chap. 79. Beiseker v. Svendsgaard, 366.

Record on Appeal.

2. Respondents' preliminary motion to strike certain matter from the appeal record is granted. A motion to vacate a judgment and reopen the case for further testimony is not properly a part of the statement of the case, but is a matter occurring subsequent to the judgment appealed from. Shockman v. Ruthruff, 597.

Specifications of Errors.

3. Section 4, chap. 131, Laws 1913, known as the new practice act, requires that a specification of insufficiency of the evidence to sustain the verdict or decision of the court shall point out wherein the evidence is insufficient. Such statutory rule is a reasonable one, designed to inform the court and respondent's counsel of the particulars relied on as to the alleged insufficiency, and a substantial compliance therewith will be exacted. Appellant's specifications in this case examined, and *held* not a substantial compliance with such statute. Feil v. Northwest German Farmers' Mut. Ins. Co. 355.

Presentation and Reservation in Lower Court of Grounds of Review.

4. A doctor was called as a witness, and was asked to base his opinion entirely

APPEAL AND ERROR—continued.

Review of Facts.

15. A finding of fact by the trial court in a mandamus proceeding will, if supported by at least some creditable testimony, not be set aside by the supreme court on appeal. State ex rel. Trimble v. Minneapolis, St. P. & S. Ste. M. R. Co. 621.
16. On an appeal from a judgment in an action on contract for the recovery of money only which was tried to the court, a jury having been waived, the findings are entitled to the weight of a special verdict, and will not be disturbed where, as in this case, they have substantial support in the testimony. Feil v. Northwest German Farmers' Mut. Ins. Co. 355.
17. From a judgment ordered against defendant on verdict, this appeal is taken, appellant contending that verdict and judgment to be without any substantial support in the evidence, and that his motion for dismissal made at the close of the case and thereafter his motion for judgment notwithstanding the verdict should have been granted. The evidence is reviewed, and it is held that the verdict and judgment rendered thereon are not sustained by any substantial evidence and should be set aside, but the motion for judgment notwithstanding the verdict is denied and a new trial granted. McKenzie v. Hilleboe, 436.

What Errors Warrant Reversal.

In criminal case, see Criminal Law, 4.

18. Defendant insists that the general conduct of the trial court was calculated to, and did, prejudice the defendant's rights. Careful examination of the record does not substantiate this complaint. Kersten v. Great Northern R. Co. 3.

Rehearing.

In criminal case, see Criminal Law, 3.

ARGUMENT OF COUNSEL. See Trial, 3.

ARTISANS.

Lien of, see Liens, 1–5.

Public Policy.

1. A supreme court can announce no public policy of its own, but merely what it believes to be the public policy of the people of the commonwealth by which it is created. It has no power to create or command, but merely to construe; and where the people have spoken, either in the form of a constitutional enactment or a valid and constitutional statute, it must be controlled by their decisions and conclusions. Northern P. R. Co. v. Richland County, 172.

Passing on Question of Constitutionality.

2. The question of the constitutionality of chapter 148, Laws 1913, not decided for reasons stated in the opinion. State ex rel. Lenhart v. Hanna, 583.
3. This court will decline to pass upon the constitutionality of a statute, where the same is unnecessary to a decision of the right of recovery. Reeves & Co. v. Russell, 265.

Delegation of Power.

By municipality, see Buildings, 8.

4. Defining the purpose for which a tax may be levied is the exclusive function of the legislative assembly, and such function has not been nor can it be, delegated to any board or person. State ex rel. Lenhart v. Hanna, 583.

NOMINATIONS.

1. In a statutory contest involving the nomination at the last primary of a Republican candidate for the office of county auditor of Mercer county, *held*, for reasons stated in the opinion, that the contestee and appellant who was such county auditor is precluded from urging irregularities connected with such election in certain precincts. Fuerst v. Semmler, 411.
2. Irregularities in the conduct of an election by election officers over whom an elector has no control will not ordinarily vitiate the vote of such election where it appears that he had no knowledge of such irregularity, and voted in good faith; and especially is this true where, as in this case, no fraud is shown or alleged, and there appears to have been a full, free, and fair expression of the will of the electors. Fuerst v. Semmler, 411.

EVIDENCE—continued.

Competency.

In bastardy proceedings, see Bastardy, 2–5.
In action on negotiable instrument, see Bills and Notes, 1.
As to authority of corporate officer, see Corporations, 7.

2. The neglect of a litigant to produce competent evidence which is in his possession does not justify a court in permitting the introduction of that which is secondary and incompetent, and if such court has inadvertently admitted the same under objection he can later correct the error by excluding the same from the consideration of the jury. Kaye v. Taylor, 293.
3. Where a litigant sues upon a book account and the books of account are shown to be in his possession, a statement by the plaintiff that there is owing to him on such account a certain sum of money does not constitute competent evidence. Kaye v. Taylor, 293.

Admissions.

4. Unless admissions are contractual they are not usually conclusive, but are open to rebuttal or explanation, or they may be controlled by higher evidence. Oakland v. Nelson, 456.

Parol Evidence as to Writings.

5. Parol evidence is admissible to show the real nature of a transaction. The rule excluding parol evidence does not apply where it is offered, not for the purpose of contradicting or varying the effect of a written contract of admitted authority, but to disprove the legal existence or rebut the operation of the instrument; and in order to determine the validity of the writing the true character of the transaction may always be shown. Grebe v. Swords, 330.
6. Extraneous and parol evidence is admissible to show the real nature and amount of the consideration of a note and mortgage, even though the same are written instruments. Beiseker v. Svendsgaard, 366.

Examination of Experts.

Sufficiency of objection to propriety of hypothetical question, see Appeal and Error, 4.

EXECUTORS AND ADMINISTRATORS—continued.

ALLOWANCE AND PAYMENT OF CLAIMS.

2. Where a decedent leaves no estate, but leaves debts unpaid, and where property has been transferred, shortly before his death, by fraudulent conveyances, to avoid payment of claims or administration of his estate, and where no personal representative has been appointed, the order of proceedings to enforce payment of claims is by statute intended to be: (a) A petition by the creditor for administration, reciting his claim to establish his interest or right to petition; (b) the appointment thereon of an administrator; (c) giving of usual notice by the administrator to present claims within the statutory period; (d) presentment by the creditor who petitioned for administration, of his verified claim to the administrator, and its allowance and approval by the representative and the court; (e) suit by the administrator to recover, under § 8173, for the benefit of those creditors whose claims shall be approved by the county judge in usual course, the property so fraudulently conveyed, and which may thus be held subject to administration for the payment of claims to be established in county court. Johnson v. Rutherford, 87.

3. The district court sustained a demurrer to a plea of payment, and rejected evidence tending to prove full payment of the claim approved by the county court and as such the basis of this action, it being the sole claim made against the estate in administration proceedings. *Held* proper, the district court having no jurisdiction to entertain a joinder of issue, or receive evidence thereon of payment. The approval by the county court, even though *ex parte*, is a prima facie determination sufficient under the statute to furnish a basis for the equitable action, and as such conclusive upon the district court upon the question of debt. Johnson v. Rutherford, 87.

4. By § 111 of the state Constitution the county court "shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians." This constitutional provision confers upon the county court exclusive original jurisdiction to determine and enter judgment upon the validity of claims against estates of decedents, and the district court has no jurisdiction to pass upon the validity of the debt of estates to claimants other than appellate jurisdiction, and therefore the district court in the equitable action has no jurisdiction to determine or pass upon the validity of the claim in question. Johnson v. Rutherford, 87.

5. Neither the appointment of the administrator, nor the approval by the county judge of claimant's claim against the estate, affords an opportunity to litigate the validity of his claim, or constitutes, as against this grantee of

JUDGMENT—continued.

Conclusiveness.

Conclusiveness of decision on claim presented to personal representative, see Executors and Administrators, 5, 6, 11.

8. The decree of distribution of a decedent's estate duly entered by the county court is final and conclusive as against a mere collateral attack. Stenson v. H. S. Halvorson Co. 151.
9. To constitute an estoppel by judgment, the causes of action in the former and subsequent actions must be identical. Coyle v. Due, 400.
10. The true test of the identity of the causes of action for the purpose of determining *res judicata* is the identity of the facts essential to their maintenance. Coyle v. Due, 400.
11. When it is not certain that the same question was determined in favor of the party in another action who relies upon the judgment therein as conclusive on such question, the judgment is not final on that point. Coyle v. Due, 400.
12. In a statutory contest of an election held to permanently locate the county seat of B. county, respondents pleaded and relied upon a judgment entered in a prior proceeding in mandamus holding the election in certain precincts null and void, as *res judicata* of such issue. *Held*, for reasons stated in the opinion, that the trial court properly sustained such defense. Dimond v. Ely, 426.
13. *Held*, for reasons stated in the opinion, that the court had jurisdiction in the mandamus case to enter the judgment which was therein entered, and such judgment, having been in all things affirmed by this court, is a finality as to the issues thereby adjudicated. Dimond v. Ely, 426.

Lien of.

14. One Frank E. Jepson died after making application to enter a government homestead. His father, Peter Jepson, was his sole heir at law. A brother, Andrew Jepson, cultivated the land and offered final proof, which was rejected by the General Land Office for the reason that the proof should be made by the father. The father, thereupon, made proof, and patent was issued to the heirs at law of the deceased entryman. Prior to the issuance of the patent, the father had quitclaimed to Andrew, and Andrew, acting upon orders from the General Land Office, had quitclaimed back to the father. Some five months after the issuance of patent, plaintiff obtained a money judgment against Andrew Jepson, and this action is brought to subject the said homestead to the lien of said judgment. *Held:* That the

Priority of Artisan's Lien.

1. Action for foreclosure of chattel mortgage of record. Boyle Brothers answer, asking affirmative relief for foreclosure of their artisan's lien for materials, repairs, and labor, performed upon the mortgaged personal property under a contract with the owner of the mortgaged personalty. The mortgage was taken in 1906, has been renewed, and is a valid mortgage upon the property. Boyle Brothers performed the work in 1911, immediately filing a claim for artisan's lien under chap. 168, Laws of 1907; and also retained possession of the property under a claim of lien by virtue of such possession under § 6295, Rev. Codes 1905, in case chap. 168, Laws of 1907, be unconstitutional, and claim their lien under § 6295 to have priority over a lien by mortgage of record. *Held:* That an artisan's lien is a common-law lien, and where possession was retained, as here, the statute being but declaratory thereof and such a lien at common law having priority over mortgage liens, an artisan's lien under § 6295, Rev. Codes 1905, where possession is retained, has priority over existing mortgage liens, and this independent of the provisions of chap. 168, Laws of 1907, in express terms granting such priority. Reeves & Co. v. Russell, 265.
2. It therefore becomes unnecessary to determine whether the 1907 statute is, or is not, unconstitutional, because, though the same may be assumed to be unconstitutional, Boyle Brothers must recover under the prior existing law, § 6295, Rev. Codes 1905, while, if the 1907 statute be constitutional, it in express terms authorizes defendants' recovery. Reeves & Co. v. Russell, 265.
3. No question of waiver of mortgage rights is involved, because all rights of plaintiff under its mortgage were subordinate to the rights of those claiming under the artisan's lien. Reeves & Co. v. Russell, 265.
4. The fact that the owner, employing Boyle Brothers to repair the engine, had purchased from the mortgagor who sold the mortgaged property without written consent, does not affect the title of such property in the purchaser, who, as owner, could authorize repairs thereto, and subject the same to an artisan's lien for repairs so authorized, such owner being, for such purposes, considered in law as the agent of the mortgagee. Reeves & Co. v. Russell, 265.
5. Where at common law an artisan's common-law lien had priority over existing contract liens, and the statute granting an artisan's lien is but declaratory of common-law principles, and is silent on such question of priority, the common law granting priority to the common-law lien must be construed to grant priority to the lien so declared by statute, and but declaratory of the common law. Reeves & Co. v. Russell, 265.

MASTER AND SERVANT.

Master's Liability for Injury to Employee.

1. It is not error to refuse to take a case from the jury where there is evidence, though contradicted, to the effect that plaintiff, a boy of nineteen, who knows generally of the explosive nature of dynamite, and has seen it used occasionally, but has had no real experience in its use or knowledge of its explosive powers when placed in mud and water at a depth of from 19 to 23 feet, or of the time which it takes a fuse to burn, is directed to push dynamite down into a hole which has been drilled for the purpose of draining water from a swamp, and, after the dynamite has been twice caught on the sides of the hole, has been twice directed by the employer to push it down, but is not warned of the time limit of said fuse, or told to come away from the hole, or to desist from the work, until too late to escape the explosion. Oakland v. Nelson, 456.
2. The degree of care which is to be used by an employer in guarding an employee from danger in the case of the use of dangerous explosives is much greater than that which is to be used under ordinary circumstances, and it is not error for the court to suggest such fact to the jury. Oakland v. Nelson, 456.

MEDICAL WORKS.

Refuting evidence of medical expert by reading from, see Evidence, 9–11.

MERGER.

Of lien of attachment in judgment, see Attachment, 1.

MINORS. See Infants.

MORTGAGE.

Appealability of order refusing to enjoin foreclosure, see Appeal and Error, 1.

Injunction against foreclosure of, see Injunction, 1–3.

On homestead before final proof, see Public Land, 3.

Failure of Consideration.

Parol evidence as to real consideration of mortgage, see Evidence, 6.

Discharge of Record.

QUESTIONS OF LAW AND FACT.

In general, see Trial, 4–6.

QUIETING TITLE.

1. Any final judgment rendered will allow defendants for the amount of taxes and interest thereon paid by them under color of title,—the void tax deeds. Murphy v. Missouri & K. Land & Loan Co. 519.
2. After trial on the merits or opportunity afforded for trial, appellants will recover costs and disbursements taxable on this appeal. Past and future district court costs and disbursements will be awarded in favor of the party to whom is awarded final judgment of title to the half section of land in controversy. Murphy v. Missouri & K. Land & Loan Co. 519.

Substitution of Parties.

3. That the motion for substitution of the trustees should have been then and there granted, and said trustees ordered substituted as defendants in lieu of the defunct corporation, and the action continued against them; that they as trustees should have served and filed pleadings, and the issue so joined should have been tried as between plaintiffs and said trustees before rendition of judgment. Murphy v. Missouri & K. Land & Loan Co. 519.
4. The cause is remanded, with directions to change title of the action that it may run against the trustee defendants; that plaintiffs and said trustee defendants may join issue on pleadings, and trial and further proceedings be had according to law. Murphy v. Missouri & K. Land & Loan Co. 519.

Dismissal of Action.

5. Plaintiffs bring this action to determine adverse claims. Substituted service was had. All defendants appeared. Corporation answers and asserts title in itself. Individual defendants do not answer. Thereafter, but before the trial was begun, the twenty-year period expired for which the foreign corporation was chartered. Ignorant thereof, the attorneys for the parties then served and filed amended pleadings and went to trial. Attorneys of corporation were also attorneys for the individual defendants. Upon trial, plaintiffs failed to prove title in them, but established payment by them of $329 taxes paid under void tax deeds. On plaintiffs resting, defendants moved for dismissal because of plaintiffs' failure of proof. Later the defunct corporation defendant submitted its proof as on the merits. Plaintiffs having pleaded a forfeiture of charter of the defendant corporation because of noncompliance with the Kansas statutes under which it was char-

RAILROADS—continued.

Accidents at Crossings.

Application of doctrine of last clear chance to, see Negligence, 2, 3.

1. In an action to recover damages for injuries received in a collision with defendant's train at a public crossing, evidence examined, and *held* that plaintiff was guilty of contributory negligence as a matter of law and that the trial court did not err in so holding. Gast v. Northern P. R. Co. 118.
2. The driver of a private conveyance who collides with a train while attempting to cross a railroad track at a public crossing known by him to be a very dangerous one on account of complete obstructions to his view of the defendant's train, and who, knowing that a train was about due, concededly did not stop and listen or exercise any precaution to ascertain whether a train was approaching, except to look around as he was driving when he knew his vision of the track was completely obstructed, is guilty of contributory negligence as a matter of law. Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. 128.
3. Where the facts respecting the failure to exercise care by the driver of a team about to cross a railroad track are conceded or uncontradicted, and it can be said that reasonable men could not draw different conclusions or inferences therefrom, the question of the contributory negligence of such driver is one of law for the court. Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. 128.
4. Where a traction engine is struck upon a railroad crossing, at a point where the track is curved and persons in charge of the train cannot determine its exact position, and the train is observed at a distance of some 5 miles, and no effort is made to flag said train or in any manner to attract the attention of the persons in charge thereof, excepting to blow the whistle of the tractor, the persons in charge of the tractor are guilty of such negligence as prevents recovery for damages sustained by the collision. Cain v. Northern P. R. Co. 471.

Injury to Animals.

5. A railroad company owes no duty to the owners of animals which are allowed to trespass upon its right of way to keep a lookout therefor, or to take steps to prevent striking them until it has discovered them; nor is it bound to presume that they may be there. Even after such discovery, the duty of the engineer to safeguard the lives of himself and the crew and passengers of his train is higher than his duty to protect the tres-

TRANSPORTATION OF SCHOOL CHILDREN.

1. Under § 232, art. 15, chap. 266, of the Laws of 1911, transportation must be furnished to children living more than 2½ miles from the district school which they are required to attend, no matter whether such school is a consolidated school or not. State ex rel. Brand v. Mostad, 244.
2. Section 232, art. 15, chap. 266, of the Laws of 1911, which provides for furnishing transportation "to and from school" for children living more than 2½ miles from the schoolhouse, should be construed liberally, and not in accordance with the strict letter of the enactment. State ex rel. Brand v. Mostad, 244.
3. School boards have the right to exercise all reasonable discretion in furnishing the free transportation which is provided for in § 232, art. 15, chap. 266, of the Laws of 1911, and it is not an abuse of such discretion, nor "an unjust or illegal discrimination," nor "a denial of transportation," to require boys of from ten to nineteen years of age to cross the frozen Mouse river, and to walk a distance of from ¼ to ⅓ of a mile to meet a team which has been sent for the children of two other families who live about a mile further on, when the river is reasonably passable for pedestrians, when all the three families live beyond the 2½ mile limit, and need to be accommodated, and the only other alternatives would be: (1) That the wagon with its load of children should go 2 miles out of its way to a bridge, returning 2 miles to the home of the plaintiff, subjecting its occupants to the cold and discomfort of 4 miles of unnecessary travel; or (2) that the board should hire two teams, one for each side of the river, and at a probable expense of from $35 to $40 a month for each; or (3) that the loaded wagon should itself cross the river and run the risk of upsetting. State ex rel. Brand v. Mostad, 244.