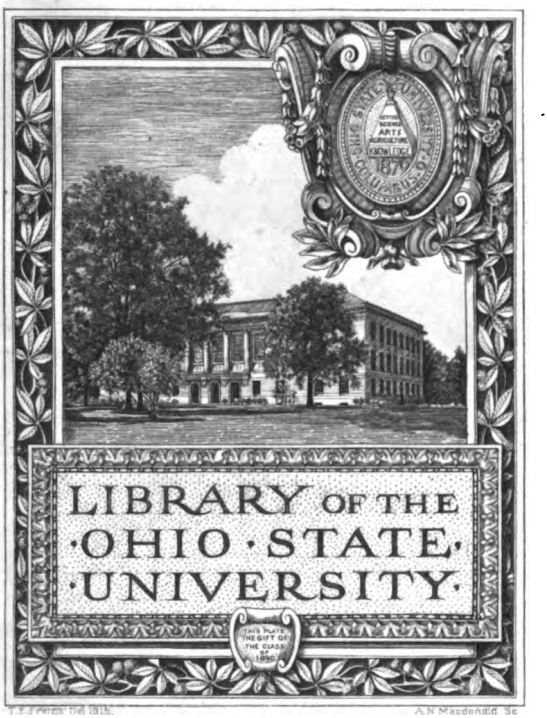

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

JOSEPH COGHLAN
REPORTER

VOLUME 43

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
ROCHESTER, N. Y.
1922.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. A. M. CHRISTIANSON, Chief Justice.
HON. LUTHER E. BIRDZELL, Judge.
HON. RICHARD H. GRACE, Judge.
HON. JAMES E. ROBINSON, Judge.
HON. H. A. BRONSON, Judge.

JOSEPH COGHLAN, Reporter.
J. H. NEWTON, 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. A. T. COLE.
District No. Four,
HON. FRANK P. ALLEN.
District No. Five,
HON. J. A. COFFEY.
District No. Six,
HON. W. L. NEUSSLE.
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. JAMES M. HANLEY.

OFFICERS OF THE BAR ASSOCIATION.

HON. T. D. CASEY, President, Dickinson, N. D.
HON. THEODORE KOFFEL, Vice President, Bismarck, N. D.
HON. OSCAR J. SILER, Secretary and Treasurer, Jamestown, N. D.

CASES REPORTED IN THIS VOLUME.

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

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TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

MRS. WILLIAM BOEHM, Plaintiff and Appellant, v. THEODORE K. LONG, Defendant and Appellant, FRED H. MOTSIFF, Intervener and Respondent.

(172 N. W. 862.)

Specific performance — intervention — construction of statute.

1. Section 7413, Comp. Laws 1913, which provides that "any person may before the trial intervene in an action or proceeding, who has an interest in the matter in litigation in the success of either party, or an interest against both," applies to an action for specific performance.

Specific performance — parties who must be joined — parties who may be joined.

2. All persons who are interested in the enforcement of the contract *must* be, and all those directly and specifically interested in the subject-matter *may* be, joined as parties to a suit for specific performance.

Specific performance — intervention.

3. The plaintiff brought the instant action for the specific performance of an alleged contract to purchase real property. Pending such action, the defendant conveyed the premises to the plaintiff. The intervener claimed to have purchased the premises from the defendant, and to be entitled to specific performance of his contract of purchase as against both the plaintiff and defendant. It is *held* that these facts presented a proper case for intervention under § 7413, supra.

Specific performance — vendor and purchaser — evidence.

4. In the instant case it is *held*, for reasons stated in the opinion, that the intervener had an enforceable contract for the purchase of the premises involved, and that a judgment awarding specific performance thereof is right and should be affirmed.

Opinion filed May 12, 1919.

Appeal from the District Court of Morton County, *Nuessle,* Special Judge.

From a judgment in favor of the intervener, plaintiff and defendant appeal.

Affirmed.

W. H. Stutsman, for appellants.

The interest which entitles a person to intervene in a suit between other parties must be in the matter of litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. Gasquet v. Johnson, 1 La. 425; Lewis v. Lewis (Minn.) 10 N. W. 586; Horn v. Volcano Water-power Co. 13 Cal. 62.

If the property is seized by virtue of a writ, to which another has a better right, the vindication of such involves a new and independent judicial inquiry.

Re McClellan, 27 S. D. 109, 129 N. W. 1037, Ann. Cas. 1913C, 1029, is a leading case on this proposition, in which the court says: "No rule is better settled or more essential to the rights of parties litigant than that every person is entitled to access to courts of justice without interference from persons who have no interest in the matter in litigation."

That a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangements. An acceptance, to be good, must in every respect meet and correspond with the offer, neither falling within or going beyond the terms proposed. Krum v. Chamberlin (Neb.) 77 N. W. 665.

Sullivan & Sullivan, for respondent.

Rev. Codes, § 7413–1913.

A person claiming to be the owner of the property in litigation or of

any interest therein has an interest in the matter in litigation and may intervene. 14 Standard Proc. p. 304; Cunnelle v. Latta, 36 Ark. 304, 111 S. W. 273; Kastner v. Pibilinski, 96 Ind. 229; Orcutt v. Woodard, 136 Iowa, 412, 113 N. W. 848; Rives v. Gulf Ref. Co. 133 La. 178, 62 So. 623; Frederick v. Gehling, 89 Neb. 93, 130 N. W. 968; Sprague v. Bond, 113 N. C. 551, 18 S. E. 701; Dempster v. Baxmeyer, 231 Pa. 38, 79 Atl. 805.

Where the proceedings would cause a cloud over an owner's title he may intervene. Whitman v. Willis, 51 Tex. 426.

Code Civ. Proc. ¶ 50a, providing for intervention before trial, does not affect the power of the court to bring other parties before it when satisfied that their presence is necessary to a proper determination of the cause. Brown v. Brown, 71 Neb. 200, 98 N. W. 718.

This power is also granted to the court under § 7413, Compiled Laws 1913. Dalrymple v. Trust Co. 9 N. D. 306.

A purchaser *pendente lite* is entitled to intervene to protect his interests. 14 Standard Proc. p. 305, and cases therein cited.

The mere fact that the intervener has other remedies which might be availed of does not constitute sufficient grounds for denying an intervention. Taylor v. Bank of Volga, 9 S. D. 572, 70 N. W. 834.

CHRISTIANSON, Ch. J. This is an appeal from a judgment awarding the specific performance of a certain contract for the sale of real property. The judgment was in favor of the intervener, Fred H. Motsiff, and the plaintiff and the defendant appeal, and demand a trial *de novo* in this court.

There is little or no conflict in the evidence. Many of the facts are stipulated. It appears that the defendant, Long, owned a quarter section of land in Morton county in this state. On August 14, 1915, one L. N. Cary, a real estate agent at Mandan, wrote Long to the effect that if he wished to sell the land and would advise him of his wishes "he would be glad to put in an effort." On September 3, 1915, Long replied that the land cost him in all $2,458.11, and that he did not feel disposed to take a loss at that time, and would be pleased to have Cary advise him what he thought it would sell for. To this letter Cary replied that the land ought to sell for $15 per acre. On October 22d, Cary wrote Long that he had received two offers for the land, one for

$15.50 an acre on payments, and another for $15 per acre,—probably cash. Long apparently did not answer these letters, and on November 20th, Cary again wrote, reminding Long of the letter of October 22d. On November 29th, Long wrote Cary in part as follows: "I have felt that to pay for the trouble and annoyance during all these years, plus interest, taxes, cost of tree planting, attorneys' fees and original investment, I should have $3,000. Unless you could get approximately this amount, I would prefer holding a while longer. Would be willing to take a long-time mortgage for say half of the purchase money." In the meantime, L. N. Cary apparently went South, and his office was left in charge of his son, A. A. Cary. On February 12, 1916, A. A. Cary wrote Long as follows: "We now have an offer for your N.W.¼ of 10–138–81, $3,000, $1,500 down, the balance in three annual payments of $500 each with 6 per cent interest. Kindly let us know if your price of $3,000 in your letter of November 29th last contains a commission of $1 an acre to us. We would be glad to hear from you at your early convenience." To this letter Long replied: "My price of $3,000 was net to me. It would not include commission." On March 14, 1916, A. A. Cary again wrote Long as follows: "The applicant for your N.W.¼ 10–138–81 has made an earnest payment of $25, check for which we inclose. He will make the payment of $1,500 the first of next month, when we send you the contract to sign. Hoping this will be satisfactory to you, we remain." On March 23, 1916, Long replied: "Your several letters of March 6th and March 14th, with check for $25, reached me during my sojourn in the South, and I hasten to reply. I regret that there has been any misunderstanding about the sale. In addition to having placed the land with your firm for sale I also placed it in the hands of Mr. Robert H. Proudfoot, of Chicago, whose sale, I believe, antedated yours, although it is at a slightly less figure than your client offers. Of course I would rather let you have it, both on account of price and because of the old-time relationship with your father. But under the circumstances I am obliged to return your check herewith." On March 28, 1916, A. A. Cary replied as follows: "I am very much disappointed to receive your letter of the 23d inst. declining to carry out your agreement to sell the N.W.¼ of section 10. Pursuant to your authorization contained in your various letters, we have found a buyer for this land, and entered into a contract with her,

and accepted a down payment to bind the bargain. Of course, we do not care so much about the loss of the commission in this matter, as it is not large, but it is a serious blow to our business reputation to be forced to repudiate contracts entered into with our customers and to be unable to carry them out. The woman to whom this sale was made insists that she has made a binding contract for the purchase of this land, and threatens to take legal steps to enforce her rights."

On the same day this letter was written, *viz.*, March 28, 1916, the plaintiff, Mrs. William Boehm, commenced the present action to enforce specific performance of her alleged contract with Long for purchase of the land. At the same time she filed a notice of *lis pendens*. Plaintiff's right of action, if any, exists by virtue of the correspondence hereinabove set forth. It is stipulated as a fact that on March 31, 1916, plaintiff's attorney of record in this action, and A. A. Cary, were both informed of the contract which the intervener claimed to have with Long for the purchase of the land in controversy.

Long, as stated in his letter of March 23, 1916, had also "placed it (the land) in the hands of Mr. Robert H. Proudfoot of Chicago." And while the foregoing correspondence took place between Long and the Carys, negotiations had also been carried on between Long and Proudfoot, with the result that the intervener, Motsiff, claims to have purchased the land and to be entitled to a decree awarding specific performance of his contract of purchase. It appears that considerable of the negotiations between Long and Proudfoot were carried on over the telephone. However, on January 31, 1916, Long wrote Proudfoot as follows: "Yours of the 19th inst. received. If a sale could be effected of my 160 acres at Mandan within sixty days, I would take $17.50 an acre net to me. *See what you can do with it.*" Later in a telephone communication Long gave Proudfoot the terms of payment. At a subsequent date Long was informed in a similar manner that Proudfoot had sold the land to the intervener, Motsiff, and that the papers, including notice of deposit, would be forwarded to Long by the First National Bank of Mandan. On February 11, 1916, said bank forwarded to Long for his execution a warranty deed for the premises. In the same letter were inclosed notes signed by Motsiff and his wife aggregating $2,300, and a real estate mortgage upon the premises in controversy securing the payment of such notes. In its letter accompanying these papers, the

bank stated: "We also hold the sum of $500, which amount we are to remit to you upon receipt of the above deed properly executed, also abstract of title to aforesaid land, title merchantable and free and clear of encumbrance." The letter further states that $3 in revenue stamps must be attached to the deed, and that if Long had no abstract the bank would obtain one and deduct the cost from the amount held in escrow, if Long would so authorize. On February 21, 1916, Long returned the papers to the bank, stating that the sale was not in accordance with his letters to Proudfoot, and that he had written Proudfoot "fully explaining the situation." On the same day he wrote a letter to Proudfoot, calling attention to the fact that the terms were $17.50 per acre net to him (Long), and that hence the purchaser must pay for the revenue stamps, abstract fee, and other expenses connected with the transfer. On February 24, 1916, Proudfoot wrote Long disclaiming any blame for the error, and further advising him that he was writing to Mandan asking them "to abide the terms" of Long's letter to Proudfoot of January 31, 1916; and that he (Proudfoot) presumed that Long would soon receive the papers, as he desired them. On February 26, 1916, the First National Bank of Mandan returned the warranty deed for execution, together with the notes and mortgage in favor of Long, executed by Motsiff and his wife, heretofore mentioned. In the letter accompanying these papers the bank stated that the items of costs, to the payment of which Long had objected, would be assumed by the purchaser; and that draft for the cash payment on deposit with the bank would be forwarded to Long on receipt of deed, if title was found "o. k." when abstract had been obtained and examined. On March 23, 1916, Long wrote the First National Bank of Mandan, as follows: "Replying to yours of February 26th and telegram of March 13th, both of which reached me during my sojourn in the South, I beg to inclose herewith mortgage for $2,300 and deed, the latter to be delivered to the grantee only on the following conditions, *and for the delivery of which I hereby constitute you my agent;* namely, The mortgage must be entered of record at the cost of the purchaser, and must show on the abstract as the first lien on the land conveyed, and the notes must be changed to include exchange charges. This may be done by having the words 'with exchange charges' added to the notes by makers or by their consent and in their presence. I inclose herewith the notes for the pur-

pose of the change aforesaid. Please see that both makers are present and approve the change. Kindly return notes when corrected; also indicate your purpose to accept the above trust as my agent under the terms proposed herein, and oblige. Do not change date of papers. Note insertion in deed as to taxes to be assumed by grantee."

After the bank received this letter, Motsiff and his wife agreed to the proposed change in the notes, and such change was made. Motsiff had already paid the $500 cash payment into the bank. The bank, however, had become aware of the notice of *lis pendens* which had been filed by the plaintiff and therefore refused to deliver the deed to Motsiff. Motsiff, however, stood on the agreement, refused to accept a return of his money and papers, and on March 31, 1916, instituted an action against Long to enforce specific performance of his contract of purchase.

In the meantime Long had received the letter from Cary of March 28, 1916, and on April 2, 1916, he wrote Cary as follows: "I have just returned from an absence from home of a week in northern Wisconsin and find your favor of the 28th ult. I inclose copy of letter this day forwarded to the First National Bank, of Mandan, which explains itself. I trust the bank has made no delivery of the deed. If it has already delivered the deed, I fear it may be too late for me to help you in the premises. I regret exceedingly that any misunderstanding has resulted." On the same day he wired the bank not to deliver the deed to Motsiff, and also wrote the following letter to the bank: "On March 23d I wrote you, inclosing certain papers and deed to be delivered upon the conditions named in my letter. I have received no acceptance of the conditions named from you. In the meantime notice has been received from Mr. L. N. Cary's office that they, too, have effected a tentative sale of the N.W.¼ of Sec. 10. The land was in the hands of both agencies, and neither one had the exclusive right to sell, and while I maintain that I have a perfect right to pass the papers in your possession, I do not wish to do anything that will in any way involve my old friend L. N. Cary in unpleasant complications with his client. If you have not recorded my deed or made delivery of it, kindly return it to me. I do not wish to be involved in any legal complications in connection with the claims of the two agencies or their clients, and wish to do

all I can to save Cary harmless. Kindly let me hear from you at once, and oblige."

On April 15, 1916, Long wrote L. N. Cary, as follows: "You have doubtless been advised of the snarl that has developed in the attempted sale of my land during your absence in the south. Of course it was not my thought to give anyone the exclusive sale of it, and I assumed that whoever found a purchaser would first submit the matter to me. It seems, however, that your son thought that he had the right to close the deal. This was not my understanding, and the report of a sale by the other agent, Mr. Proudfoot, of this city, having reached me first, I felt, as a matter of fair play and business honor, that the land should go to his customer, although I much preferred from a personal standpoint to have it go to your customer. At any rate after executing the papers and forwarding them to the bank, it seems that all proceedings were stopped by the filing of a *lis pendens* by each party. Now I do wish that you would take the matter in personal charge, and see if you cannot have it fixed up some way so that all parties will be satisfied, without putting me to any further annoyance and expense. If you conclude that I must have an attorney to represent me, kindly advise me who will be a good man to look after my interests." Thereafter considerable correspondence followed between Long and Cary, and on June 26, 1916, Long conveyed the land to the plaintiff, Mrs. Boehm, for a consideration of $3,000.

A stipulation was entered into between the attorney representing Mrs. Boehm and the defendant, Long, and the attorneys representing Motsiff, that the court grant leave to said Motsiff to file his petition in intervention, "provided his complaint sets up a proper case for intervention, which question shall be tried out on demurrer to said complaint;" and that said petition in intervention be allowed to stand as a complaint in the said action against the plaintiff, Mrs. William Boehm, and the said defendant, Theodore K. Long, and that they have a period of thirty days in which to answer or demur to said petition in intervention.

The plaintiff and defendant demurred to the petition in intervention on the grounds: (1) That the intervener "had no interest in the matter in litigation, in the success of either party, or against both;" and (2) that said petition "does not state facts sufficient to constitute a cause of action against either plaintiff or defendant, or both of them." The

demurrer was overruled. The plaintiff and defendant thereupon interposed separate answers to the petition in intervention. The answers, aside from certain admissions, are in effect general denials, coupled with the pleas on the part of Long of the pendency of the action brought by Motsiff for specific performance; and the plea on the part of Mrs. Boehm, that if the intervener has a contract for the purchase of the land, she had no knowledge or information thereof "until long after she had contracted for the purchase of said land from defendant." The case was tried upon the issues framed by these pleadings, and as already stated resulted in findings and judgment in favor of the intervener.

Appellants assign error upon the overruling of their demurrer to the petition in intervention. It is contended that the action between the plaintiff and defendant involved merely the respective rights and duties of those two individuals under a certain contract, and that no one else had any interest therein. Under the statute, "any person may before the trial intervene in an action or proceeding, who has an interest in the matter in litigation in the success of either party, or an interest against both." Comp. Laws 1913, § 7413. The statute is not limited to any particular class of actions or proceedings, but is general in its application. While the rule of English chancery practice is that parties to the contract, or those who have been substituted in their place on the death of the original parties, on the conveyance of the land, or on the assignment of the whole contract, are the only proper parties to a suit for specific performance, the generally accepted rule in this country "is that all persons who are interested in the enforcement of the contract *must* be, and all those directly and specifically interested in the subject-matter *may* be, joined as parties to the suit for a specific performance."

Pomeroy, Spec. Perf. of Contr. 2d ed. pp. 546 et seq.; 36 Cyc. 767, 768; Pom. Eq. Jur. 3d ed. § 114; 20 R. C. L. pp. 684 et seq. In the instant action the plaintiff, Mrs. Boehm, had received a conveyance from Long before the petition in intervention was filed. The interests of the plaintiff and defendant were the same. They both sought to attain the same end, and by the express terms of their stipulation they recognized the intervener as their joint antagonist. We have no hesitancy in holding that Motsiff had "an interest in the matter in litigation" herein "against both" the plaintiff and defendant, and that the

trial court committed no error in holding that the petition in intervention presented a proper cause for intervention.

The correspondence and acts upon which the rights of the parties to this litigation are predicated have already been noted. We are entirely satisfied that the correspondence between Long and Cary upon which the plaintiff based her action for specific performance did not create any contract whatsoever. It is also clear that the conveyance which she obtained from Long is subject to all valid contract rights of the intervener, for when the plaintiff obtained the deed she had full knowledge of whatever rights the intervener had under his contract of purchase. Hence, the plaintiff obtained no greater rights as against the intervener than her grantor had. 36 Cyc. 761. See also § 7201, Comp. Laws 1913; Hunter v. Coe, 12 N. D. 505, 97 N. W. 869.

Appellants argue that the intervener has not established a contract of purchase. They say he has not shown the terms of payment, and that "it does not definitely appear what kind of notes and mortgage were contained in the proposition." In our opinion the argument is devoid of merit. In his letter to Proudfoot of January 31, 1916, Long quoted a price of $2,800 for the land. Proudfoot testified that the terms of payment were definitely agreed upon between himself and Long; but leaving such testimony wholly on one side, the terms of the sale are clearly established by the documentary evidence in the case. In the letter written by the First National Mank of Mandan, dated February 11, 1916, Long was fully advised of the terms on which Proudfoot had sold the land to Motsiff. In that letter Long was informed that Motsiff had deposited $500 in cash, and executed notes aggregating $2,300. The notes and mortgage securing the same were forwarded to Long in the letter. He made no objection whatever to the terms of payment; his sole objection was to the suggestion in the letter that he (Long) would be required to pay for the revenue stamps to be attached to the deed and for the abstract of title. The papers were again returned to Long on February 26, 1916, and in the letter accompanying them he was informed that the items of costs to the payment of which he had objected would be paid by the purchaser. After examining the papers he requested that certain changes be made in the notes. The changes were made, and so far as the intervener is concerned he complied with every request of Long. It is indeed difficult to understand how it can be

seriously contended that there was any uncertainty as to, or any failure of the minds to meet upon, the terms of payment.

Appellants also contend that the First National Bank of Mandan was not authorized to accept payment from Motsiff. The contention is untenable. An agent has authority to do everything necessary or proper and useful in the ordinary course of business for effecting the purpose of his agency. Comp. Laws 1913, § 6340. When Long transmitted the deed to the bank, and specifically constituted it his agent to deliver it to Motsiff, both Long and the bank knew all about how the purchase price was to be paid. They both knew that the bank had received from Motsiff, and was then holding, for Long $500 in cash. Long forwarded to the bank the notes representing the balance of the purchase price, with the request that certain changes be made therein. He said: "Please see that both makers are present and approve the change. Kindly return the notes when corrected." No other construction can reasonably be placed upon the correspondence, in view of the circumstances, than that Long expected the bank to receive and transmit to him the purchase price agreed upon.

We believe the intervener had and has an enforceable contract. He has paid the full purchase price agreed upon in the manner and to the person to whom Long intended and required it to be paid. There was nothing further for the intervener to do. He had done every act which he could, or was required to do, in order to complete the contract on his part. He certainly was not to blame for the failure or refusal of the bank (Long's agent) to deliver the deed. He was entitled to such delivery. If the deed had been delivered, and it and the mortgage recorded, such mortgage would have shown "on the abstract as the first lien on the land." "A lien is a charge imposed upon specific property by which it is made security for the performance of an act." Comp. Laws 1913, § 6699. When Long, in his letter to the bank, stated that the mortgage from Motsiff "must show on the abstract as the first lien on the land," he doubtless had in mind that there might be other liens created by or existing against Motsiff, and it was such liens that he wanted to guard against. It would be unreasonable to suppose that he had in mind any liens or claims that might be claimed against himself. The notice of *lis pendens* filed by the plaintiff did not create any lien, nor did it have any effect upon the obligations of the defendant. A no-

tice of *lis pendens* merely serves to give notice to subsequent purchasers or encumbrancers of the pendency of the action, so as to make the judgment therein binding upon such persons. Comp. Laws 1913, § 7425; Bouvier's Law Dict. Long's own contemporaneous construction of the transaction with Motsiff is quite illuminating. In his letter, dated March 23, 1916, Long expressly recognized that Proudfoot had made a "sale" of the land. And in his letter to Cary dated April 15, 1916, he says: "I felt as a matter of *fair play* and *business honor,* that the land should go to his [Proudfoot's] customer." This was Long's own construction of the deal and the rights of the intervener thereunder, although he admits "that both on account of the price and because of the old-time relationship" he would rather have the land go to Cary's customer. "Equity imputes an intention to fulfil an obligation," and "regards as done that which ought to be done." Our courts are open to administer "right and justice" (N. D. Const. § 22), and our laws do not permit one to "change his purpose to the injury of another." Comp. Laws 1913, § 7246. The judgment in this case meets with our entire approval. It awards to the intervener the land which he purchased and paid for. It also safeguards the rights of the plaintiff for the payments which she has made to the defendant.

Affirmed.

OLE HOUGO, Appellant, v. T. O. HUSO, Respondent.

(173 N. W. 453.)

Mechanics' liens — charges for extra labor by subcontractor — evidence.

In an action by a subcontractor to foreclose a mechanic's lien for alleged extra labor, it is *held* that the plaintiff has failed to establish a cause of action against the defendant, and that the trial court properly ordered a dismissal of the action.

Opinion filed May 23, 1919.

Appeal from the District Court of Divide County, *Leighton,* J.

Plaintiff appeals.

Affirmed.

Brace & Stuart, for appellant.

There is no requirement in our statute that a contract need be in writing to support a mechanic's lien, and in the absence of such requirement an oral or implied contract is sufficient. 20 Am. & Eng. Enc. Law, 352; Carney v. Cook, 80 Iowa, 747, 45 N. W. 919, 99 N. W. 1105; Tom Sweeney Hardware Co. v. Gardner, 18 S. D. 166.

Geo. P. Homnes, for respondent.

CHRISTIANSON, Ch. J. In February, 1916, the defendant entered into a written contract with one Peterson, whereby Peterson agreed to erect a barn for the defendant on his farm in Divide county. The contract is in two parts. The first part relates to the construction of a concrete basement and foundation. The other part relates to the frame structure to be erected upon the concrete foundation. There is no controversy with respect to the frame building. The only part of the contract involved in this litigation is that relating to the concrete work, which is in words and figures as follows: "I do hereby agree to erect the forms and to do all labor in the erection and construction of a concrete basement for a barn 58x76-9 feet clear same wall to be 12″ thick and all necessary abutments to support the stall posts, also a center wall to support partition running through the barn on side of shed. All the material including cement, sand, gravel, and stone to be furnished delivered on the ground by the owner. All the above for the sum of $180."

After this contract had been made Peterson employed the plaintiff Hougo to do the concrete work, that is, to pour the concrete into the forms prepared by Peterson. For this work Peterson agreed to pay Hougo $150. Hougo claims that by reason of alteration of the plans he was required to do more work than was contemplated in the original contract, and he filed a mechanic's lien against the barn for such additional work, and has brought this action to foreclose the lien.

The trial court ordered judgment in favor of the defendant for a dismissal of the action. Plaintiff moved for a new trial on the ground that the evidence was insufficient to justify the decision and that the decision was against law. The motion was denied, and plaintiff appealed from the judgment and from the order denying a new trial.

The plaintiff, Hougo, testified that he entered into a contract with

Peterson to pour cement into the forms constructed by Peterson. He also testified that after he had commenced work it was decided, instead of placing abutments or "piers" as referred to in the contract, to place "walls;" and that this alteration in the contract required him to mix and pour more concrete. The plaintiff admits that the change was advantageous to Peterson, and that it was easier for him to prepare the forms for the "walls" than to prepare the forms for the different "piers" or abutments. The defendant, who was called as a witness, testified that the changes were made at the suggestion of Peterson, and that at the time Peterson suggested the changes he also stated that it would be more convenient for the plaintiff to pour concrete into the forms for walls than into the forms for abutments. It also appears that at Peterson's suggestion the walls were reduced in height so that the basement was only 8 feet "in the clear" instead of 9 feet "clear," as specified in the contract.

The plaintiff does not claim that he had any contract or understanding with the defendant at all. His contract was with Peterson, and with him alone. Nor does plaintiff claim that he had any contract or understanding either with Peterson or with the defendant with regard to the alleged additional work which he claims that he performed. In our opinion the evidence in the case fails to show that the changes or alterations taken altogether required the performance of any more work than that which the contractor was required to do under his contract with the defendant. It is undisputed that the defendant has made settlement with Peterson and paid him the full amount stipulated in the contract. It is also undisputed that Peterson has made settlement with the plaintiff and paid him the full amount agreed upon between them at the time they made their contract. We are of the opinion that the plaintiff has wholly failed to establish any cause of action against the defendant, and that the trial court very properly ordered a dismissal of the action.

Judgment affirmed.

HERBERT BARTON, Appellant, v. WILLIAM BLACK, Respondent.

(173 N. W. 172.)

Partnership — appeal and error — accounting — new trial will be ordered where findings and judgment are indefinite.

1. In an action for partnership dissolution and an accounting, where the record, together with the findings and judgment rendered, is so indefinite and uncertain upon matters of accounting that the supreme court, upon a trial *de novo*, cannot make, with any degree of accuracy, a final disposition, a new trial will be ordered.

Partnership — advance to partnership by partner — interest — accounting.

2. In such action, where one of the partners furnished the money wherewith to engage in the horse selling business upon the claimed agreement that he was to be paid interest upon moneys advanced, or moneys borrowed, for the partnership at the rate of 8 per cent per annum, payable semiannually, at compound interest, it is *held* that the trial court properly determined such party to be entitled to be credited with, and to receive, such interest upon an accounting, excepting that upon moneys advanced by such party, not borrowed, he should receive only simple interest, not compounded.

Opinion filed May 23, 1919.

Action for a partnership dissolution and for an accounting.

From a judgment in District Court, Williams County, *Fisk*, J., for the defendant, the plaintiff appeals and demands a trial *de novo*.

New trial ordered.

E. R. Sinkler and *Greenleaf, Wooledge, & Leak*, for appellant.

Capital does not bear interest in the absence of express agreement or a usage of the firm to allow it. St. Paul Trust Co. v. Finch (Minn.) 54 N. W. 190.

Where one borrows money with which to purchase land it does not entitle him to deduct the interest before dividing the proceeds on a resale, in the absence of an agreement to that effect. Carpenter v. Hathaway, 25 Pac. 549; Sweeney v. Neeley (Mich.) 19 N. W. 128.

Interest is not recoverable on an excess of capital contributed to a partnership by one partner on the ground that he devoted his time and money to carrying on the partnership business, whereas the other partner contributed nothing in the way of time or labor. Thompson v. Noble (Mich.) 65 N. W. 563.

John J. Murphy and *F. W. Medbery,* for respondent.

BRONSON, J. This is an action for dissolution of a partnership and for an accounting. The action was started in June, 1915, in the district court of Williams county, and came to trial in October, 1916.

On February 5, 1917, the trial court made findings adjudicating a balance between the parties in favor of the defendant for $542.59, and appointed a receiver to dispose of existing partnership property. Finally, on March 15, 1918, after receipt of the report of the receiver, judgment was entered in favor of the defendant for $190.38.

The plaintiff has appealed from such judgment and demands a trial *de novo.* It appears from the evidence that the defendant owned a ranch near the Missouri river, and that the plaintiff had been working for him for several years, principally engaged in the handling and selling of horses. In the spring of 1908, it appearing to be a good season for the disposition of horses, the parties entered into an understanding or agreement concerning the handling and selling of horses. It was agreed that the defendant would purchase some horses; that the plaintiff would handle the same and sell and dispose of them; that they would divide the profits over and above the expenses; that the defendant would provide a place for such horses at the ranch and a corral in which to handle them. The plaintiff testifies that the defendant agreed to buy the horses and give him one-half interest in them; that he was to do the work and sell and collect for the horses sold; that, if he did not get money out of the horses right away, the defendant was to give him money enough to live and keep his family. The defendant testified that he agreed to buy a bunch of horses and to divide the profits over the expenses; that the plaintiff was to do the selling and collecting away from the ranch; that he would do what he could at home, around the ranch; that he advised the plaintiff that he thought he could borrow sufficient money at 8 per cent with which to get the horses; that the money was not to be furnished free of cost, but the defendant was to receive 8 per cent or whatever he had to pay the bank where he borrowed such money.

Pursuant to this arrangement, the defendant made arrangements with a bank at Minot to borrow the money at 8 per cent interest payable

every six months. On July 13, 1908, 148 horses were purchased. The cost of the same, including the expenses in connection with their transportation, amounted to $9,859.65. The defendant borrowed $10,000 to finance the horse deal, at Minot, North Dakota. The defendant testified that the note therefor was renewed once and then taken up with money that he got from a bank in St. Paul; that it was so carried along until the fall of 1911, and that he paid 8 per cent interest thereon. In the year of 1908, about one third of the horses were sold. In 1909 many of the horses were sold on time payment upon notes drawing interest at 12 per cent, which was so arranged between the parties. During this year the plaintiff worked for the defendant on a salary of $400, helping the defendant to manage the ranch; his wife doing some cooking. The defendant furnished everything. The sales of horses and the collections of moneys due therefor continued in the years 1910, 1911, and partly so in 1912. Many notes were taken. The plaintiff and the defendant both participated in the collections of the same.

The books of account have been kept in a very crude manner. From time to time, apparently, settlements were made between the parties concerning horses sold and cash received. There appears upon the record no complete statement of the interest that the defendant paid or of the various items of expenses or disbursements involved in the transactions between the parties pursuant to this arrangement. Apparently, it was the custom of the plaintiff, when some of the horses were sold, to account to the defendant for the cash received by turning over the net amount without keeping or entering into any books a detailed statement of the horses sold or the particular expenses involved in such particular transaction. It is quite evident that both parties used "rule of thumb" methods concerning the bookkeeping. Both parties are equally at fault in failing to keep full and accurate records of the partnership transactions handled by each. The trial court in its findings determined that it was the understanding that the defendant was to be paid interest on the money furnished by him or upon moneys that he borrowed for the partnership at a rate of 8 per cent per annum, computed every six months, and, if not paid, such interest to become a part of the principal. The trial court found the amount of interest to which the defendant was entitled amounted to $2,468.95. The appellant's principal contention is that the trial court erred in allowing interest to the defendant in the

amount stated, or otherwise, upon moneys furnished or moneys borrowed by the defendant for the partnership. The appellant also attacks the computations made in the findings upon the accounting had.

In matters of arithmetic, the findings and conclusions of the trial court, including the judgment rendered, do not agree. The respondent in part so concedes in his brief. For instance, in the findings, the court determines the items of moneys disbursed or advanced by the defendant which aggregate $14,738.10, and the items of payments made to the defendant which total $14,901.31. This leaves an excess balance received by the defendant of $163.30, whereas the excess amount as determined by the court is $452.65. The error possibly, as the respondent contends, is in the amount allowed for the interest item which probably was cut down by the trial court, but not changed in the findings in the specific item therefor. Furthermore, in such findings, the trial court determined that the plaintiff collected and received $2,429.66 and his properly allowable expenses to be $977.82, leaving the net amount of $1,451.84 which the plaintiff had received. Thereupon, the court determined, in its conclusions, that the amount owing the defendant from the plaintiff was $542.47, whereas the amount, from the face of the findings, should be $644.27, or, in any event, if the interest item be corrected in accordance with the final excess balance found by the court to have been received by the defendant, to wit, $452.65, the amount then due the defendant from the plaintiff upon such computation would be $499.59, as the respondent concedes, instead of $542.57, as found by the court. Furthermore, in such findings the court directs the receiver to apply the net amount received by him in the sale of the partnership property in payment upon the amount so due the defendant from the plaintiff.

Plainly, as a matter of arithmetic against the partnership assets which were sold by the receiver, if they were in fact partnership assets, and were so considered by the trial court, belonged one half to each of the parties, and only one half of such net amount so received by the receiver should be credited upon the amount found due the defendant from the plaintiff.

We are satisfied upon this record that the trial court properly found that the defendant should be allowed interest upon moneys advanced, or moneys secured through loan for partnership purposes.

We are further satisfied, however, that the defendant should not be allowed compound interest upon any moneys furnished by him excepting where he has in fact paid such interest upon moneys borrowed by him for such partnership purposes. The record, together with the findings and judgment rendered, is so indefinite and uncertain that this court, upon a trial *de novo,* is unable to determine, with any degree of accuracy, the proper allowance for the interest item, or what the proper amount of the judgment should be, pursuant to the findings and the record in this case. Accordingly, in the interests of substantial justice, we are constrained to remand this case for a new trial with directions to the trial court particularly to determine the amount of interest to be allowed the defendant, pursuant to this opinion, and to specifically find upon every item contested between the parties to this action.

Landis v. Knight, 23 N. D. 450, 137 N. W. 477; Williams County State Bank v. Gallagher, 35 N. D. 24, 159 N. W. 80; Sutherland v. Noggle, 35 N. D. 538, 160 N. W. 1000.

It is so ordered. The costs of this appeal will abide the result of the new trial.

GRACE, J. I concur in result.

ROBINSON, J. (dissenting). The complaint avers that in 1908 the plaintiff and defendant entered into a copartnership for the purpose of buying and selling horses; that defendant was to furnish the capital and the plaintiff to do the work of selling the horses, and each to receive half the profits; that defendant has received $2,200 more than his just share of the profits and continues to collect debts of the partnership and to appropriate the money; wherefore, the plaintiff demands an accounting and division of the partnership funds. By answer defendant denied the partnership and offered no accounting. However, on the trial, he admitted the partnership and that he was to furnish the capital and the plaintiff to do the work, and on the trial defendant claimed that for the capital advanced he should have interest at 8 per cent compounded semi-annually. The claim of interest was unjustly allowed, and it amounted to $2,468.95. Plaintiff swore positively that he never heard of interest till the trial; that defendant had never made a claim for interest, and it also appeared that no interest charges had been made on the books.

And of course it was highly improbable that plaintiff should pay interest on the capital and do nearly all the work and receive only half the profits. Hence the allowance for interest was clearly wrong. Then it appears defendant borrowed most of the capital and repaid the same, with interest, from partnership funds received from the sale of horses, and for the amount so paid defendant took credit and charged the same to the partnership, when the interest should have been paid from his own funds. Defendant was no more entitled to interest on the capital than plaintiff was entitled to compensation for his time and services given to the partnership.

This action has dragged along for over five years. In June, 1913, at Williston, North Dakota, the summons and complaint was served on defendant. In September, 1915, the answer was served,—and it comes near to being a mere sham. In October, 1916, the case was brought on for trial and the evidence taken. In February, 1917, the judge made findings and conclusions. In March, 1918, judgment was entered against the plaintiff, and in April, 1918, this appeal was taken. If the defendant had kept a true account and promptly served a true answer, with a correct statement of account, the chances are there would have been no occasion for litigation. Defendant kept the books in pencil, and in such a way that it is not possible for him or any person to state an account with any reasonable assurance of accuracy. However, it is quite clear that the plaintiff is entitled to recover about $3,000.

Defendant has received several sums amounting to	$16,853.92	
He has expended	11,212.58	
This leaves in his hands	$5,641.34	
Barton has received from partnership money	1,173.00	
The balance to be divided is	$4,468.34	
Of this the plaintiff must receive half or	$2,234.17	
Interest on the same for five years	570.00	
Half of net sum received from sale of partnership property	183.54	
Total		$2,987.71

In the brief of counsel it is said: There were only two witnesses in the case; there is a direct conflict of testimony in regard to interest, and

the findings of the trial court should not be disturbed without good reasons. That would be of much greater force if the answer had fairly and correctly stated the case and the issues to be determined, and if the action had been tried and judgment entered within a reasonable time. We have before us the briefs of counsel, the judgment roll, the account books, the statement of the case, covering over 200 pages. How be it as the case is presented by the pleadings—the answer and the whole record? There is nothing to be gained by an extended discussion of the facts, and it is time to end this suit.

The judgment of the district court should be reversed and it be ordered that judgment be entered to the effect that the plaintiff do have and recover from the defendant $2,987.71, with costs.

ANNA BECKWOLD LARSON, Appellant, v. FRANK DUTTON and Mrs. Frank Dutton, Respondents.

(172 N. W. 869.)

Habeas corpus — custody of child — best interests of child.

1. In determining the custody of a child, the paramount consideration is the child's welfare.

Habeas corpus — appeal — trial de novo.

2. A habeas corpus proceeding is not triable anew in this court.

Habeas corpus — findings based on parol evidence.

3. Where the findings in a habeas corpus proceeding are based upon parol evidence, they will not be disturbed unless they are shown to be clearly wrong.

Opinion filed May 27, 1919.

From a judgment of the District Court of Burleigh County, *Nuessle*, J., plaintiff appeals.

Affirmed.

NOTE.—On denial of custody of child to parent for its well-being, see note in 41 L.R.A.(N.S.) 564, where it appears that the rule that obtains in most courts at the present day is that the welfare of the child is to be regarded more than the technical rights of the parents. So that, following this rule, it is held that the child will not be delivered to the custody of either parent where it is not for the best interest of the child.

Wade A. Beardsley and *E. T. Burke,* for appellant.
Newton, Dullam, & Young, for respondents.

CHRISTIANSON, Ch. J. This is a habeas corpus proceeding, instituted by the petitioner in the district court of Burleigh county to recover the custody of her infant daughter. The trial court made findings adverse to the petitioner, and she has appealed from the judgment quashing the writ.

The testimony of the petitioner shows that while she was working in Christiania, Norway, she became acquainted with one Bjorne Larson. He was a machinist on an ocean steamer. Having made a contract to perform some work in China, he went to Germany in the early part of February, 1914, for the purpose of embarking for China. The petitioner, who at that time was between nineteen and twenty years of age, went with him. They stayed at a hotel in Germany for a day and a night, whereupon he embarked for China, and she went back to Norway. Some four months later she consulted a physician, and was informed that she was pregnant. She thereupon decided to come to this country. She says she wanted to leave Norway because she "wouldn't have her family shamed (disgraced)." She did not tell her folks anything about her pregnancy. The petitioner and Bjorne Larson were not engaged at the time the child was begotten. She says they had never talked about marriage. The petitioner arrived in this country on July 23, 1914. She went to the home of a friend in South Dakota, where she stayed for about one week. She then obtained employment with one Mrs. Shade, where she remained until about the middle of September, 1914, at which time she left and came to Buffalo, North Dakota, where her cousin was working as a domestic in the home of one More, a lawyer and banker at that place. The petitioner, shortly after her arrival in Buffalo, went to More's home, where she remained until some time in October, when she was taken to Mrs. Camp's private maternity hospital in Fargo. On November 1, 1914, she gave birth to the child whose custody is involved in this proceeding. She remained in the maternity hospital until November 24, 1914. On that day she went back to More's home at Buffalo, where she remained until December 25, 1914. The day before she left the hospital, she executed a written instrument which in terms provided that she relinquished all rights to the child to ———,

and that they were to provide the child with a proper home and care, and to maintain and educate it. The name of the party to whom the child was to be delivered was left blank, and the names of the respondents were subsequently inserted by Mrs. Camp.

The petitioner admits that she executed the instrument. She also admits that she was not forced to sign it, and she denies, apparently with some indignation, any intention to assert that More deceived her with respect to the contents or effect of the instrument. She says: "He tried to explain. He said something to my cousin and she said it to me, but I didn't understand then what it meant." She admits, however, that she knew that it related to her child, and "had something to do about giving [her] child away."

During an examination of the petitioner conducted by the court, the following questions were asked and answers given thereto:

Q. Did you think that you couldn't take the baby around and do housework?

A. Yes, my cousin told me I couldn't get any place with the baby.

Q. You had thought about that?

A. Yes.

Q. So you didn't know just what to do at that time?

A. No, because I thought I had to save the baby's life anyway.

Q. Your cousin told you then (November 24, 1914) that you had to make some arrangements about the baby?

A. Yes.

Q. Had you made up your mind then to let the baby go?

A. Yes, to folks who would be good to her.

Q. That is when you signed the paper?

A. Yes.

Q. So, then, you really knew, at the time you signed this paper, that the baby was going to be put out in some family where they would be good to her?

A. Yes.

The following question was propounded, and answer given during petitioner's redirect examination:

Q. While you were at Mrs Camp's was there any talk of your letting this child go to any other place than with Mrs. Camp?

A. Yes, I heard them mention Davis.

The petitioner, however, claims that she did not know that she was "giving the child away for all time," and says that she supposed she would get it back at some future time, "because in Norway they never adopt a baby,—they just take care of it." She says, however, that no promises were made to her that the child would be returned to her in the future.

Petitioner says that on the day following the execution of the instrument, before leaving for Buffalo, Mrs. Camp told her that she "had no right to the child any more." Petitioner identified, and there was offered in evidence, a letter from Mrs. Camp, dated December 13, 1914. In this letter Mrs. Camp informed her that the little girl had gone to a very nice home, and that the people who had her loved her very much, and that before taking her away from Fargo, they had purchased many nice clothes for her. Mrs. Camp also inclosed a letter which she had received from the respondent, Mrs. Dutton. In this letter Mrs. Dutton tells how much they enjoy the baby, and how she is growing. She says: "My husband thinks it the only baby ever, and we are so happy with it. Wish you would send paper, as we want to get it baptized just as soon as we can. Inclosed find notice which was in the paper." The notice referred to was also sent to the petitioner with the letter. It was a clipping from the Wilton newspaper, mentioning the arrival of a little girl at the Dutton home. It was so phrased as to indicate that the child was the natural child of the Duttons. (Mrs. Camp had clipped Mrs. Dutton's signature from the letter, and also erased from the newspaper clipping something which indicated where the paper was printed.) At the time the petitioner received this letter she was with her cousin in the More home at Buffalo.

According to petitioner's testimony she did not notify the child's father of her trouble until after the child had been born. He then sent her $70, which she received in the January following. She also says that he later sent her various amounts aggregating in all $500. All of petitioner's expenses at the maternity hospital were paid by More as an act of charity, and he also in addition thereto paid petitioner wages during the time she was at his home. Neither petitioner nor her husband are citizens of this country or residents of this state, and they have no property in this country, although she says they have about $300 in money here, and that her husband has some money in Norway. At the

time of the trial she was, and since her arrival in Wilton in May, 1917, had been, working in a hotel there, and her husband was working in the harvest fields near Wilton and they had no established home anywhere. She testified that her husband had been earning 270 Mexican dollars a month while he was working as a machinist in China.

When the petitioner left More's home on December 25, 1914, she went to visit a cousin who lived at Clearbrook, Minnesota. She remained with this cousin until April, 1915, when she went to Minneapolis. She worked in Minneapolis for about three months, and then went to South Dakota, and worked for Mrs. Shade until Christmas, 1915. She then went to Minneapolis, and worked for the Northwestern Knitting Company until April, 1916, when she returned to Mrs. Shade and worked for her until in August, 1916. At this time she returned to Minneapolis, and had an operation performed, later she went to work for the Northwestern Knitting Company, where she worked until the beginning of April, 1917. At this time she came to Buffalo, North Dakota, and remained there for about a month visiting with her cousin and with Mrs. More. In the beginning of May, 1917, she left Buffalo, and came to Wilton, North Dakota, where the child was then and still is living with the respondents in this case. She commenced this proceeding on May 18, 1917. In July, 1917, she married Bjorne Larson, the child's father. The testimony of the petitioner does not indicate that she made any particular effort to locate her child until in the winter or spring of 1917, and it seems rather a reasonable deduction that in the meantime she and Bjorne Larson had agreed upon marriage. At the time the petitioner left the child at the maternity hospital she had no expectation of such marriage, and when her testimony is considered in light of all the circumstances it seems extremely doubtful that she then had any intention of ever claiming the child at any time in the future. Such intention seems to have been formed only after the marriage between herself and Bjorne Larson had been arranged for. The petitioner's husband, Bjorne Larson, did not testify at all, although he was present at the trial.

Both respondents testified. They reside at Wilton, where Mr. Dutton is working for the Washburn Lignite Coal Company. He is a "cutter" in the coal mines of the company. He has been so employed for over sixteen years, and is receiving a wage of from $150 to $225 per month. The respondents have been married about fifteen years, and have lived

at Wilton all of their married life. Their marriage has been childless. They were desirous of adopting a child, and had made inquiries from the superintendent of the North Dakota Children's Home at Fargo, and through him they were put in touch with Mrs. Camp, with the result that Mrs. Dutton received the little girl from Mrs. Camp on the 28th or 29th day of November, 1914. At the time she weighed only 6 pounds and was ruptured. The respondents desired to adopt her, and were under the impression that the instrument which they had received —which had been executed and acknowledged by the mother—accomplished a legal adoption. It was only after the petitioner claimed the child that they ascertained that this was not so, and upon the hearing before the district judge both respondents declared their desire and willingness to legally adopt the child. No one can read the testimony of the respondents without being impressed with their apparent candor and good faith, and convinced of their intense affection for the child.

Many residents of Wilton were called as witnesses by both sides. They all agree that the respondents have always manifested a great deal of affection for the child, and she for them. No one denied that they had given, and were giving, her a good home. Even the petitioner said that she "thinks Mrs. Dutton treats the baby nicely," but that she thinks "she doesn't know how to take care of it right." She admits that the baby is "healthy and well" now, and says she thinks Mrs. Dutton cares for it, and that Mr. Dutton "cares a whole lot." The evidence shows that the child upon two occasions was quite ill. During those illnesses the Duttons procured for her the very best of medical care, and upon one occasion a trained nurse. The child was also ill after the petitioner came to Wilton, and Mrs. Dutton then sent word to her that the baby was not expected to live; but the petitioner did not go and see the baby, and upon the trial she gave no explanation for her failure to do so. During the time that petitioner has lived in Wilton she has not gone near or even spoken to the respondents.

It is truly unfortunate that controversies like this should ever arise. Manifestly any decision rendered will cause pain and heartache to someone. On the one side we have the mother, claiming her child. On the other hand we have those who have been the only mother and father the little one has ever known. They received her with the intention that she should thenceforth become and be known as their daughter. And

as a daughter they have treated her. They are not rich in this world's goods, but they have gladly borne every expense necessary for the child's welfare and comfort. When they received her she was a small, sickly baby, and through their care she has become "healthy and well." They sat beside her sick bed, and "watched her breathing through the night, her breathing soft and low, as in her breast the wave of life kept heaving to and fro." They saw her first smile and received her first caresses. She occupies a place in their home and in their hearts which nothing else can fill, and they have become bound to her with ties which no earthly decree can sever.

It has been suggested with much force that if persons who receive and adopt children from a children's home or similar institution, and keep and care for them for years until strong ties of attachment are formed, may be deprived of them because the natural parent changes his mind, then no one would dare to adopt such children, and as a result they would be denied homes, and might even lose their lives for want of proper care. The legal rights of the contending parties, however, are not of controlling importance. The question of the custody of the child "is dealt with as one of discretion, to be exerciesd on equitable principles, rather than one of strict right, in whatever forum it arises." And in a case like this, where the natural parent has in effect abandoned all dominion over a child, and it has been taken into the home of others, who have received and treated it as their own, the fact that the child has not been legally adopted by the latter is by no means decisive of the right of custody. For even the legal dominion which the law gives to the natural parent has its limitations. Such dominion is in the nature of a sacred trust which the law imposes upon the parent for the benefit of the child. Nugent v. Powell, 4 Wyo. 173, 20 L.R.A. 199, 62 Am. St. Rep. 17, 33 Pac. 23. As long as the parent is true to such trust the right to the custody and control of his or her child is paramount, but when the parent fails to perform the duties which the trust implies, the parent forfeits the legal dominion over the child as a matter of absolute right; and such dominion will not be enforced by the courts if the court deems it to be contrary to the best interests of the child. In controversies like the one involved in this case the paramount question is, What is for the best welfare of the child? and it is the duty of the court "to leave the child where its interests will be best subserved." Re Sidle,

31 N. D. 405, 154 N. W. 277; Re Hickey, 85 Kan. 556, 41 L.R.A. (N.S.) 564, 118 Pac. 56; Re Burdick, 91 Neb. 639, 40 L.R.A.(N.S.) 887, 136 N. W. 988.

During the course of the trial the trial court expressly announced that he deemed the child's welfare to be the determinative factor in the case. And with this in view he refused to compel a change of custody. We have already referred to the evidence adduced upon the trial. Of course we have merely the written record before us. The trial judge had the parties as well as the child in flesh and blood. He heard the stories of the parties, and saw their demeanor and conduct. Obviously he was in far better position to pass upon the questions involved than are the members of this court. And even though the case was triable anew in this court, we would hesitate to overturn the findings of the trial judge under these circumstances. In fact, it seems to be a rule of general application that in cases of this kind the trial court is deemed to be vested with a wide discretion. 21 Cyc. 34, note 69. But while appellant has demanded a trial *de novo* in this court, we are satisfied we have no authority to grant such demand, for the authority of this court to try cases anew is derived solely from the statute. Littel v. Phinney, 10 N. D. 351, 87 N. W. 593. And the statute does not authorize a trial *de novo* of a special proceeding. State ex rel. Bickford v. Fabrick, 16 N. D. 94, 112 N. W. 74. Inasmuch as this is a special proceeding, this court has no power to try the case anew, but is limited to a review of errors. And "the case comes to us with the presumption in favor of the legality and correctness of the findings. Appellant must establish error, and where a finding is based upon parol evidence, its error must clearly and unquestionably appear, or it will not be disturbed." Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; 21 Cyc. 346.

The record shows that the trial was conducted with extreme fairness. The district judge, who looked into the faces of the parties and their witnesses, and heard their stories as they fell from the lips, concluded that the welfare of the child would be best subserved by leaving the child with the respondents. There is nothing in the record before us to justify this court in interfering with that conclusion.

Judgment affirmed.

GRACE, J. From the result at which the majority opinion has arrived, I respectfully dissent.

ROBINSON, J. (concurring specially). Four years ago at the maternity hospital in Fargo a poor young woman found herself the mother of an infant for which she had no father. It weighed 4 pounds. The mother being destitute and having to earn her own living by working as a domestic, she arranged with the matron of the hospital to find some good family to adopt the infant. A good motherly woman was found, who went from Wilton to Fargo, took the infant of two months, cuddled it to her bosom as her own child, and returned with it to her good home in Wilton. The foster mother being childless, the infant at once became the pet and idol of herself and her husband, and, under the best of care and nursing, it grew to be a bright and beauteous and happy child. Of course it was with grief and tears that the natural mother gave away her infant and signed a paper releasing her claim to it, but she did it for the good of the infant and to preserve its life because she was unable to care for it.

Now she has married the father of the child and lives with him somewhere in Idaho, and another infant has come to her, and now she asks to regain the first child and to carry it out of the state and beyond the jurisdiction of the court, and to rend the ties of love and affection which bind the little girl to the mother who has preserved its life. There is nothing to show that the plaintiff has any means or any home, or that she is prepared to give the child the care and comforts to which she has been accustomed. There is a showing of poverty and improvidence which indicates that an exchange of homes and a transportation to Idaho would bode ill for the child. Two years ago, when this action was commenced, the plaintiff and her husband had no home. She was a domestic; he a hired man. At present they may have a homestead with a little shack on the plains in some valley in Idaho.

The primary and controlling question is the welfare of *society* and the welfare of the child. She is not a chattel to which any party can assert a legal title, *and the superior right is with the mother who has preserved the life of the child, and not with her who abandoned it.* Yet, strange to say, on this question the judges are divided and they talk of common law and legal rights and the scrap of paper which the mother gave with her infant to show that she released and abandoned it. And it is true the scrap of paper is but a link in the chain of evidence showing how the mother gave away and abandoned her infant the same as if

she had wrapped it in a basket and left it at the door of some house. One judge says there is no common-law adoption; says there can be no adoption of a child unless in the manner provided by statute; but children were adopted long before people knew anything of laws and statutes. In the legends of ancient Rome we read how a good motherly wolf adopted and nursed Romulus and Remus and how the boys grew up and always loved and cherished their wolf mother. The law of natural adoption has always prevailed among the human species and among the inferior animals, and it has saved millions of helpless infants. If we repeal the law of natural adoption by deciding that a motherly woman cannot safely adopt an abandoned infant, then we doom such infants to perish by neglect, because the motherly instinct will not impel a woman to adopt an infant waif and to cherish it as her own if she knows that the law may rend her heart and her dearest affections by tearing the child away from her. I cannot well imagine a scene more tearful and distressing than the tearing apart the little happy child and her foster mother. How can such tearing be voted for by any judge who has at heart the welfare of the child and the welfare of humanity and of other children that may need a foster parent?

BRONSON, J. (I dissent). I agree with neither the result nor the principle of law applied in this case. It is deemed unnecessary to review or restate the facts otherwise than as stated in the majority opinion. They have been stated rather favorably for the defendants, being drawn somewhat from the testimony adduced by the defendants. It is sufficient to state that no delinquencies are established or proved as against the natural parents which affect their right, legally, to the custody of their own child. The record fairly shows that both of the contesting parties are equally able and willing to give the child involved a suitable home and suitable care and attention. If any mistake was made by the plaintiff before marriage it is now rectified. The child is the legitimate child of the plaintiff and her husband. Comp. Laws 1913, § 4421. The child has not been adopted by the defendants and no proceedings have been taken by them so to do. Fairly, does the evidence show that this poor Norwegian girl, coming from a foreign country, neither understanding nor able to read or write English, without money and without friends, except charitable friends, while in a condition of distress, not

for her own sake, but for the sake of her child, and for the love that she bore for it, being informed, in a country strange to her, that she could not keep the child and take it with her, signed the written statement mentioned in the majority opinion. That she has ever been solicitous about and has had a real mother's love for the child is evidenced by her letter written to the maternity hospital soon after her departure therefrom, as well as by all her attempts afterwards to locate the child, and by this proceeding through which she seeks to gain the actual custody of the child. As a matter of law, at the present time, the natural parents of this child have imposed upon them the legal duty to maintain, care for, and educate such child. As a matter of law, as such natural parents they are entitled to the custody and control of such child. Comp. Laws 1913, § 4440. The defendants in this case have no such legal duty imposed upon them; they have no right, as a matter of law, to the custody or control of such child except such as this court, through its opinion, grants, by its fiat, under the doctrine that the welfare of the child is the paramount consideration.

In the abstract, the principle of law stated in the majority opinion, that "in determining the custody of the child the paramount consideration is the child's welfare," is founded neither upon good morals nor upon the best interests of civilization when it ignores the legal status and the legal considerations applicable to the child, upon the record, and the natural considerations of parental love and affection which in a measure is the backbone and basis of our civilization. Truly there is a place and there is a field for the application of this abstract principle of law. It does not mean, however, that in every case that the chancellor's foot should become the measuring stick by which the custody of a child should be torn and taken away from its natural parents and given to absolute strangers where the law has established no legal right in the strangers to such child, and has established no delinquency or disability of the natural parents to perform their parental duties. If such be the rule, well might the bright, intelligent child in the humblest home of poor, devoted parents be taken and given to the home, much better provided and with much greater facilities existing, owing to the prominence and wealth of the owners, but strangers to the child, when, in the viewpoint of the chancellor, the best welfare of the child as a future citizen of this state would be subserved. Such applications of equity do vio-

lence to the most tender feelings and sympathies that modern civilization discloses, namely, to the natural love and affection of father and mother for their own child and to the assurance that modern society and civilization has given to them; the assurance that, no matter how humble their home may be, or how little of this world's possessions they may have, their child, begotten by them, shall remain with them unless by reason of their delinquency the law adjudicates them to be improper persons to longer continue their custody, and unless, further, the law determines that this parental love with which goes the performance of parental duties is absent. The majority opinion relies to a great extent upon the determination made by the trial court and upon the discretion exercised by the trial court. The record discloses that upon the facts, the controversy is not serious, the question is principally one of law. The trial court necessarily was guided by the broad principle of law stated in the case of Re Sidle, 31 N. D. 405, 154 N. W. 277. That case upon principles of right, and of justice, in accordance with the facts in that case, should be criticized, and expressly disapproved. It is to be noted that in the great majority of cases where the principle is applied that the welfare of the child is the paramount consideration, the relations generally concern the right of father and the right of the mother to the custody of the child, or the right of some immediate relative as against one of the parents in connection with divorce proceedings, or where actual delinquencies are shown on the part of the parents; or in cases where questions arise as between a guardian appointed by the court and the parents. The history of the law in American and English jurisprudence clearly demonstrates that, down through the centuries, the law has guarded zealously the right of the natural parents to the custody of their own children, in the interests of civilization as well as upon principles of right and equity. See 41 L.R.A.(N.S.) 570, and 20 Am. Dec. 330.

Even in the Sidle Case, supra, the contest arose between one claimed by legal adoption and therefore the legal guardian, as against the natural parents. Even in the Hickey Case (cited in the majority opinion) the mother, claiming the child as against the person having possession, was shown to be delinquent, she having remarried, or attempting so to do, while a divorce was pending against her husband, the natural father of the child. In Re Burdick, 91 Neb. 639, 40 L.R.A.(N.S.) 887, 136

N. W. 988, cited in the majority opinion, the natural mother died immediately after the birth of the child, and the father executed a written agreement relinquishing right to the custody and control of the child to a neighbor. Thereafter he remarried and sought to regain the custody of the child. Even in this case the situation can be readily distinguished from the case at bar, where both the natural father and the natural mother are seeking to secure the custody of their own child, where the record discloses lack of intent to permanently abandon the child by its mother or of any abandonment of the maternal love for such child. In other words, the court should always give the custody of the child to the person having legal right thereto, and this legal right should not be interfered with unless the parents so conduct themselves as to render it essential to the safety and welfare of the child in some serious and important aspect either physically, intellectually, or morally, so that it should be removed from their custody. 29 Cyc. 1594. See note in 4 A. R. C. 892.

The judgment, therefore, in any event should be reversed, either absolutely, or for purposes of a new trial to take additional testimony with respect to any existing legal reasons that might be adduced why the natural parents should not have the custody of their own child.

V. D. FOOTE, Respondent, v. L. C. SMITH & BROTHERS TYPEWRITER COMPANY, Appellant.

(172 N. W. 833.)

Sales — contract with selling agent.

1. In an action on a dealer's contract to handle typewriters, which gives to the dealer the exclusive right to sell certain typewriters for a period of one year, commencing February 27, 1918, and which provides that the Typewriter Company shall deliver to the dealer twelve machines each month during the life of the contract, it is *held* that the latter provision refers not to calendar monthly periods, but to monthly periods measured from the date of the inception of the contract.

Sales — agency contract — time of deliveries — evidence.

2. In an action on such dealer's contract to recover for the failure to deliver machines as contracted, where it appears from the record that the con-

tract provides for its termination at any time upon thirty days' notice from the defendant, and the defendant received and accepted orders for typewriters pursuant to the terms of such contract, until it gave notice of its cancelation, and where the defendant in its answer, and its evidence introduced or offered, relies upon an exception in the contract justifying delay in deliveries where extraordinary conditions unforeseen arise, and upon the extraordinary war conditions and war demands, to which it had been subjected in the manufacture and delivery of machines, it is *held*, upon the record, that there is no showing of obligatory compliance to make deliveries to the plaintiff in view of its acceptance of orders and continuance of the contract.

Trial — effect of motion by both parties for directed verdict — decision by court.

3. In such actions where both parties moved for a directed verdict at the close of the case, without reservation, the parties are deemed to have consented to a decision by the court of both questions of law and of fact, and it is deemed immaterial whether the court specifically makes findings of fact or directs a verdict pursuant to the motion of one of the parties.

Sales — sales agency contract — damages for breach of contract.

4. In such action, where the trial court directed a verdict for damages, based upon the difference between what the buyer would have paid the seller for each machine plus the express thereupon, and the price that he would have received for each machine, it is *held*, pursuant to § 7153, Comp. Laws 1913, that upon the evidence the proper measure of damages was applied.

Opinion filed May 28, 1919.

Action on dealer's contract for failure to deliver typewriters.

Verdict directed for plaintiff in District Court, Cass County, *Cole*, J.

From judgment entered and motion denying judgment *non obstante*, or, in the alternative, for a new trial, the defendant appeals.

Judgment modified and affirmed.

M. A. Hildreth, for appellant.

In any contract where there is no provision whatsoever releasing the party from performance, extraordinary conditions like strikes, destruction of property, fire, or tornado or act of God have almost invariably, excepting in a few instances, been considered sufficient excuse for failure to perform. In contracts where the provision is written in and made a part of the instrument, the authorities are almost uniform that such conditions operate, when once established, to excuse the perform-

ance of the contract, and are a perfect defense upon an action arising for failure to perform thereunder. Lorillard v. Clyde, 142 N. Y. 462 (opinion by Ch. J. Andrews); Ott v. Murphy, 141 N. W. 462. See National Defense Act, pp. 428–430, U. S. Comp. Stat. under the head of Mobilization of Industries; Moore & Tierney v. Roxford Knitting Co. 250 Fed. 282; Cottrell v. Smokeless Fuel Co. 9 L.R.A.(N.S.) 1187; Malcomson v. Wappoo Mills, 88 Fed. 680; Cotrell v. Smokeless F. Co. 129 Fed. 175; Western Hardware Mfg. Co. v. Bancroft C. S. Co. 116 Fed. 176; 9 Cyc. 631–633; Taylor v. Caldwell, 3 Best & S. 833; Howell v. Coupland, L. R. 1 Q. B. Div. 258; Bailey v. DeCrespingy, L. R. 4 Q. B. 185; Dexter v. Norton, 47 N. Y. 64, 7 Am. Rep. 415; Ontario Deciduous Fruit Growers Asso. v. Cutting Fruit Packing Co. 134 Cal. 21, 53 L.R.A. 681, 86 Am. St. Rep. 231, 66 Pac. 29; Stewart v. Stone, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 596; Wells v. Sutphin, 64 Kan. 873, 68 Pac. 648; Krause v. Bd. of Trustees, 162 Ind. 278, 65 L.R.A. 111, 102 Am. St. Rep. 203, 70 N. E. 267, 1 Ann. Cas. 460; Berg v. Erickson, 234 Fed. 817; Dunyan v. Culver, 168 Ky. 45, 181 S. W. 640, L.R.A.1916F, 3, note page 10.

The following English cases sustain the doctrine for which we contend, namely, that in time of war impossibility of performance of contract is a perfect defense; Chandler v. Webster, 4 K. B. 493; Kreel v. Henry, 2 K. B. 748.

Barnett & Richardson, for respondent.

Appellant, having prevented such sales by nondelivery, prevented the respondent from earning the profits which he would have earned if delivery had been made. This seems to be the rule applied in the following cases: Young v. Land Co. (N. D.) 122 N. W. 1105; Talbott v. Boyd (N. D.) 88 N. W. 1028.

A shortage of labor, or the difficulty of procuring labor for the purpose of fulfilling a contract, is not a defense for a failure to deliver under the contract.

An exhaustive note on this point is contained in L.R.A.1916F, at page 31.

"It is no excuse for the nonperformance of a contract that it is impossible for the obligor to fulfil it, if the performance be, in its nature, possible. . . . There is a marked distinction not to be overlooked, in this connection, between a mere disability or inability of a party to

perform a contract, and the absolute and inherent impossibility of performance in the true sense. . . . Unless an act is inherently impossible within itself, a contract to do it is binding, although the performance may be improbable, or even impossible to the promisor. To excuse performance, the impossibility must be simply more than merely a great inconvenience, hardship, or even impracticability." Reid v. Company (Or.) 73 Pac. 337; Piago v. Summerville (Miss.) 80 So. 342.

"There can be no question but that a party may, by an absolute contract, bind himself or itself to perform things which are subsequently impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossible might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor." Chicago Co. v. Hoyt, 149 U. S. 1; Mahaska Bank v. Brown (Iowa) 141 N. W. 459; see also note in L.R.A.1916F, p. 20, and cases cited.

Bronson, J. This is an action upon a dealer's contract for failure to deliver typewriters pursuant to the terms of an express contract. Trial was had in the district court of Cass county commencing January 27, 1919, before a jury, and, upon motion made for a directed verdict by both parties, the court directed a verdict for the plaintiff in the sum of $1,542.25. Pursuant thereto judgment was entered on February 27, 1919. From an order thereafter made denying the motion of the defendant for judgment *non obstante,* or, in the alternative, for a new trial, the defendant has appealed to this court, from such order and from the judgment.

Substantially the facts are as follows:

On February 27, 1918, the parties made a written dealer's contract whereby the plaintiff was granted the exclusive right to deal in typewriting machines and supplies sold or dealt in by the defendant company for a term of one year. It was provided in such contract that the plaintiff agreed to purchase, take delivery of, and pay for, and the defendant agreed to sell and deliver to the plaintiff, twelve machines each month during the life of the contract and a greater number each month as might be ordered by the plaintiff subject to the ability of the defendant to fill such orders in excess of the quantity above mentioned. It was

also provided in this contract that all machines ordered by the plaintiff should be shipped f.o.b., Syracuse, New York, as speedily as possible by the defendant unless prevented by strikes, fires, orders of court, or other extraordinary conditions now unforeseen, or over which the defendant had no control. It was furthermore stipulated that the plaintiff agreed to sell exclusively in the territory specified, typewriting machines of the defendant at prices not less than those set forth in the regular authorized catalogue of the defendant, and that plaintiff should labor diligently during such time for the purpose of selling such machines; that he should establish a place of business in one of the principal cities at his own expense for the sale of such machines, and that he should not deal in, sell, or handle typewriting machines other than those of the defendant excepting second-hand machines taken in exchange as part payment for defendant's typewriters, portable machines, and second-hand typewriters of all makes. It was further stipulated that the plaintiff would employ at his own expense a competent repair man and that he would keep in good repair all of defendant's typewriters sold by him within the territory. It was further stipulated in such contract that either of the parties might terminate the same by giving a written notice of thirty days to that effect.

Pursuant to this contract the plaintiff, who was an experienced typewriter salesman theretofore engaged in business at Grand Forks, removed to Fargo, established an office, employed a repair man, and proceeded to act as a dealer in the machines of the defendant pursuant to the contract. There is no question raised in the record that the plaintiff has not complied with the terms of his contract.

On February 27, the plaintiff ordered 32 typewriters.
On March 1, the plaintiff ordered 1 typewriter.
On March 21, the plaintiff ordered 10 typewriters.
On March 26, the plaintiff ordered 10 typewriters.
On April 11, the plaintiff ordered 2 typewriters.
On April 28, the plaintiff ordered 1 typewriter.
On April 29, the plaintiff ordered 4 typewriters.
On April 30, the plaintiff ordered 10 typewriters.
On May 25, the plaintiff ordered 2 typewriters.
On May 29, the plaintiff ordered 1 typewriter.
On July 11, the plaintiff ordered 10 typewriters.

On July 15, the plaintiff ordered 1 typewriter.

On August 1, the plaintiff ordered 7 typewriters.

The defendant received and accepted these orders.

On July 31, 1918, the defendant gave notice of the cancelation of the contract, effective August 31, 1918. During the life of the contract the defendant delivered only fifty-three machines. The plaintiff claims that under the contract it was the duty of the plaintiff to purchase and the duty of the defendant to deliver, during the period between February 27, 1918, and September 1, 1918, the life of the contract, eighty-four machines. The defendant contends that under such contract the plaintiff was entitled to twelve machines during each thirty days or monthly period commencing February 27, 1918, so that in any event the plaintiff was not entitled to the delivery of more than seventy-two machines. The defendant in its answer alleges that by reason of the state of war existing it was compelled to and did comply with governmental demands in the manufacture and delivery of its typewriting machines. That this required it to send immense quantities of typewriting machines to the United States government, which constituted an extraordinary condition unforeseen, against which the defendant could not provide and which it was unable to foresee. During the course of the trial the defendant asked leave of the court to amend its answer to allege, in effect, that after the making of the contract the parties understood and agreed that delivery should be made under and in view of the war conditions, and not otherwise. The trial court, upon objection made by the plaintiff, denied leave to amend upon the ground that it introduced entirely a new cause of defense. The defendant also offered to prove in the record that by reason of the Draft Act of May 17, 1917, the legitimate force in the manufacturing plant of the defendant was reduced between 50 and 60 per cent so that the output was curtailed, and it became a physical impossibility for the defendants to make delivery of their machines because of the war conditions.

Furthermore, the defendant offered to prove that under the Act of June 3, 1916, the Federal government demanded and required a large portion of their output in preference to private deliveries. This offer of the defendant was refused by the trial court. In the evidence, the plaintiff proved his ability to dispose of all the machines so ordered and

his damages resulting, amounting to $52.50 per machine, less express charges of $2.75 for each machine. As both parties moved for a directed verdict at the conclusion of the trial without reservation, the questions of law and of fact involved were for the court, under the usual rule heretofore followed in this state.

In the specifications of error the defendant raises two principal contentions:

1. That the trial court erred in directing a verdict for the full amount of the claim.

2. That the trial court erred in determining that the defendant had failed to perform its contract in view of the request of the defendant to amend its answer and its offer of evidence to show that the contract, made in war time, was subject to war conditions and governmental demands, and to the inabilities thereby imposed upon the defendant concerning deliveries.

We are satisfied that the contract provision requiring a delivery of twelve machines per month refers not to calendar monthly periods, but to monthly periods measured from the date of the inception of the contract. The contract was originally drawn for a period of five years. This meant sixty months from February 27, 1918, and not sixty-one calendar months, including February at the commencing and February at the end. The contract subsequently was changed to read as to its term for one year instead of five years. This plainly meant a twelve-month period from February 27, 1918, to the same date in the succeeding year. Consequently during that period of time the defendant was bound to furnish 144, not 156, machines, if the contract survived that long. The date of the last order was August 1, 1918. No attempt, as the evidence discloses, was made to compel the defendant to deliver twelve machines between the dates of August 27 and August 31, 1918. The contention of the plaintiff that because there remained four days after the expiration of the monthly contract period therefore plaintiff was entitled to receive twelve machines for that period cannot be sustained. The defendant had thirty days within which to comply with the contract requirements for the delivery of twelve machines. If the contract terminated prior to the expiration of that time by the consent and agreement of the parties, the plaintiff manifestly cannot claim a delivery within a period of time not covered by the contract; for the

defendant had thirty days, not four days, within which to deliver the required machines. We are, therefore, clearly of the opinion that the defendant, pursuant to the contract, was required to deliver only seventy-two machines instead of eighty-four, and that the trial court therefore, in any event, should not have directed a verdict for the plaintiff in excess of damages sustained by reason of the failure to deliver nineteen machines.

We are clearly of the opinion that appellant's second contention cannot be sustained. Neither the evidence offered nor introduced by the defendant make applicable the legal principles and cases cited by the defendant as a legal justification for the nonfulfilment of the contract terms, through war conditions or war necessities, preventing defendant's compliance.

The contract was made after a state of war was existing. Under its terms the defendant had the option to terminate it at any time upon thirty days' notice. If the defendant became heavily burdened by war conditions and governmental requirements, it could readily at any time relieve the plaintiff, as well as itself, from the contract terms by a notice of the cancelation thereof. It chose otherwise to do, at least until August 31, 1918, and to attempt to take care of plaintiff's orders.

The record does not disclose any notice to the plaintiff that the defendant would not and could not make deliveries on account of governmental requirements and war conditions. There was no attempted showing of obligatory compliance with governmental orders which resulted in defendant's involuntary disability to make deliveries.

The fact that the defendant in its rule book of May 15, 1918, stated that the company reserved the right to determine the order in which machine deliveries shall be made, on account of war conditions and government orders, did not operate to relieve the defendant, nor the plaintiff, from the requirement to respectively deliver, and to take, twelve machines every month. If anything, this shows an intention, voluntarily, to continue the contract instead of trying to escape its terms.

Clearly upon this record it must be presumed that the defendant consented to a continuance of this contract, in addition to its government orders, and in connection with the war conditions to which it was subject.

As bearing upon this question, see Moore & Tierney v. Roxford Knitting Co. 250 Fed. 278; Mawhinney v. Millbrook Woolen Mills, 105 Misc. 99, 172 N. Y. Supp. 461; Columbus R. Power & Light Co. v. Columbus, 249 U. S. 399, 63 L. ed. 669, 6 A.L.R. 1648, P.U.R.1919D, 239, 39 Sup. Ct. Rep. 349; Kingsville Cotton Oil Co. v. Dallas Waste Mills, — Tex. Civ. App. —, 210 S. W. 832.

The appellants also contend that, in any event, the trial court erroneously directed a verdict allowing the plaintiff as damages the difference between the selling price of the defendant for each machine, plus the express thereupon, and the retail price at which the plaintiff was required to sell pursuant to the contract. The trial court did not err in this regard. Both parties having made a motion for a directed verdict without reservation, the trial court had the right to determine the facts concerning the damages as well as the law applicable, as the measure thereof. It could do this as well by directing a verdict, pursuant to the motion of one of the parties, as by making findings of fact. Aber v. Twichell, 17 N. D. 229, 116 N. W. 95.

In the evidence there is no particular controversy concerning damages; the plaintiff testified that he always had more than sufficient money with the defendant to pay for the typewriters delivered to him. The defendants specifically objected concerning this testimony, upon the ground that it was irrelevant to the issue whether he paid cash or paid for the goods later on. The plaintiff specifically testified that he would have been able to have disposed of these thirty-one machines, and more if they had been furnished to him. Under this contract the plaintiff was precluded from selling these machines at a lesser price than the price fixed by the defendant. If the machines had been delivered to him he would have received, under the evidence, such price. In such case, the measure of his damages, therefore, is the difference between such price fixed by the defendant, being the value of the typewriter to the buyer, over the amount which would have been due to the defendant, under the contract, if the machines had been delivered, plus the express upon each machine. Comp. Laws 1913, § 7153; Young v. Metcalf Land Co. 18 N. D. 441, 450, 122 N. W. 1101; Talbot v. Boyd, 11 N. D. 81, 85, 88 N. W. 1026. Such rule of damages was properly applied in this case in measuring the profits that the plaintiff would

have received, for the reason that the evidence offered to establish the same was neither uncertain nor speculative. 17 C. J. 788.

We have examined other specifications and contentions made by the defendant, and we determine them to be without merit.

The judgment of the trial court, accordingly, should be reduced so as to read $945.25 instead of $1,542.25. It is so ordered. The appellant will recover costs of this court upon this appeal.

GRACE, J. I concur in the result arrived at by the court in the majority opinion in the above-entitled case.

ROBINSON, J. This is an appeal from a judgment on directed verdict for $1,542.25. The complaint is based on a written contract dated February 27, 1918. The plaintiff agrees to sell typewriting machines for defendant. He agrees to purchase twelve machines a month and defendant agrees to furnish the same from time to time as ordered at a discount of 50 per cent from the list price, payable in cash with the order or C. O. D. The complaint avers that the average profit to plaintiff on each machine was $54.50, which is manifestly untrue. It avers that defendant refused to ship plaintiff twelve machines a month to his damage $1,674.26. The contract was terminated by notice of cancelation on July 31st, to become effective August 31st. During the life of the contract defendant was bound to fill cash or C. O. D. orders for twelve machines a month. The total of all orders was ninety and they were given without cash. They were given on uncertified checks, which are commonly a poor substitute for cash. On such orders defendant shipped fifty-three machines and failed in the shipment of nineteen.

Now the measure of damages was thus: "The excess, if any, of the value of the property to the buyer over the contract price." Comp. Laws, § 7153. The complaint does not state facts or in any way show the damage. It does aver that the average profits upon said machines to the plaintiff was the sum of $54.50, and that by reason of the failure of defendant to comply with the contract the plaintiff suffered damages to the sum of $1,674.26, but that is manifestly untrue, and it does not show "the excess value of the property to the buyer over the contract price." The list price of each machine was from $105 to $117. The plaintiff was bound to sell each machine at half the list

price, to pay freight or express on it from Syracuse, New York, to keep it in repair when sold, and to incur the expense of making sales and the risk of collecting the money. The alleged damage assumes that the machines were sold without any risk or expense. That is manifestly preposterous. The seller of typewriting machines does well when he makes a clear profit of 50 per cent on his investment. Surely he does not make 100 per cent. If machines could be sold at list price, without any trouble, risk, or expense, then for making a sale there would be no occasion for paying half the list price. In directing a verdict the court was manifestly in gross error. Hence the judgment must be reversed and the case remanded for a new trial. It is true that in this case both parties moved for a directed verdict, but as the court did not take the case from the jury and decide it on findings of fact and conclusions of law, the appeal does not make it a court case and warrant this court in trying the case anew. And, in any event, the case must be remanded, because there has been a mistrial. Neither the complaint nor the evidence bears on the proper measure of damages.

MARY FORD, Respondent, v. CHARLES J. FORD, Appellant.

(173 N. W. 454.)

Divorce — desertion — property settlement between parties.

This is an appeal from a decree of divorce. It presents only a question of fact on which the judgment of the court is clearly right.

Opinion filed May 23, 1919. Petition for rehearing denied June 7, 1919.

Appeal from the District Court of Stutsman County, Honorable *J. A. Coffey,* Judge.

Affirmed.

Geo. W. Thorp and *Russell D. Chase,* for appellant.

"From all these facts, we conclude that, while defendant charged marital infidelity against plaintiff that did not exist, and while such charges tended to destroy the domestic happiness of these parties, and may have caused plaintiff mental suffering, yet facts and circumstances

for which plaintiff was, to a large extent, directly responsible so far justified the defendant in making such charges that it does not now lie in plaintiff's mouth to accuse her of extreme cruelty for so doing." McAllister v. McAllister, 7 N. D. 324; Mosher v. Mosher, 16 N. D. 269; 14 Cyc. 607; Thompson v. Thompson, 32 N. D. 530.

The acts and interference of relatives do not constitute cruelty on the part of the defendant, nor can such be distorted into grounds for divorce. Gray v. Gray, 31 N. D. 618.

The cruelty contemplated by the law must operate upon the husband or wife while living in the relation of husband and wife. She had already destroyed the legitimate ends of her marriage by her desertion and persistent association with Danekas. Beach v. Beach (Okla.) 46 Pac. 514; Mahnken v. Mahnken, 9 N. D. 188.

Knauf & Knauf, for respondent.

Carpenter v. Carpenter, 30 Kan. 712, 2 Pac. 122; Gibbs v. Gibbs, 18 Kan. 419; Bennett v. Bennett, 24 Mich. 151; Whetmore v. Whetmore, 49 Mich. 417; Caruthers v. Caruthers, 13 Iowa, 266; Wheeler v. Wheeler, 53 Iowa, 511; Smith v. Smith, 6 Or. 100; Kennedy v. Kennedy, 73 N. Y. 369; Latham v. Latham, 30 Gratt. 307; Cook v. Cook, 11 N. J. L. 195; Beyer v. Beyer, 50 Wis. 254; May v. May, 62 Pa. 206; Beebe v. Beebe, 10 Iowa, 133; Mahnken v. Mahnken, 9 N. D. 189; Palmer v. Palmer, 7 N. W. 760; Andrews v. Andrews, 52 Pac. 298; Reichard v. Reichard, 83 N. W. 1008; Wagner v. Wagner, 30 N. W. 766; Berdolt v. Berdolt, 77 N. W. 399; Comp. Laws 1913, § 4382.

Robinson, J. This is a suit for the dissolution of a matrimonial partnership. Each party does charge that the other has been guilty of love's treason; each party demands that the partnership be dissolved. There is no demand for the care and custody of children, because there are none. There is no serious contest over property, because the parties have been good enough to make a settlement which the court has adjudged to be just and equitable. He has duly conveyed and transferred to her a share of the property, and the conveyance was made for a good and valuable consideration, because she in writing agreed to accept it in lieu of alimony and all claims against the defendant, and there is nothing in the pleadings nor in the evidence to impeach the

conveyance. And because of the amicable property settlement the decree of divorce was given without costs to either party. Defendant was not required to pay alimony, attorneys' fees, or costs. And the divorce inures to the freedom and benefit of the one as much as to the other. Surely neither party has any just cause of complaint. Seldom does an appeal to the courts terminate so happily. Indeed it is hard to discover the purpose of the appeal to this court, unless it be to secure an affirmance of the judgment.

While there is no occasion for reviewing the facts or the evidence, as a matter of form it may be said: In the springtime of life, when she was twenty-two and he a few years older, the parties met, and it was love at first sight. They quickly formed a matrimonial union and yoked themselves together, and to improve their fortunes each worked hard late and early. He took her with him into the fields, and day after day she did the work of a man. She was to him a partner, a wife, and a hired man. But the strain was too much for her. After five or six years she broke down and had to quit the field work. Then he rented the farm—three quarter sections—to her cousin and to one Meyers, who had a young and vivacious wife in whose company the plaintiff took delight, but defendant became jealous and charged that she delighted in the company of a cousin. When defendant rented the farm he took his good wife to live in two little rooms which he constructed as an addition to the house of her father. It seems his wish was for her to remain like a good domestic animal in a stall, and not to go out without his kind permission. She did not obey. He just put up his fist, as he says, to stop her from going out of the door, and she fell against it and hurt herself; but she and the other witnesses say that he struck her a hard blow and knocked her down and severely injured her,—and such was the finding of the trial court. That was on June 7, 1917. Then she commenced this action, and in two days the parties met and made a settlement of their property affairs. He served an answer denying the cruelty, and about six months afterwards—a few days before the trial—he served an answer charging that in July, 1917, the plaintiff committed adultery with her cousin, and demanding a reconveyance of the property. On the trial he said that one morning in July, at 5 A. M., he walked into an open door and saw the fair lady and her cousin sleeping on the same bed, and that he

silently stole away and never made mention of it to any person until the time of amending the answer. But, as it appears, the story is as untrue as it was ridiculous. Indeed it seems the defendant did not perceive that he was under any legal or moral obligations to speak the truth.

The judgment is clearly right and it is affirmed.

GRACE, J. I concur in the result.

ALBERT ROSTEN, Martin Borstad, and Adam Piper, Appellants, v. BOARD OF EDUCATION of Village of Wild Rose and O. B. Lia, Clerk of the School Board, Respondents.

(173 N. W. 461.)

Schools and school districts — annexation of territory for school purposes — petition — notice — withdrawal of names from petition — section 1240, Compiled Laws 1913, construed.

1. The special school district of Wild Rose sought to annex certain territory for school purposes. A petition signed by a majority of the voters of the territory to be annexed was presented and filed with the board of education of such special school district. The board of education gave notice of the time and place of hearing of such petition; between the time of filing the petition and the date of hearing, sufficient number of signers of the petition had in writing withdrawn their names from the petition and filed such withdrawals with the clerk of the school district prior to the time of the hearing, so that the number of names remaining on the petition in favor of the same, if the withdrawal of names was legal, would leave the petition with less than a majority of the signatures of the qualified voters of the territory sought to be annexed; *held* that such petitioners had the right to withdraw their names from the petition at any time before the board of education legally made an order annexing the territory; *held*, construing under § 1240 of the Compiled Laws of 1913, that the petitioners had a legal right to withdraw their names from the petition at any time prior to the time of the making of a legal order by the board of education annexing such territory.

Schools and school districts — annexation of territory — notice to voters — section 1240, Compiled Laws 1913, construed.

2. Section 1240 of the Compiled Laws of 1913 is an amendment of § 949 of the Revised Codes of 1905. Under § 949, the board of education could make

the annexation after a proper petition was filed without giving any notice to the petitioners or voters in the territory to be annexed. Section 1240 requires the giving of fourteen days' notice of hearing before the board of education can make an order annexing the territory, and then the order cannot be made until five days after day of hearing on the petition.

Opinion filed May 19, 1919. Rehearing denied June 13, 1919.

Appeal from the District Court of Williams County, North Dakota, Honorable *Frank E. Fisk,* Judge.

Reversed.

Greene & Stenerson and *H. B. Wingerd,* for appellants.

Either one of these plaintiffs could maintain the action alone, he having the qualifications of voter and being a freeholder and taxpayer residing within the territory sought to be annexed. Comp. Laws 1913, §§ 7403, 7406.

"Each petitioner acts on his individual responsibility, and if he should change his mind on the question whether a new township would better serve the convenience of the inhabitants therein residing, or if he should be induced to sign it under a misapprehension, or through undue influence, he ought to have the right to correct his mistake." Littell v. Vermillion County, 198 Ill. 205, 65 N. E. 78; State ex rel. Morgan v. Co. Commissioners (Neb.) 4 N. W. 373; Slingerland v. Norton (Minn.) 61 N. W. 323; Dunham v. Fox, 100 Iowa, 131, 69 N. W. 436; La Londe v. Board (Wis.) 49 N. W. 960; Slingerhead v. Norton (Minn.) 73 N. W. 631; Black v. Campbell, 112 Ind. 122, 13 N. E. 409; State v. Boyden, 15 Ann. Cas. 1122, and extended note, 21 S. D. 6.

Fisk & Murphy, for respondents.

A private individual or single taxpayer may sue as an individual, in cases of this sort, only when he suffers some special damage distinct from that of the balance of the community. 30 Cyc. 113, 114; Wood v. Bangs, 1 Dak. 179, 46 N. W. 586.

So far as affecting the jurisdiction which had already attached was concerned, the protests and remonstrances were of no effect. They were proper to be taken into consideration by the board in passing upon the merits of the petition, but they were not available for any other purpose. It must be remembered that jurisdiction does not attach as of

the day when the board *acted,* but as of the day when the legal petition was filed. Sim v. Roscholt, 11 L.R.A.(N.S.) 372; Territory v. Veal, 35 L.R.A.(N.S.) 1113; State v. Boyden (S. D.) 15 Ann. Cas. 1122.

GRACE, J. Appeal from the district court of Williams county, Frank E. Fisk, Judge.

This is an injunctional action to restrain the defendant school board from exercising jurisdiction or authority over certain territory which the defendant sought to annex to the Wild Rose special school district, and from levying taxes, issuing bonds, or doing any other act in furtherance of such alleged annexation, and to finally determine whether or not the order of annexation was valid.

The material facts in the case are as follows:

On March 22, 1917, a petition was filed with the board asking that certain descriptions of land mentioned in the petition and located in Divide county, but adjacent to the Wild Rose special school district, be annexed to this special school district. The petition contains the names of twelve men and three women. Some of the petitioners were not qualified to sign the petition. At the trial the names of those not so qualified were stricken from the petition. After striking off such names, the number of names of qualified petitioners remaining on the petition constituted a majority of the voters of the adjacent territory sought to be annexed, unless prior to the time of making the order annexing such territory they had legally withdrawn their names therefrom in sufficient number as to leave the board without power or authority to make such order.

On the 23d day of March, the board met for the purpose of considering the petition, and at that time made an order to the effect that it was for the best interest of the school and of those in the territory to be attached that the petition be granted, and entered an order that from that date such territory was annexed to the special school district for school purposes. The board, however, took this action without giving the fourteen days' notice as required by § 1240 of the Compiled Laws of 1913.

On April 24th, the board by resolution rescinded the order of annexation of March 23d, and after such resolution had passed and on the same day they passed another resolution requiring the clerk of the

school board to give the required notice above referred to, and appointed a meeting for May 14th to consider the petition for annexation.

On the last-mentioned date a meeting was held at which many people were present, and practically all of the signers of the original petition for annexation withdrew their names from the petition. Most of the withdrawals, however, had been filed with the clerk on May 2d. Notwithstanding such withdrawals and the presenting of remonstrances against the granting of such petition, the board, subsequent to the 14th day of May, made an order annexing the territory in question to the special school district.

The question presented in this case is: After the acceptance and determination of the sufficiency of the petition as it existed on the 23d day of March, 1917, may the petitioners or any of them legally withdraw their names from the petition prior to and including the day fixed for consideration of the petition? Did the board of education lose jurisdiction, or more properly power or authority, to make an order annexing the territory where those who had previously signed the petition, thereafter and before the expiration of the fourteen-day notice, withdrew their names from the petition in such number as to leave thereon less than a majority of the legal voters in the territory sought to be annexed?

The law which determines this matter is that relative to special school districts at the time the controversy arose. We think the counsel for both parties have overlooked the law which is really applicable to the case. Section 1240 of the Compiled Laws of 1913 is an amendment of § 949 of the Revised Codes of 1905, the amendment having been made by § 133, chap. 266, of the 1911 Session Laws.

Section 949 in part reads as follows: "When any city, town or village has been organized for school purposes and provided with a board of education under any general law or a special act, or under the provisions of this article, territory, outside the limits thereof but adjacent thereto, may be attached to such city, town or village for school purposes by the board of education thereof, upon application in writing signed by a majority of the voters of such adjacent territory."

The remainder of § 949 of the Revised Codes is substantially retained in § 1240 of the Compiled Laws of 1913, with the exception that there is no provision in § 949 for any notice of any kind or char-

acter to be given prior to the time the order of annexation is made by the board of education.

In § 1240, Compiled Laws of 1913, which is part of chap. 266 of 1911 Session Laws, there is provision made for the giving of notice of the time when a hearing shall be had before the board with reference to the annexation of the territory sought to be annexed. It is in this respect that § 1240 of the Compiled Laws of 1913 amends § 945 of the Revised Code of 1905. The provision in § 1240 with reference to such notice is as follows: "Provided, further, that in all cases fourteen days' notice of a hearing before the board shall be given, by publication in the nearest newspaper and posted notices in conspicuous places, three in the special district, three in the territory sought to be annexed, and three in the district remaining from which the territory shall be taken. And such territory shall not become a part of the special district until five days after such hearing, upon order of the board as hereinbefore provided."

At the time of the decision of the case of Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 393, 127 N. W. 499, § 949 was in full force and effect, and was in that case construed, and it contained no provision for notice to be given of any hearing on the petition for annexation. At that time, when a petition for annexation of territory to a special school district was presented to the board of education, or when any city, town, or village has been organized for school purposes and provided with the board of education, and sought to annex adjacent territory, the board of education could act upon the petition as soon as presented and immediately make or refuse to make the order of annexation. It was not then required by law to give notice of a hearing upon the petition at which objections might be heard against the granting of the petition or the annexation of the territory sought to be annexed. It is entirely different under § 1240; there fourteen days' notice of a hearing must be given in the time and manner above stated in the provision relative thereto. It will be noticed that the law has by great particularity provided in what manner such notice shall be given. It is further to be noted that the territory cannot be annexed until the expiration of five days after the hearing. What, then, is the purpose of the hearing?

Respondent contends that as soon as the petition is filed, the school

board has jurisdiction of the matter, and that on the 23d day of March, 1913, it had passed upon and determined the sufficiency of the petition. This contention of the respondent amounts to this,—that after the petition is received and filed and its sufficiency passed upon by the board of education, that thereafter it would make no difference what remonstrance or objections were made by any of the petitioners or withdrawal of names therefrom, it could in no way affect the right of the board or its jurisdiction to make an order annexing the territory, and in effect respondents contend that the board of education could make its order annexing the territory at any time after the filing of the petition.

All of this reasoning would be fairly sound under § 949 of the Revised Codes. We do not believe, however, it is sound since § 949 has been amended in the respect we have heretofore stated. We are of the opinion that § 949 was amended in the manner we have stated to prevent the recurrence of similar abuses and hardships as had prevailed and arisen thereunder, and to afford the voters in the territory sought to be annexed an opportunity to take proper steps to prevent the annexation.

Unless this is true, there would be no merit in the amendment. The fourteen-day period was for the purpose of affording time in which to make objection of such nature and character to the granting of the petition as would go to the sufficiency of the petition. As we view the matter, upon the day when the order is made annexing the territory, the petition, from and after the expiration of fourteen days' notice, would have to be sufficient in order to support the order, that is, there would have to be upon it at the time of making the order the signature of a majority of the voters in the territory to be annexed who had not at that time in some manner withdrawn their names therefrom.

It seems to us it was the intention of the legislature in amending § 949, to provide a means whereby those who signed a petition to annex territory to a special school district might reconsider their act in signing the petition and withdraw their names therefrom at any time within the fourteen-day period; that it was further the intention of the legislature that there should be a sufficient petition at the time of the making of the order annexing the territory; that if there was not a sufficient petition at such time, then the board of education would not have authority to make the order annexing the territory. Unless this

be true, the amendment would be of little effect; for if the board of education has the power at any time after a petition is filed with it, to make the order annexing territory without regard to any remonstrance against the making of the order, and regardless of the fact that sufficient names have been withdrawn from the petition by proper notice filed with the clerk so that the number of names legally remaining on the petition is less than a majority of all the legal voters in the territory affected, then certainly the amendment is of little or no force and effect.

The amendment, we are certain, was for the purpose of correcting abuses which had arisen under § 949. Section 1240 of the Compiled Laws of 1913 is a law which applies directly to this case. The respondents claim that the principle of law stated in Sim v. Rosholt, 16 N. D. 77, 11 L.R.A.(N.S.) 372, 112 N. W. 50, is applicable to the case at bar. With this we do not agree. In that case it was held that jurisdiction of the board of drain commissioners to order a drain is acquired by the filing with the board a petition as required under § 1821, Revised Codes of 1905, Comp. Laws 1913, § 2464; that after such jurisdiction is thus acquired and the board has taken action thereunder, it cannot be devested of such jurisdiction by the action of the petitioners withdrawing their names from the petition. An examination of § 1821 of the Revised Codes of 1905 discloses that the power of the drain commissioners under a petition for a drain filed with them is very similar to those of the board of education with which a petition for annexing territory was filed, under § 949 of the Revised Codes of 1905. Under § 1821, all persons whose lands were affected by the drain might appear before the board of drain commissioners and express their opinion upon the matters pertaining thereto. There is no provision, however, in that section prohibiting the drain commissioners from making the order establishing the drain until after a hearing is had thereon; nor were those affected by the drain entitled to be heard before the making of the order establishing the drain. The law with reference to drains provides in § 1825, Comp. Laws 1913, § 2468, that an assessment made is subject to review and that ten days' notice shall be given of the time and place when and where such assessment will be reviewed by the board of drain commissioners.

It is not difficult to discern the similarity between the powers of the

drain commissioners under the law to which we have referred under § 1821, etc., of the Revised Codes of 1905, and those of the board of education under § 949. If § 949 had not been amended, the reasoning of the Sim v. Rosholt case would have considerable force.

Under § 1821 of the Drain Law, the drain commissioners not only could perform the ministerial act of receiving and filing a petition for the drain, but immediately upon the filing thereof could quasi judicially determine its sufficiency, and the same reasoning applies to § 949. It might be well at this point to distinguish powers which are ministerial and those which are quasi judicial in their nature, as possessed by boards such as drain commissioners, boards of education, etc. A more appropriate case than this rarely arises, for the purpose of distinguishing between such ministerial acts and the exercise of such quasi judicial functions. The act of the board of education in this case in filing a petition for the annexation of the territory in question, and their further act in giving fourteen days' notice of the time and place such petition would be heard, were purely ministerial acts and which are to be performed in the manner directed by the statute relative thereto. In fact, their every act to be performed in the annexation of the territory, from the inception of the petition to the point where the order of annexation is made, is in effect by statute a ministerial act,—the board of education does not act quasi judicially until it proceeds to make the order annexing the territory; that act is of a quasi judicial nature. The right, authority, and power to make such order of annexation does not accrue until after the expiration of the fourteen days' notice of the time and place of hearing such petition.

If, after the expiration of the fourteen days' notice, the petition is legally sufficient at the time the order is made, the board has power and authority to make the same. If, however, the petitioners have the right to withdraw their names from the petition at any time prior to and upon the day of hearing, and in the light of § 1240 we hold they have, and a sufficient number does withdraw their names from the petition within the time stated, so that the remaining names on the petition which desire the annexation of the territory are less than a majority of all the voters in the territory to be annexed, then such board has no right, authority, or power to make such order.

Under § 949 of the Revised Codes of 1905, it is scarcely to be doubt-

ed that the powers therein conferred upon boards of education were used or exercised in an arbitrary manner. It is common knowledge that it is never very difficult to get a petition such as the one in this case signed. Petitions of any character for a lawful purpose are generally very readily signed, and it was thus with petitions circulated under the authority of § 949. Many of the signers of a petition under § 949, it may be assumed, did not realize that by so signing they had placed themselves where they could make no further objection so far as the board of education was concerned, and it may be assumed that many of them did not realize they were conferring an absolute authority upon the board to at once make an order immediately annexing such territory, and we must assume that it was from the hardships, dissatisfaction, and complaint which arose as a result of proceeding had under § 949, that caused that section to be amended as set forth in § 1240 of Compiled Laws of 1913.

This conclusion seems almost irresistible, and we believe it is correct. We hold, therefore, for the foregoing reasons, that the board of education of Wild Rose had no power or authority to annex the territory in question at the time it made its order annexing the same. We hold that those who withdrew their names from the petition had a right to do so at any time prior to and including the day of hearing of the petition; that after the withdrawal of such names, the petition is insufficient under § 1240, it containing less than a majority of the voters in the territory sought to be annexed, and the board of education for that reason was without power or authority to make the order of annexation.

The judgment appealed from is reversed and the board of education of Wild Rose, the defendants in this action, are permanently enjoined from exercising or assuming to exercise any authority or jurisdiction over the territory in question which is sought to be annexed to the special school district of Wild Rose. The appellants are entitled to statutory costs on appeal.

CHRISTIANSON, Ch. J. (concurring specially). There are many decisions dealing with the right of one who has signed a petition initiating a proceeding for a public purpose to withdraw his name from such petition. None of the cases deny the right of a petitioner to withdraw

his name while the petition is still in circulation and before it has been filed or presented to the person or body to whom it is addressed. Nor do any of the cases recognize the right to withdraw from the petition after it has been finally acted upon and the prayer thereof granted. Note in 11 L.R.A.(N.S.) 372. In a number of jurisdictions it is the rule that one who has signed a petition may withdraw his name therefrom at any time before final action has been taken by the board or officer empowered to determine the matter which the petition asks to have determined. Note in 15 Ann. Cas. 1125. In other jurisdictions the right to withdraw from a petition is more limited, and is deemed terminated where the officer or board to whom it is presented recognizes the validity of the petition and takes some action thereon looking toward the final disposition of the proceeding initiated by the petition. Notes 11 L.R.A.(N.S.) 376 and 15 Ann. Cas. 1126. The latter rule was recognized by this court in Sim v. Rosholt, 16 N. D. 77, 11 L.R.A. (N.S.) 372, 112 N. W. 50, as applicable to a petition for a drain. I have had some difficulty in distinguishing the instant case from the rule announced in the Rosholt Case. But in view of the differences between the statutes, the nature of the two proceedings, and the character of the action taken by the board of drain commissioners in the Rosholt Case and the action taken by the board of education in the case at bar, I am not prepared to say that such action had been taken by the board of education upon the petition involved in this case as to prevent one who had signed the petition to withdraw his name therefrom.

BIRDZELL, J. (concurring specially). I concur in the conclusion reached in the opinion of the court as prepared by Mr. Justice Grace; but it is not clear to me that the distinction drawn in that opinion between § 949 of the Revised Code of 1905 and § 1240, Compiled Laws of 1913, the latter being an amendment of the former, providing for notice and a hearing, is sufficient to control the decision of the question involved. The question presented for decision is, as stated, the right of the petitioners to withdraw their names before the board of education has acted on the petition and attached the territory. In the case of Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 393, 127 N. W. 499, this question was not involved. But the remarks in that case concerning the function of determining the sufficiency of

the petition are, admittedly, somewhat pertinent. As I read § 949 of the Revised Code of 1905, the board of education was authorized, upon proper application being made, to make an order of annexation, and, as pointed out in the opinion by Mr. Justice Grace, no notice and no hearing was necessary. It would appear to me, therefore, that the board of education was required to take no step in recognition of the petition or toward achieving the end desired by petitioners until it should make the order. This being true, it would seem that, before anything is done under the petition, the petitioners should be free to withdraw their names. Under § 1240, Compiled Laws of 1913, however, the board must first determine the existence of a valid petition in order that it may give the statutory notice of a hearing thereon. Thus, there must be at least a preliminary determination of the sufficiency of the petition. So, under the amended statute, it seems to me that there is less, instead of greater, reason for allowing petitioners to withdraw before final action is taken than under the former statute.

But I am satisfied that under either statute a petitioner may withdraw before final action is taken; for in both the legislature has given to boards of education the power to annex adjacent territory only "upon application in writing signed by a majority of the voters of such adjacent territory." And if at any time before the order of annexation has been made, the application is altered by being converted into a protest, applicants by withdrawing their signatures would, in effect, withdraw their application. If the contention of the respondents is correct, it would make possible the annexation of territory upon the protest of the majority of the voters instead of upon their application, and thus the statute would not only be defeated, but reversed. One can hardly be said to be applying for certain action when he is in fact protesting against it.

There are no preliminary steps involving material items of expense in attaching adjacent territory to a school district as is the case with the organization of drainage districts. When a drainage petition is filed, jurisdiction is immediately conferred to do preliminary work of importance and involving expense; hence there is a clear ground for distinction between this case and the case of Sim v. Rosholt, 16 N. D. 77, 11 L.R.A.(N.S.) 372, 112 N. W. 50.

For the foregoing reasons I concur.

THOMAS SMITH, Respondent, v. J. H. BLOOM, E. H. Dummer, the Capital Printing Company, a Corporation, Dakota Printing & Stationery Company, a Corporation, and the Northwestern Press Association, a Corporation, Appellants.

(173 N. W. 171.)

Mortgages — foreclosure — by action — foreclosure of separate mortgages in same action.

1. In an action of foreclosure, two different mortgages, not executed by the same parties, may be foreclosed in the same action where they stand as security for the principal indebtedness upon which the action to foreclose is being maintained.

Mortgages — foreclosure by action — separate mortgages.

2. In an action upon a promissory note for which a certain anterior mortgage stood as security pursuant to an agreement, and for which a certain subsequent mortgage, together with a note signed by one of the parties to the principal note, likewise stood as additional and collateral security, the foreclosure of both mortgages may be had in the same action.

Specifications of error on appeal.

3. In such action, the other specifications of error made by the appellants have been examined and found to be without merit.

Opinion filed May 23, 1919. Rehearing denied June 13, 1919.

Action upon a promissory note and to foreclose certain mortgages.

From a judgment for the plaintiff, in District Court, Burleigh County, *Nuessle,* J., the defendants have appealed.

Affirmed.

Theodore Koffel, for appellants.

The demurrer should have been sustained on the ground that several causes of action were improperly united. Sleeper v. Baker, 22 N. D. 386, 39 L.R.A.(N.S.) 864, 134 N. W. 717; Tyner v. Stoopes, 11 Ind. 22, 71 Am. Dec. 341; Re Waddell-Entz Co. 67 Conn. 335; 35 Atl. 257; 10 Ky. L. Rep. 359; 6 Duer, 583; 3 Wyo. 803; First Nat. Bank v. D. S. B. Johnson Land & Mortg. Co. 97 N. W. 748.

That the averments must all be shown upon the face of the complaint without the aid or reference to any exhibits, and if the mortgage should be held insufficient upon demurrer. C. Aultman & Co. v. Siglinger,

50 N. W. 911; Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512; Scott & B. Mercantile Co. v. Nelson County, 14 N. D. 407, 104 N. W. 528; Eby v. Ryan, 35 N. W. 225; Andrews v. Wynn, 54 N. W. 1047.

Defendants' motion that plaintiff's complaint be made more definite and certain as to the amount claimed or the amount in controversy, and the nature and extent of the relief prayed for, should have been granted. McCrary v. Lake City Electric Co. 117 N. W. 964; Batterson v. Chicago & G. T. R. Co. 13 N. W. 508; Logan v. Freeks, 14 N. D. 127, 103 N. W. 426; Weber v. Lewis, 126 N. W. 105.

The defendants' motion that plaintiff be required to set out his various causes of action, if any, separately, should have been granted. Ives v. Williams, 19 N. W. 562; Dumell v. Terstegge, 85 Am. Dec. 466.

Every deposition intended to be read in evidence on the trial must be filed at least one day before the trial. Comp. Laws 1913, § 7905; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Hunnstel v. State, 86 Ind. 431; Ueland v. Dealy, 11 N. D. 530, 89 N. W. 325.

It is not sufficient for a party to mark a paper an exhibit and offer it without proving its execution and delivery, and also that it is the same paper that is set out in his cause of action. Stoddard v. Lyon, 99 N. W. 1116.

The defendants' motion for judgment of dismissal should be granted because of the state of the record. Ibid.

There is no testimony in the record, that the lien or claim of the Dakota Printing & Stationery Company, if they had any, is inferior to that of the plaintiff, not even by inference, and this omission is fatal. Force v. Peterson Mach. Co. 7 N. D. 220, 116 N. W. 84; Rust-Owen Lumber Co. v. Fitch, 52 N. W. 879.

W. L. Smith and *F. E. McCurdy,* for respondent.

Counsel are required to discuss errors assigned or points raised, or they will not be considered. Silt v. Hawkeye Ins. Co. 71 Iowa, 710, 29 N. W. 605; Neimeyer v. Weyerhauser, 95 Iowa, 497, 64 N. W. 416; McCormick Harvesting Mach. Co. v. McCormick, 128 Iowa, 155, 103 N. W. 204.

The defendants are in the position of one taking a conveyance of property subject to a mortgage or other lien. That a grantee in such a conveyance is precluded from questioning its existence is well settled.

Jones, Chat. Mortg. 4th ed. § 494; Dwight v. Scranton Lumber Co. (Mich.) 36 N. W. 752; Jones, Mortg. 3d ed. § 1491; Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003. See also Jones on Liens, 2d ed. vol. 1, § 89.

A debtor's additional promise to pay cannot, from the very nature of the case, be treated as collateral security for the debt, unless such additional promises are themselves secured by a lien on property or by obligations of third parties. People v. Remington, 54 Hun, 488, 121 N. Y. 675; Third Nat. Bank v. Eastern R. Co. 122 Mass. 240, 124 Mass. 518.

BRONSON, J. This action was instituted in the district court of Burleigh county to recover on promissory notes and to foreclose certain mortgages on linotype machines. From a judgment of foreclosure, the appellants Bloom and Dummer and the Dakota Printing & Stationery Company have appealed and demand a trial *de novo*.

Upon the trial, the appellants offered no evidence, electing to stand upon the record made by the respondent, and upon their motions and objections made.

The material facts, substantially, are as follows:

The Times Publishing Company was indebted to the plaintiff upon certain notes amounting to $3,338.68, secured by mortgages upon its printing plant, including a No. 1 linotype machine involved herein. On July 15, 1913, such company sold its printing plant to the appellants Bloom and Dummer for $4,500.

As a part of the purchase price, Bloom and Dummer made to the plaintiff their promissory notes, aggregating $3,338.68, representing the mortgage indebtedness, with the understanding had with the plaintiff that the mortgages then held by him should stand as security for the payment of such notes and indebtedness. The notes were payable in instalments, *viz.*, $1,632.68 due in sixty days; $700, in one year; $1,000, in two years; interest 7 per cent. At the same time, the plaintiff purchased a note for $167.52 made by Bloom and Dummer, and by them given as a part of such purchase price. Later, on January 15, 1914, the indebtedness, then due and owing by Bloom and Dummer, not having been paid, Mr. Bloom, one of the appellants, gave his note to the plaintiff representing such indebtedness for the sum of $1,833.50

as an extension note, and as additional security for the same made a chattel mortgage upon one No. 5 linotype machine.

Prior to April 13, 1915, said Bloom and Dummer made no payment on such indebtedness excepting $50, which was indorsed on the note given by Bloom alone. On that date Bloom and Dummer sold the property mortgaged. Then it was agreed that upon the payment of $2,500 to the plaintiff he would release all of the personal property, so mortgaged, excepting alone the No. 1 Mergenthaler linotype machine, and mortgage given by Bloom. That, further, such payment should be applied first to the notes other than the $1,632.68 note (which was represented in the extension note given by Bloom for $1,833.50). The payment of $2,500 was made, and upon application to the notes, it paid all of the same excepting the $1,632.68 note, upon which it paid the interest and $212.37 on the principal thereof, leaving a balance of $1,420.41 owing on April 15, 1916. It was also further agreed that if the additional sum of $500 should be paid, the plaintiff would release the mortgage upon said No. 1 linotype machine. No further payments were made. The Dakota Printing & Stationery Company, one of the appellants herein, claims to be the owner of said No. 1 Mergenthaler machine. Accordingly, the plaintiff in the months of May and June, 1916, instituted this action. The appellants interposed a demurrer that several causes of action were improperly united and that the complaint did not state a cause of action. The demurrer was overruled, the complaint amended, and answer interposed by the appellants, and the case proceeded to trial on October 23, 1917. The trial court ordered judgment for the plaintiff in the sum of $1,671.70, interest included, and for the foreclosure of the surviving unsatisfied mortgages mentioned, to satisfy such amount, with expenses and costs of sale. Pursuant thereto judgment was entered on October 31, 1917. The facts as stated are, substantially, the facts as found by the trial court. The appellants, by their specifications, have challenged these findings of fact as unwarranted upon the record. We have examined such record and find such findings of fact justified upon the evidence. In fact, the appellants make no serious contention with regard to the same in their brief submitted, the case having been submitted to this court upon briefs.

The appellants complain that several causes of action have been im-

properly united in the complaint, and that the trial court erred in disregarding their demurrer and motions made in regard thereto. Thus, they assert, the complaint shows a cause of action, if any, against Bloom and Dummer for the foreclosure of one mortgage, and another cause of action, if any, against Bloom alone for the foreclosure of another mortgage. This contention is without merit. The action seeks to recover an indebtedness on the note of the appellants Bloom and Dummer for which two different mortgages stand as security. The separate note and mortgage given by Bloom is not a separate and independent indebtedness. They constitute collateral and additional security to the principal indebtedness. No reason is shown in the pleadings or in the record why the mortgages involved should be separately foreclosed. It was quite proper to foreclose these mortgages securing the same indebtedness in the same action, although not made by the same parties. Jones, Mortg. 7th ed. §§ 1391, 1225b, 1228a; McGowan v. Branch Bank, 7 Ala. 823, 828.

The contentions of the appellants with reference to the error of the trial court in holding the complaint to state a cause of action, in refusing to require the plaintiff to make more definite the complaint, and in refusing to suppress a deposition, and with reference to improper evidence admitted, have been examined in the record and found to be without merit.

The judgment of the trial court, accordingly, is affirmed, with costs to the respondent.

H. E. JOHNSON, Appellant, v. OSCAR ROSENQUIST, Respondent.

(175 N. W. 215.)

Mortgages — effect of obtaining mortgage under duress — evidence of duress in execution of mortgage.

The defendant was sued for $15,000 damages for seduction. He was a single man. He offered to marry the girl and did do so. Prior to the time of the marriage he gave a note to the attorneys who brought the action for $2,500, secured by a mortgage on certain land. The note and mortgage were for attorneys' fees. For the reasons stated in the opinion the note and mortgage

are *held* to be without consideration and to have been procured by duress. The trial court found that the note and mortgage were procured by duress, and his judgment is right and is affirmed.

Opinion filed June 28, 1919. Rehearing denied October 31, 1919.

Appeal from judgment of the District Court of Divide County, *Leighton*, J.

Affirmed.

Greene & Stenerson, for appellant.

"A female upon whom rape is committed may maintain an action to recover damages for the injury sustained." 33 Cyc. 1521; Hough v. Iderhoff, 69 Or. 568, 139 Pac. 931, Ann. Cas. 1918A, 247; Watson v. Taylor, 35 Okla. 768, 133 Pac. 922.

Geo. P. Homnes, for respondent.

"Written securities extorted by means of threats of prosecution for criminal offenses of which the party threatened was guilty in fact, but which were in no manner connected with the demand for which compensation was sought, may be avoided." 9 Cyc. 447; Thompson v. Niggley, 53 Kan. 664, 26 L.R.A. 803, 35 Pac. 290.

Courts of equity relieve a party when he does an act or makes a contract when he is under the influence of extreme terror, or apprehension short of duress; for in cases of this sort he has no free will, but stands *in vinculis*. 1 Story, Eq. Jur. § 239; Whelan v. Whelan, 3 Cow. 537; Sears v. Schafer, 1 Barb. 408, 6 N. Y. 272; Howell v. Ranson, 11 Paige, 538.

If one party acts under oppression, injustice, hardship, undue influence, or great inequality of age, or condition, although he may be *in delicto*, he is not *in pari delicto* and may have relief in equity. 1 Story, Eq. Jur. § 300; Phalen v. Clark, 19 Conn. 421; Pinckton v. Brown, 4 Jones, Eq. 494; Freelove v. Vole, 41 Barb. 318; Sanford v. Sornborger, 41 N. W. 1102.

GRACE, J. An appeal from the judgment of the district court of Divide county, Leighton, Judge.

This is an action to foreclose a certain real estate mortgage executed by the defendant to plaintiff, and which covers and describes in the complaint three quarter sections of land. The mortgage was given

to secure a certain $2,500 note. The answer is that the note and mortgage are without any consideration, and were procured by the plaintiff from defendant by duress. It appears that one Mayme Aulman in part of the years 1914 and 1915 was employed by the plaintiff as a domestic servant in his home. She was at that time under the age of eighteen years. The defendant was at that time an unmarried man about thirty-seven years of age. On or about the 29th day of October, 1915, Mayme Aulman, while a single woman and under the age of eighteen years, gave birth to a child of which the defendant is the father. The father of Mayme Aulman procured Johnson and Meilke, attorneys at law at Ryder, to bring an action against the defendant for damages. That action was commenced on or about the 16th day of November, 1915. It was for the sum of $15,000. In that action Mayme Aulman appeared as plaintiff by her guardian *ad litem,* Henry Aulman. It was commenced by the service of a summons and complaint which were drawn up by the plaintiff, or some employee of his firm. The complaint is very short and simple, being composed of barely two pages of double-spaced typewriting; the plaintiff's partner, Meilke, made one trip to Crosby and plaintiff made one trip to Minot. The plaintiff claims to have given some advice in the matter. The services of plaintiff, as disclosed by the record, including whatever service was rendered by Meilke, were of an exceedingly meager character. The plaintiff's partner, Meilke, went to Crosby in the month of November, 1915. While there he showed to Geo. P. Homnes, then county attorney of Divide county, the pleadings in the action brought against Johnson. There was at that time some conversation had between Meilke and Mr. Homnes relative to defendant's criminal liability, and Meilke asked Mr. Homnes at that time that if a complaint charging the defendant with rape were presented and filed if he would approve the issuance of a warrant. Mr. Homnes told him that if the facts were as stated he would be obliged to do so. Meilke then went out to see the defendant for the purpose of effecting a settlement of the action for damages. Mr. Homnes then told Meilke that if his (Meilke's) purpose in procuring a warrant was to use the state's attorney's office as a club that he (Homnes) did not favor the proposition. At the time Meilke went out to see the defendant he took with him the sheriff of Divide county, who served the summons and complaint in the damage action. The testi-

mony shows that on the 20th of November, 1915, Meilke went out from Crosby to see the defendant, that a conversation was had by the defendant and Meilke with reference to settlement of the damage case. Such conversation was had before the service of the papers by the sheriff. Defendant claims that Meilke told him that in case he did not make settlement that he would enforce the law, that he had a charge of seduction against the defendant, but that he would not enforce the law on a seduction charge providing defendant settled the matter at that time. At that time the defendant gave to Meilke a note for $1,000 as a guaranty that he would appear in Crosby the following day. The defendant did go to Crosby, and while there consulted the state's attorney, Mr. Homnes, and from him learned that he was subject to imprisonment. The defendant at that time settled by giving five notes aggregating $5,000. These notes were afterwards destroyed at the telephone office at Crosby, North Dakota. They were burned, it appears, for the reason that plaintiff herein did not wish to consent to such settlement. He claims that he had no authority to make the settlement, and that he would not, under the circumstances of the case, consent to the settlement, and told Meilke to come home on the next train. The defendant and Meilke both came to Ryder, and were at the plaintiff's office. At about this time Meilke and the defendant went to see Mayme Aulman at her home and to see her parents. The defendant wishing to make a proposal of marriage to her and to get Mayme Aulman's and her parents' consent to said marriage. The trip was made to the Aulman home and the consent to the marriage was obtained all around. There is some testimony to the effect that while at the Aulman home the defendant agreed to pay the attorneys' fees fixed at $2,500. Mayme Aulman and defendant and plaintiff herein went to Minot after the trip to the Aulman home, and the defendant and Mayme Aulman were there married. The defendant executed note and mortgage in question to the plaintiff while at Ryder, but the mortgage was not recorded. The defendant finally, after some negotiation, gave the plaintiff check for $2,500 on the Security Bank of Noonan, North Dakota. The check was dated November 24, 1915. At the time of giving the check the defendant procured the return of the $2,500 note and mortgage. Thereafter defendant stopped payment on said check. The present action was begun to have mortgage

in question declared a lien upon the land described therein, and to foreclose the same, and to sell the land to satisfy the note for $2,500, interest, costs, etc. The trial court has found as a fact that Johnson and Meilke induced the defendant by threats of prosecution for rape to settle said cause of action for $2,500, said amount representing attorneys' fees claimed by Johnson and Meilke for their services in bringing such action for and on behalf of Mayme Aulman, and that said amount was demanded by them as a consideration for withdrawing and discontinuing said action against the defendant; that the defendant gave the plaintiff, Johnson, a note for said $2,500, secured by the mortgage in question. After careful examination of the entire record it is clear there is abundant evidence to sustain the findings of fact of the court above referred to. That the mortgage and note in question were procured by duress there is not the least doubt, and for this reason the note and mortgage are each absolutely null and void and of no force or effect. It is also further quite evident that there is in fact no consideration for either the note or the mortgage. There is evidence, also, that prior to the time when summons and complaint were served upon the defendant he had in good faith offered to marry Mayme Aulman. He testified to various offers to marry her. He did marry her. Under our statute an offer in good faith by a single person to marry one whom he has seduced, or if in fact he does marry her, the prosecution for seduction is abated, and we think after such an offer of marriage or marriage there could be no action for damages.

The action for damages was thereby abated. We think that on the grounds of public policy such action, especially after the marriage, should be abated in such case. The wrong has, to a large degree, been righted. That is, the defendant has done that which he should do in order to right the wrong. If the defendant married Mayme Aulman it would seem that the action for damages was at an end. Taking all the facts as they exist into consideration, and the fact that defendant has married Mayme Aulman, and the further fact that plaintiff has done a very small amount of work in the bringing of said action, we are quite convinced that there is no consideration for the note and mortgage in question. At the least, there is insufficient consideration. We have carefully considered all the errors assigned and find nothing that would justify a reversal of the judgment appealed from. The judg-

ment appealed from is affirmed. The respondent is entitled to statutory costs on appeal.

BOVEY-SHUTE LUMBER COMPANY, a Corporation, Respondent, v. FARMERS & MERCHANTS BANK OF LEEDS, NORTH DAKOTA, a Corporation, Appellant.

(173 N. W. 455.)

Mortgages — redemption from foreclosure sale — redemption by lienholder not gift or voluntary payment.

1. When, for the manifest purpose of protecting his liens and titles, a party redeems from a foreclosure sale, there is no gift or voluntary payment.

Mortgages — redemption — right of party to adopt the most favorable remedy under the circumstances — wrongdoer estopped from questioning remedy adopted.

2. When a party unjustly contrives to put another in a dilemma, to put him, as it were, between the Devil and the deep sea, and he jumps one way, it is not for the wrongdoer to insist that he should have jumped another way.

Opinion filed March 18, 1919. Rehearing denied July 1, 1919.

Appeal from District Court of Benson County, Honorable *C. W. Buttz,* Judge.

Affirmed.

Sinness & Duffy and *Adrian E. Buttz,* for appellant.

"Notwithstanding the fact that the action of assumpsit is equitable in its nature, it lies only for money and only when the rights of the parties will be adequately conserved by the payment and receipt of money." 5 C. J. 1381.

Defendant in an action of assumpsit is entitled to a trial by jury. 5 C. J. 1410; Hanson v. Carlblom, 13 N. D. 361.

"He [the cashier] has no power, however, to make a representation respecting the solvency of a customer in response to an inquiry addressed to him by one considering the desirability of making a loan to such customer or of extending credit for goods sold [or] to guarantee on behalf of the bank the performance of a contract between third parties for the delivery of merchandise." 3 R. C. L. pp. 440, 446, citing:

Taylor v. Commercial Bank, 62 L.R.A. 783, 95 Am. St. Rep. 564; Hindman v. First Nat. Bank, 57 L.R.A. 108; Norton v. Derby Nat. Bank, 60 Am. Rep. 334; North Star Shoe Co. v. Stebbins, 2 S. D. 74, 48 N. W. 833; Comp. Laws 1913, § 5150.

"A banking corporation cannot lend its credit to another by becoming surety, indorser, or guarantor for him." 3 R. C. L. 420, 425; 7 C. J. 595; Merchants Bank v. Baird, 17 L.R.A.(N.S.) 526; Norton v. Derby Nat. Bank, 60 Am. Rep. 334; Appelton v. Citizens Bank, 32 L.R.A.(N.S.) 543.

A corporation created for the purpose of banking only has no authority to engage in a business not incidental to banking. Clark & M. Priv. Corp. p. 374.

It is *ultra vires* of a corporation to execute accommodation paper or to enter into contracts of guaranty or suretyship not in furtherance of its business, unless given express authority to do so. Famous Shoe Co. v. Eagle Iron Works, 51 Mo. App. 66; Best Brewing Co. v. Klassen, 76 Am. St. Rep. 26; Lucas v. White Line Transfer Co. 59 Am. Rep. 449.

"If the party against whom demand is made has full opportunity at the time to test the legality of the exaction he should do so, and not postpone the litigation by making payment and afterwards suing to recover it back." New Orleans, etc., R. Co. v. Louisiana, etc., Co. 94 Am. St. Rep. 395 and extensive note; Joannin v. Ogilbie, 49 Minn. 564, 16 L.R.A. 376, 32 Am. St. Rep. 581; Kilpatrick v. Germania, etc., Co. 2 L.R.A.(N.S.) 575, and note; Walser v. Board of Education, 31 L.R.A. 329; McArthur v. Luce, 38 Am. Rep. 204; Behring v. Somerville, 49 L.R.A. 578; Kimpton v. Studebaker Bros. Co. 125 Am. St. Rep. 185, 14 Ann. Cas. 1126. See also 2 R. C. L. 785.

R. A. Stuart and *Cuthbert & Smythe,* for respondent.

Good consideration defined. Any benefit conferred or agreed to be conferred upon the promisor by any other person to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer as an inducement to the promisor, is a good consideration for a promise. Comp. Laws 1913, § 5872.

Redemption under protest of property sold at an execution is not

a voluntary payment of the debt. Murphy v. Casselman, 24 N. D. 336; Fargo v. Cass County, 28 N. D. 209; Tyler v. Shea, 4 N. D. 381; Clark v. Ostranders, 13 Am. Dec. 546, and authorities cited in note; 2 R. C. L. §§ 38, 40, and 44, and the cases cited.

No payment is voluntary that is done in a legal proceeding, that if not done the rights of the party might be jeopardized. See 5 Cyc. 470.

In an action against a corporation on a note given by defendant for property, which was delivered to defendant, it will be estopped to set up the defense of *ultra vires*. Dewey v. Toledo R. Co. 51 N. W. 1063; Wisconsin Lumber Co. v. Greene (Iowa) 101 N. W. 742; Fidelity Ins. Co. v. German Sav. Bank (Iowa) 103 N. W. 958; Garrison v. Stanley (Iowa) 110 N. W. 171.

A bank, though not expressly organized to deal in real estate, or authorized by statute to do so, may acquire and hold land for the purpose of securing itself from loss in its authorized business. State Security Bank v. Hoskins, 106 N. W. 764; Hunt v. Hauser (Minn.) 103 N. W. 1032; Eastman v. Parkinson, 113 N. W. 649; Barber v. Stromberg (Neb.) 116 N. W. 157.

The board in this case would be conclusively presumed to know that Mr. Wood was conducting such transactions, under the evidence in this case and the authorities. First Nat. Bank v. Bakken, 17 N. D. 224; Iowa v. Source, 117 N. W. 301; Debzin v. Gould Balance Valve Co. (Iowa) 118 N. W. 40; Emerado v. Farmers Bank, 20 N. D. 270; Blackwood v. Lansing, 144 N. W. 823; Bank v. Garceau, 22 N. D. 576, 134 N. W. 882.

Where an officer of the bank does that which the directors had or ought to have had knowledge of, the corporation is estopped to deny the authority of its officer where it received the benefit. First Nat. Bank v. State Bank, 15 N. D. 594, 109 N. W. 61.

There is no ironclad rule which confines an involuntary payment to cases of duress of person or goods. Money compulsorily paid to prevent an injury to one's property rights comes within the same principle. Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, 2 L.R.A. (N.S.) 579; Buckley v. New York, 30 App. Div. 463, 52 N. Y. Supp. 454, 159 N. Y. 558, 54 N. E. 1089; Radich v. Hutchins, 95 U. S. 210, 213, 24 L. ed. 409, 410; Adams v. Irving Nat. Bank, 116 N. Y. 610, 6 L.R.A. 493, 15 Am. St. Rep. 477, 23 N. E. 8; Briggs v. Body,

56 N. Y. 289; Stenton v. Jerome, 54 N. Y. 480; Baldwin v. Liverpool & G. W. S. S. Co. 74 N. Y. 125, 30 Am. Rep. 277.

"If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion." Baldwin v. Liverpool & G. W. S. S. Co. supra; McPherson v. Cox, 86 N. Y. 572; Spaids v. Barrett, 57 Ill. 289; Hackley v. Headley, 45 Mich. 569; Harmoney v. Bingham, 12 N. Y. 117; Radich v. Hitchens, 95 U. S. 210, 24 L. ed. 409.

Where a party redeems property about to be conveyed by a tax deed, under protest, such payment cannot be regarded as voluntary. Hanaw v. Bailey (Mich.) 9 L.R.A. 801, 46 N. W. 1039; Martin v. W. J. Johnson Co. 128 N. Y. 605, 27 N. E. 1018; Harrington v. Plainview (Minn.) 6 N. W. 777; James v. Wilder, 25 Minn. 305; Peyser v. Mayer, 70 N. Y. 497; Bank v. Mayor, 43 N. Y. 184; Swift v. Poughkeepsie, 37 N. Y. 511.

"There must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other immediate means of relief than by advancing the money." Brumagin v. Tillinghast, 18 Cal. 265; Radich v. Hitchens, 95 U. S. 210, 24 L. ed. 409; 2 Dill. Mun. Corp. § 943; Garrison v. Tillinghast, 18 Cal. 404.

"Circumstances of extreme necessity or distress of a party, although not accompanied by any direct duress or restraint, may also overcome free agency, and justify the court in setting aside the contract on account of some attending oppression." Wheelan v. Whelan, 3 Cow. 537; Sears v. Shafer, 1 Barb. 408, 6 N. Y. 272; Howell v. Ranson, 11 Paige, 538; Wilis v. Messervie, 11 Paige, 467, 5 Denio, 640; Lomerson v. Johnston, 44 N. J. Eq. 103; Adams v. Irving Nat. Bank, 6 L.R.A. 493.

An action may be maintained to recover back money obtained by fraud and under circumstances which, in equity and conscience, require that it should be repaid. Krump v. First State Bank, 8 N. D. 75; Dickey County v. Hicks, 14 N. D. 73.

ROBINSON, J. In the summer of 1915, at Devils Lake, the plaintiff was a practical, hard-hearted, and hard-headed lumber and material dealer; and at Leeds, the defendant was a big-hearted banker. Mr. Wood was its cashier, general agent, and general manager. He was virtually the bank; and, sad to say, he has departed this life and has gone where the good bankers go, and that is the cause of this law suit. Fred Cropper was a good customer, a borrower, and a servant in the bank,—the borrower is the servant of the lender. Cropper had three quarter sections of land, on which the bank and others had mortgages amounting to over $12,000, and on his crops for the year 1915 the bank had a mortgage for $3,400. Poor Cropper, he had no house or granary, and for that reason he was not well prepared to crop the land for himself or the bank. To aid him and itself, and to secure its loan, the good bank request Bovey-Shute to take a mortgage on the land and then to furnish material and erect a house and granary for Cropper. Bovey-Shute refused to do it unless the bank would guarantee payment or agree to reduce the mortgage liens against the land to $8,900. It did agree to reduce the mortgage liens $3,400, the sum for which it held a chattel mortgage,—and up went the house and the granary. For material and construction Cropper made to the company a mortgage for $1,665 and interest.

Meantime there were foreclosures and redemptions, thus:

In December, 1916, the lumber company foreclosed for $1,213.85.

In January, 1917, Frank Spaulding foreclosed the first mortgage for $3,660.54.

On August 14, 1917, Bovey-Shute redeemed, paying $4,354.29.

Then, within three days, under a mortgage of March 1, 1915, the bank redeemed, paying $4,361.91.

Then, on August 24, 1917, Bovey-Shute redeemed from the bank, paying $6,309.77. By its redemption Bovey-Shute paid the bank on its mortgage $1,947.59. For that sum, with interest and costs, the trial court gave judgment against the bank, and did also adjudge that the mortgages against the land in excess of $8,900 should be subjected to the liens of the lumber company. The judgment was strictly in accordance with the agreement of the bank, as made by its deceased manager.

However, appellants claim that the agreement is *ultra vires*,—that

it was beyond the power and authority of the bankers, and that the redemption was a voluntary payment. On those points it is needless to cite authorities. The right of a bank to make loans on land and on crops does necessarily imply the right to improve the land and to care for the crops and to make the same available. A bank has the same right as a natural person to care for its property; it is not bound to incur the risk of losing a horse for the want of a nail or a shoe. When it takes a loan on land and on crops it must have a right to improve the land and to care for the crops. In this case the bank had a perfect right to bargain, as they did, for the construction of a house and granary. It was good business, and it should not have lead to any litigation.

In regard to the voluntary payment, nearly $2,000, we must not think it the purpose of Bovey-Shute to make the bank a present of anything. By its foreclosure and redemption from a first-mortgage foreclosure, the bank had put Bovey-Shute Company in a dilemma. The company had to redeem from the bank or to risk the loss of their mortgage and money amounting to over $4,000. Counsel for the bank insist that the proper remedy of the lumber company was to have brought an action to cancel the bank redemption, but the company were business men, and not prophets or clairvoyants and not able to forecast the minds of the judges. They did not want to risk a suit that might have dragged until after the period of redemption. When a party unjustly contrives to put another in a dilemma, to put him, as it were, between the Devil and the deep sea, and to subject him to necessity and distress, and he jumps one way, it is not for the wrongdoer to insist that he should have jumped the other way.

Judgment affirmed.

BRONSON and GRACE, JJ., concur in the result.

THOMAS E. HAGAN and Clara L. Hagan, Respondents, v. C. M. KNUDSON and J. H. Jensen, Copartners Doing Business as Western Building Company, Appellants.

(173 N. W. 794.)

Contracts — building contract — loss of rents from failure to complete building — damages.

For the partial failure to perform a building contract, resulting in some loss of rents, the damages must be proximate and reasonable.

Opinion filed May 23, 1919. Rehearing denied July 1, 1919.

Appeal from the District Court of Ward County, Honorable *K. E. Leighton,* Judge.

Modified.

Greene & Stenersen, for appellants.

"While a contract is executory, a party has the power to stop performance on the other side by an explicit direction to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that hour or stage in the execution of the contract. The party thus forbidden cannot afterwards go on and thereby increase the damages, and then recover such damages of other party." Hamilton v. Feary, 52 Am. St. Rep. 491; Dillon v. Anderson, 43 N. Y. 239; Gibbons v. Bente, 22 L.R.A. 85; Clark v. Marsiglia, 1 Denio, 317; Moline Scale Co. v. Beed, 52 Iowa, 307, 3 N. W. 96; Lord v. Thomas, 64 N. Y. 107; Sutherland, Damages, § 88, 2d and 3d ed.; 3 Elliott, Contr. § 2151; 8 R. C. L. p. 442, § 14; Eaton v. Gladwell, 121 Mich. 444, 80 N. W. 292.

The party who has suffered from a breach of a contract may elect whether he will hold the other party to the full performance of completion of the work and then recover for the damages because it is not in accordance with contract, or he may stop the work and recover for such damages as he can show. In the latter case the rule as shown by the authorities is that he must then be diligent to minimize the damage to the other party to the contract by doing all within his power to save himself from loss. Griffith v. Blackwater B. & L. Co. 55 W. Va. 604, 69 L.R.A. 156; Beymer v. McBride, 37 Iowa, 118; Mather v.

Butler Co. 28 Iowa, 259; Johnson v. Brown, 138 Tenn. 395, 198 S. W. 243, Ann. Cas. 1918C, 672; Hale v. Hess, 30 Neb. 42, 46 N. W. 261; Hamilton v. Feary, 8 Ind. App. 615, 52 Am. St. Rep. 491; Hendry v. Squier, 126 Ind. 19; Lexington v. Chanault, 151 Ky. 774, 44 L.R.A.(N.S.) 301, 152 S. W. 939; Kimball Bros. v. Gas & E. Co. (Iowa) 118 N. W. 896; Huntington & Co. v. Parsons (W. Va.) 9 L.R.A.(N.S.) 1132, 57 S. E. 253; Adair v. Bogle, 20 Iowa, 243; Simpson v. Keokuk, 34 Iowa, 568; Ludlow v. Yonkers, 43 Barb. 493; Worth v. Edmonds, 52 Barb. 40; Brant v. Gallup, 53 Am. Rep. 638.

McGee & Goss, for respondents.

ROBINSON, J. This is an appeal from a judgment against defendants for $3,175 damages for the failure to erect a building in accordance with a written agreement. There is no statement of the case and no evidence before the court. Hence the appeal must be decided on the judgment roll.

As it appears, on October 2, 1916, the parties made a written agreement for the construction of a store building on a lot in Minot, the same to be under the directions of Stacy Judd as architect, acting as agent for the owners. The plaintiffs agreed to pay for work and material $6,600, and defendants agreed to complete the building by December 1, 1916, the time to be extended in case of a general strike, alterations, fire, or unusual action of the elements. On December 12, 1916, there was made a supplementary contract reciting that the building was in course of construction, and could not be completed until the spring of 1917, and that as constructed the building shall and may be used by J. B. Reed as a tenant of the plaintiffs, commencing January 1, 1917. Then, in February, 1917, the plaintiffs served on defendants a written notice whereby they elected to rescind and cancel the building contract, and demanded that defendants desist from and discontinue any further work upon or the taking of any steps toward the completion of the building. Then, on February 9, 1917, the plaintiffs commenced this action to rescind the contract and to recover damages for nonperformance of the same. Then, on March 8, 1917, defendants commenced an action to recover the reasonable value of the services and materials furnished and used in the construction of the building. The

defendants had been paid $1,500, and in the last-mentioned action the court found the facts thus:

Value of completed building	$6,600
Expense to complete it	1,489
Total value of defendants' labor and material	$5,111
By cash payment	1,500
Balance due defendants for labor and material	$3,611

And it was by the court adjudged that defendants recover from the plaintiffs $3,611 with interest, as a balance due on the reasonable value of the labor and materials.

In this action the court found that plaintiffs, by reason of defendants' failure to do the work according to the plans and specifications, had sustained damages to the amount of $325, and that by reason of defendants' failure to complete the building on time the plaintiffs had lost the rent of the building at $150 a month from January 1, 1917, to August 1, 1918, amounting to $2,850, which, with the special damages, $325, made the total $3,175, for which judgment was given against the defendants. The court also found that with reasonable diligence the work of completing the building could have been done by June 1, 1917. The defendants contend that according to the facts found they were liable only for the rental of the building up to June 1st, five months at $150 a month, making $750, which, with the special damages, $325, makes the sum of $1,075 in lieu of $3,175. The plaintiffs contend that the defendants were not bound to observe the written notice to desist from completing the building, even though an action was commenced to cancel the contract and to recover damages for its nonperformance. They also contend that defendants did not regard the notice to desist, because that after its service they readjusted and rebuilt some walls that by mistake were placed 2 or 3 inches over onto land which the plaintiffs did not own. But such replacing was merely the correction of an error for which the plaintiffs and their architect may have been in part to blame. Doubtless they should have marked the boundaries of the lot. And the building was to be constructed under the direction of the architect. There is no evidence that defendants

intended to withhold the building or to continue the work contrary to the orders of the plaintiffs. The written notice and the action of each party shows conclusively that defendants did not withhold the building or attempt to complete it contrary to the plaintiffs' notice, and the plaintiffs never looked for nor expected the defendants to disregard the notice and to complete the building.

The appeal presents no question only in regard to the loss of rent. The plaintiffs adopted a dog in the manger policy. They refused to permit the defendants to complete the building, and they themselves made no attempt to complete it, while they attempted to charge the defendants a rental of $150 a month for nineteen months, when in less than ten months such a rental would have paid for the completion. There would be some force in the claim that the rent should be allowed for six months from December 1st to June 1st, were it not for the contract with Reed to occupy the building after January 1, 1917, and there is no showing that he did not pay some rent. And then it appears that $150 a month is more than the ordinary rental value of such a cheap building. It is 10 per cent a year on a building worth $18,000. One hundred dollars a month is a good rental for a $6,600 building, with a lot of corresponding value. There is no finding on the rental value of the building. The finding is that Reed contracted to pay $150 a month, but that does not fix the measure of damages. Reed may have contracted to pay a thousand a month. Certain it is that till June 1, 1917, the loss of rent was not more than $750.

For the nonperformance of the building contract the damages must be proximate and reasonable. The plaintiffs are entitled to recover only the special damages, $325, and the loss of rent to June 1, 1917, $750, making the sum of $1,075, with the costs of the trial court. The defendants are entitled to recover the costs of the appeal.

Let judgment be entered accordingly.

CHRISTIANSON, Ch. J. (concurring specially). I concur in the opinion prepared by Mr. Justice Robinson, with the exception of what is said therein with respect to the rental value of the building. The findings of fact are to the effect that the plaintiffs had entered into a rental contract with J. B. Reed at a monthly rental of $150, that this contract was made before the defendants entered into the contract to construct

the building; and that the latter contract was made with knowledge of, and with reference to, the rental contract. Under these circumstances, it seems to me that the rent stipulated for would be the proper measure of damages.

BIRDZELL, J. I concur in the opinion of Mr. Justice ROBINSON, with the qualification stated by Mr. Chief Justice CHRISTIANSON.

JOSEPH E. KNIGHT, Petitioner and Respondent, v. BERTHA O. HARRISON, Minnie Maine Knight, Mildred T. Knight, Helen W. Knight, Hanna Olive Knight, a Minor, and S. B. Bartlett as Guardian and Trustee for Said Hanna Olive Knight, a Minor, Abbie E. Knight, and H. M. Washburn, Defendants and Respondents, and LOUISE G. KNIGHT, Defendant and Appellant.

(174 N. W. 632.)

Executors and administrators — question for vacation of decree of distribution must be brought as a direct attack of decree.

1. To set aside or vacate a final decree of distribution of a county court in this state upon equitable grounds of mistake, it is necessary to bring an action directly for that purpose.

Executors and administrators — action to set aside part of final decree is collateral attack and will not be sustained on grounds of mistake only.

2. In an action for statutory partition of the property of a deceased among the heirs entitled thereto, pursuant to a final decree of distribution of the county court of this state, wherein it is sought to set aside and vacate such final decree, in part, in such proceeding, it is *held* that this is a collateral attack upon such final decree.

Executors and administrators — collateral attack on decree of distribution.

3. In such action final decree of distribution of a county court in this state is not subject to collateral attack upon the equitable grounds of mistake, where the jurisdiction of the county court and no fraud or collusion, are shown.

Executors and administrators — effect of decree of distribution.

4. In such action, where it appears that such action of partition was instituted by one of the heirs, a son of the deceased, to have allotted in severalty the estate of the deceased pursuant to the statute, among the persons en-

titled thereto, in accordance with the terms of the final decree of distribution theretofore rendered, and a supplemental complaint is therein filed, concurred in by the remaining children, the heirs of the deceased, which seeks to set aside such final decree so far as the same awards a one-third distributive share to the widow of the deceased, upon the ground that such widow was never the wife of the deceased by reason of the failure of a court in California to enter and file a final decree of divorce between such widow and her former husband, and where it appears that the parties in such proceeding were parties to the proceeding had in the county court, it is *held* that the final decree of distribution rendered is *res judicata* between the parties in this proceeding.

Opinion filed June 30, 1919.

Action of partition in District Court, Cass County, *Cole,* J., wherein it is sought to vacate and set aside, in part, a final decree of distribution of a county court in this state.

From a judgment rendered in favor of the children of the deceased, and from an order denying a new trial and leave to file an amended answer, the widow of the deceased, one of the defendants, appeals.

Reversed and judgment ordered to be entered for partition in accordance with the final decree of distribution.

T. H. McEnroe, for Louise G. Knight, one of the defendants and appellant.

Where positive evidence exists which proves that the defendant has all along recognized the plaintiff's right, delay on the part of the plaintiff in bringing the suit will be excused. 18 Am. & Eng. Enc. Law, 111; Hovey v. Bradbury, 112 Cal. 620; Sailesby v. Young, 3 Cranch, 249.

The relationship of the parties and the fact that they are members of the same family has an important bearing on the question of laches; a delay under such circumstances not being so strictly regarded as where the parties are strangers to each other. 18 Am. & Eng. Enc. Law, 113.

Laches cannot be imputed to one who was ignorant of his rights and for that reason failed to assert them. Ibid.

A collateral attack is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying such judgment or decree. 17 Am. & Eng. Enc. Law, 848.

A judgment cannot be impeached collaterally on account of any illegality or insufficiency in the cause of action on which it is founded, this not being a jurisdictional defect or sufficient to render the judgment void. 23 Cyc. 1068, 1071, 1095.

The policy of the law of the civilized world is to sustain the validity of marriage contracts. Re Wood (Cal.) 69 Pac. 900.

The court may amend its records *nunc pro tunc,* and when amendment is ordered, the clerk must alter the record therein so as to conform to the amendment. The amended record stands as if it had never been defective, and no court can independently inquire into its verity—and when and how it was altered forms no part of it. We are not at liberty to inquire how it came to be as it is. Galloway v. Keithen, 42 Am. Dec. 153; Jones v. Lewis, 47 Am. Dec. 338, and note p. 340; Hamilton v. Seitz, 64 Am. Dec. 694; Ware v. Kent, 82 Am. St. Rep. 132, and note p. 133.

"Good faith means without fraud or deception; it signifies honesty as distinguished from mala fides—bad faith. In general, good faith means without notice, as well as for a valuable consideration." 14 Am. & Eng. Enc. Law, 1078; Gress v. Evans, 1 Dak. 383.

"As between Davidson and Richardson, the *nunc pro tunc* entry is retrospective and has the same force and effect as if entered at the time the judgment was rendered, and unless they have rights intervening prior to the date of such entry its effect cannot be questioned by third parties." Davidson v. Richardson, 126 Am. St. Rep. 738; Freeman, Judgm. 3d ed. 67.

The correction of the judgment placed the parties in the same attitude they would have been if the omission to enter up the record had not occurred. Leonard v. Broughton, 16 Am. St. Rep. 347; Coe v. Erb, 59 Ohio St. 259, 69 Am. St. Rep. 764.

None of the heirs or legatees have any vested interest in the property of a deceased person; and the state can do away with the right of inheritance or bequest altogether. Strauss v. State, 36 N. D. 594; Davidson v. Richardson, 126 Am. St. Rep. 738; Leonard v. Broughton, 16 Am. St. Rep. 347.

"Every intendment must be indulged in favor of the validity of the proceedings not inconsistent with the record." Los Angeles County Bank v. Raynor, 61 Cal. 145.

A *nunc pro tunc* entry of record is competent evidence of the fact which it recites, and cannot be impeached collaterally. Ninde v. Clark, 4 Am. St. Rep. 832 and note.

There is an inherent common-law power in the court to cause the entry of the judgment *nunc pro tunc* in proper cases and in furtherance of justice. Re Wood (Cal.) 60 Pac. 900; Re Cook, 1 L.R.A. 567; Baum v. Roper (Cal.) 82 Pac. 390; Nolte v. Nolte (Cal.) 154 Pac. 873; Re Pillsbury (Cal.) 166 Pac. 11.

The power is inherent in courts of law and equity to make "entries" of judgments *nunc pro tunc* in proper cases, and in furtherance of the interests of justice. Knefel v. People, 187 Ill. 212, 79 Am. St. Rep. 217.

"It is the duty of the court to see that the parties shall not suffer by delay; a *nunc pro tunc* order should be granted or refused as justice may require in view of the circumstances of the particular case." Freeman, Judgm. § 57; and see Fox v. Hale & N. Silver Min. Co. (Cal.) 41 Pac. 328; Borer v. Chapman, 119 U. S. 587, 30 L. ed. 533.

J. F. Callahan, S. B. Bartlett, Engerud, Divet, Holt, & Frame, for respondents.

The interlocutory judgment entered in a divorce suit does not dissolve the marriage bond. Deyoe v. Supreme Ct. (Cal.) 74 Pac. 28; Grannis v. Superior Ct. (Cal.) 79 Pac. 891; Re Seiler, 128 Pac. 334.

In actions for divorce the court must file its decision and conclusions of law as in other cases. Cal. Civ. Code, § 131; Crim v. Kessing (Cal.) 26 Pac. 1075.

It is not the reducing to writing or signing, but it is the filing of the written findings, conclusions of law, and order for judgment that constitutes the decision. Comstock v. Superior Ct. 57 Cal. 625.

This method of rendering a decision is mandatory (Russell v. Amador, 2 Cal. 305), and is exclusive of every other method (Hastings v. Hastings, 31 Cal. 95; Canadian & Co. v. Clarita & Co. 74 Pac. 301).

The "decision" must be reduced to writing and filed with the clerk. Crim v. Kessing, 26 Pac. 1074; Bank v. Mahoney Min. Co. Fed. Cas. No. 392.

The rendition of the judgment is a judicial act. Its entry upon the records is purely ministerial. Comstock etc. Co. v. Superior Ct. 57 Cal. 625.

The filing of the findings, conclusions, and order for judgment in the clerk's office in the county where the case was pending being the act which constitutes the decision and determines the action, it was held to be immaterial where the judge deliberated on and signed the findings and order. Holt v. Holt (Cal.) 40 Pac. 390.

Decisions holding that the written findings, conclusions, and order for judgment filed with the clerk constitute the decision, and that it is not the writing of these documents, but the filing of them with the clerk of court where the case is tried which constitutes the decisions referred to in §§ 632 and 633, Cal. Civ. Code Proc., are found in Conolly v. Ashworth, 33 Pac. 60; Hastings v. Hastings, 31 Cal. 95; Warring v. Frear, 28 Pac. 115; Broder v. Conklin, 33 Pac. 211; Walter v. Merced Academy, 59 Pac. 136; Porter v. Hopkins, 63 Cal. 53; Sawyer v. Sargent, 3 Pac. 872; Clifford v. Alleman, 24 Pac. 292; Hibernia v. Moore, 8 Pac. 824; Rose's Estate, 20 Pac. 712; Wood v. Etiwanda, 54 Pac. 726; Crane v. First Nat. Bank, 26 N. D. 268; Matheson v. Wood (Wash.) 64 Pac. 520; Northern, etc. Co. v. Hender, 41 Pac. 913.

Until the decision has been filed with the clerk the case was not fully tried. Warring v. Frear, 28 Pac. 115.

Until the decision itself has been entered in the minutes, or reduced to writing by the judge and signed by him and filed with the clerk, the case has not been tried to legal intent. This mode of deciding or evidencing the decision of cases is exclusive.

Other California cases which have used similar language to that just quoted from the last two cases are: Broder v. Conklin, 33 Pac. 211; Connolly v. Ashworth, 33 Pac. 60. For similar holdings see also: Polhemus v. Carpenter, 42 Cal. 375; Van Court v. Winterton, 61 Cal. 615; Mace v. O'Reilly, 11 Pac. 721; Northern, etc. Co. v. Hender, 41 Pac. 913; Matheson v. Ward (Wash.) 64 Pac. 520; Crane v. First Nat. Bank, 26 N. D. 268.

To be effective and capable of supporting a judgment, a "decision" must be filed with the clerk before the judge retires from office.

A *nunc pro tunc* order cannot be made for the purpose of declaring that something was done which was not done. Its only office is to cause the record to show something done which was actually done but which by mistake or neglect was not at that time entered in the record. Re Cook, 17 Pac. 923; Re Cook, 19 Pac. 431; Re Cook, 23 Pac. 392.

Entries *nunc pro tunc* can only be made upon evidence furnished by the papers and filed in the case or something of record or in the minute book or judgment docket as a basis to amend by.

Other California cases announcing a similar rule are: Swain v. Naglee, 19 Cal. 127; Hegler v. Henckell, 27 Cal. 491; Railway Co. v. Holschlag, 45 S. W. 1101; Dranghan v. Bank, 1 Stew. (Ala.) 66.

Where the law requires records to be kept they are the only lawful evidence of the action to which they refer, and such records cannot be contradicted or supplemented by parol. The whole policy of the law would be defeated if they could rest partly in writing and partly in parol. See also following cases: Railway Co. v. Golasher (Mo.) 45 S. W. 1101; Whitewell v. Emory, 3 Mich. 84; Boulden v. Jennings (Ark.) 122 S. W. 639; Lawrence v. Landford (Ark.) 153 S. W. 592.

Where a judgment of a domestic court of general jurisdiction is void for want of jurisdiction apparent upon the record, it is, in legal effect, no judgment. In legal contemplation it never had a lawful existence. By it no rights are devested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. Frankel v. Satterfield, 19 Atl. 898.

This rule is of universal application, and it was recognized by this court in the case of Shane v. Peoples, 141 N. W. 737.

And it has been recognized and applied by the supreme court of California in the following cases: Grannis v. Superior Ct. 79 Pac. 891; Braley v. Seaman, 30 Cal. 610; Forbes v. Hyde, 31 Cal. 342; Steinbach v. Leese, 27 Cal. 295; McMinn v. Whelan, 27 Cal. 300; Hahn v. Kelly, 34 Cal. 391; Hill v. City Cab Co. (Cal.) 21 Pac. 728; Felton v. Insurance Co. 15 N. D. 373; Cowdry v. London Bank (Cal.) 73 Pac. 19; Young v. Young (Mo.) 65 S. W. 1016; Gray v. Brignardello, 68 U. S. 627, 17 L. ed. 693; Wells v. Gieske (Minn.) 8 N. W. 380; Auerbach v. Behnke (Minn.) 41 N. W. 946; Boulden v. Jennings, 122 S. W. 639; Forbes v. Hyde, 31 Cal. 342; Coe v. Erb, 59 Ohio St. 259, 69 Am. St. Rep. 764; Vose v. Morton, 4 Cush. 27; Hunter v. Cleveland, etc. 31 Minn. 505.

It does not accord with the spirit of the law that the rights of third persons, not parties to the suit, nor privies to such parties, should be adjudicated by a *nunc pro tunc* decree in the rendition of which they

have not participated. Sinkler v. Berry (Or.) 96 Pac. 1070; McCormick v. Wheeler, 36 Ill. 114; Remick v. Butterfield (N. H.) 64 Am. Dec. 318; Auerbach v. Behnke (Minn.) 41 N. W. 946; Wells v. Gieske (Minn.) 8 N. W. 380; Freeman, Judgm. 3d ed. § 66; Coe v. Erb, 59 Ohio St. 259, 69 Am. St. Rep. 764; Gilpin v. Fishburn, 15 Am. Dec. 614; Creed v. Marshall (N. C.) 76 S. E. 270; Harvey v. Wheelock, 1 Mont. 713; Ninde v. Clark (Mich.) 4 Am. St. Rep. 823, 28 N. W. 765; Aklin v. Acklin, 45 Ala. 609.

BRONSON, J. This is an action for partition wherein it is sought to vacate in part a final decree of distribution entered in the county court of Cass county. The defendant Louise G. Knight has appealed from a judgment rendered in favor of the plaintiff and the remaining defendants, awarding partition and setting aside, in part, such final decree, and from the order of the trial court denying a new trial, with leave to file an amended answer.

There is little dispute upon the facts. This appeal involves, practically, questions of law alone. In substance, the facts are as follows:

The appellant was married to one Bonfoey, in Michigan in 1883. In August, 1903, the husband, Bonfoey, instituted an action for divorce upon the ground of desertion in the superior court of Los Angeles county, California. The appellant admitted service and made no answer or appearance in such action. On September 25, 1903, the divorce action came up before, and was submitted for decision to, the court in California. On September 30, 1904, the judge of the California court made and signed an interlocutory decree, which provided that, upon the expiration of one year from and after the entry of such interlocutory decree, a final decree should be made dissolving the bonds of matrimony. On October 9, 1905, the appellant, age stated thirty-nine years, was married to one Elmer Gordon, age stated forty-four years, by the judge of the superior court of San Diego county, in the city of San Diego, who certified that he believed the facts stated in the marriage license to be true, and that there appeared no legal impediment to the marriage. On November 30, 1909, said Elmer Gordon died in San Bernardino county, California, from accidental causes. On January 19, 1910, the appellant pursuant to a marriage license issued in Orange county, California, was married to the deceased, Suel H. Knight, age stated seven-

ty-five years, residence Cass county, North Dakota, by a justice of the peace of such county, at Santa Ana, who certified that he believed the facts stated in the license to be true, and upon inquiry that there appeared to be no legal impediment to the marriage. On January 26, 1914, said Knight died intestate in Los Angeles county, California, and at the time was living there with the appellant. He left surviving him seven children, all of age excepting one girl, who appears in this action by her guardian. Such children are his only heirs at law if the appellant is not entitled to her statutory share in his estate. Thereafter proceedings for the administration of the estate of the deceased were instituted in the court of Cass county, this state, and pursuant to proceedings had in such county court, a final decree of distribution was rendered and entered by the court on December 30, 1915. Such decree of distribution awarded one third of the real and personal property to the appellant and the remaining two thirds to the respondents. The estate consists of farm lands, city buildings and lots and personal property, aggregating an appraised valuation of over $150,000. An agreement in writing was made between the appellant and the respondents that, after the date of the decree of distribution, and up to and including December 31, 1916, one Washburn, who was the administrator, should rent, manage, and control the property of the estate and attempt to dispose of the same for a fee of 5 per cent and a commission of 5 per cent, in case of an agreed sale of any of such property. On March 27, 1917, a complaint was filed by the plaintiff herein in the district court of Cass county, alleging ownership of the parties herein in the property of the deceased, pursuant to the final decree rendered, including the one-third interest of the appellant therein, and praying for a statutory partition of the real property in severalty. On October, 1917, the appellant herein requested leave of the court to file her answer and, upon leave being granted, her answer was filed praying for a partition in accordance with the demand of the plaintiff's complaint. In August, 1917, a written contract was made between the parties hereto, wherein the plaintiff agreed to sell to the appellant and to the remaining children all of his right and interest in the real and personal property of the estate for the sum of $33,000, $10,000 to be paid on September 1, 1917, and the balance on or before ten years thereafter. Upon this agreement the plaintiff brought an action for specific perform-

ance and filed a *lis pendens,* but, after the commencement of this action of partition, the same was abandoned and dismissed.

On April 18, 1918, pursuant to an application made, the trial court permitted the plaintiff to file an amended and supplemental complaint. In this supplemental complaint many of the facts hereinbefore stated are alleged, and it is further alleged that the appellant was never the wife of said deceased, but that she was and for many years had been the lawful wife of said Bonfoey; that the plaintiff and the other children of the said deceased did not ascertain such fact until within six weeks prior to the filing of such supplemental complaint; that the proceedings had in the county court and with relation to such estate were so had upon the belief of the parties interested that said appellant was in fact the wife of said deceased. Such complaint therefore prayed that the final decree of the county court be set aside to the extent that it awarded to said appellant such interest as the widow of the deceased, and that it be decreed that the children of said deceased be the only heirs and the ones entitled to the entire estate; that, further, such children be determined to be the owners in fee as cotenants of the real and personal property of the estate; that furthermore such children recover judgment against the appellant for the moneys paid to her, some $9,902, out of such estate, and that partition of the real and personal property be had as provided by law. To this supplemental complaint the defendants, other than the appellant, interposed an answer admitting all the allegations thereof and asking for judgment as demanded therein. To such supplemental complaint the appellant interposed a second separate answer denying specifically the allegations therein contained concerning her status as the widow of the deceased. In such answer the appellant specifically alleges that she procured an absolute divorce from said Bonfoey, in the superior court of Los Angeles county, California, which ripened into a final decree and judgment of divorce, and that such judgment is now in full force and effect. That furthermore the county court of Cass county had full jurisdiction and entered a final decree of distribution in the estate of the deceased pursuant to which the appellant became entitled to the distributive share therein mentioned. The action herein, upon these issues, came up for trial in the district court in October, 1918. Upon the trial it was shown that an interlocutory decree hereinbefore mentioned in the di-

vorce case of Bonfoey v. Bonfoey was duly made and filed in the California court, but that the final decree of divorce was never, in fact, entered. There was introduced, however, a *nunc pro tunc* final decree of divorce, made by the successor of the judge who heard the divorce case and entered by the court on August 31, 1918, which awarded an absolute decree of divorce and ordered that such decree be entered as of the date, October 4, 1905.

This *nunc pro tunc* divorce decree was secured upon a showing made to the California court by said Bonfoey to the effect that his attorney inadvertently failed and neglected to cause to be entered the final decree of divorce at the expiration of one year from the entry of the interlocutory decree.

On November 20, 1918, the trial court in this action made findings through which judgment was ordered, setting aside the final decree of the county court so far as it awarded the distributive share of the estate to the appellant, granting to the children of the deceased the right to recover from her some $8,215 received by her from the estate, and ordering a partition of the property. Pursuant thereto judgment was entered on November 26, 1918. Thereafter in January, 1919, the appellant made a motion for a new trial, among other things, upon grounds of newly discovered evidence and for leave to file an amended answer. Upon such motion there was presented to the trial court a new, amended final decree of the California court, dated December 11, 1918, which directed the entry of a final decree of divorce *nunc pro tunc* as of the date of October 4, 1905, and recites therein that such court did after the expiration of one year from the entry of such interlocutory decree, to wit, on or about the 4th day of October, 1905, sign a final order and decree in and conformative to such interlocutory decree, but that the same was through inadvertence not presented to the clerk, and not entered by the clerk of the court, and has become lost. This amended decree was secured upon a showing made through the affidavit of Lizzie Farmer, the sister of the appellant; that such sister called upon the judge of the California court, who heard the divorce action and who advised her that he had signed the final decree and that everything requisite in the matter had been done. Also the affidavit of said Bonfoey, to the effect that he asked his attorney in such divorce action if the final decree had been procured, and that he was advised that the final decree

had been prepared and had been signed by the judge, and that he would cause it to be filed, and also the affidavit of Beulah Rynerson, the daughter of the appellant and said Bonfoey, to the effect that in a letter which said attorney for Bonfoey wrote to the appellant that the final decree had been granted, had been signed by the judge, and that everything had been done that was required by law to be done in such matter to make said decree final. There was also presented to the court an affidavit of the appellant to the effect that she received such letter from said attorney, and that she wrote to her sister, and that she received a letter from her sister to the effect that said judge had advised of his signing such final decree. There are also affidavits of diligence used to ascertain the facts. On March 4, 1919, the trial court denied the motion of the appellant. This appeal is before this court upon such record.

The action was tried to the court apparently as an equity action. All the evidence offered was received. The appellant demands a trial *de novo* and specifies some twelve alleged errors. It is the contention of the appellant that, upon the showing made before the trial court for a new trial, the amended judgment of divorce is a valid judgment; that it could be validly entered *nunc pro tunc;* that there is a sufficient showing of a final decree of divorce in fact, having been pronounced valid as a judgment even though not entered and filed by the clerk of the California court; that the respondents in this action are seeking to collaterally attack a judgment of the county court of this state duly entered.

The respondents contend that the record upon which the judgment herein was secured affirmatively shows no valid judgment of divorce granted to the appellant; that likewise upon the showing made by the appellant for a new trial the amended judgment of divorce then presented shows no valid judgment of divorce existing at the time the final decree of distribution was made or prior thereto. That furthermore, under the decisions and the law of California, no valid judgment could be rendered in a divorce action until it had been, in fact, filed and entered; that the amended judgment of divorce could not operate retroactively to destroy or affect the rights of the respondents herein; that the judgment of divorce, as amended or otherwise in the California courts, was subject to collateral attack, being void on its face, at least so far as the rights of the respondents herein are concerned, and that

the respondents are directly attacking such final decree of distribution manifestly made through mistake. The main arguments of the parties relate to the construction to be placed upon the law and the decisions of the state of California concerning the pronouncing and rendition of a final judgment. In our opinion it is wholly unnecessary to pass upon or determine the construction to be given, or the interpretation that should be placed upon the law or the decisions of California. The respondents seek by a partition proceeding to have awarded to them the estate due them pursuant to a final decree of distribution made in a court of record in this state, in the manner in which they desire it to be revised. It is conceded by the respondents that, in rendering that final decree of distribution, the county court had jurisdiction of the parties and jurisdiction over the subject-matter. There is no contention made in that regard. In this partition action they are seeking a statutory partition as provided in this state to have awarded in severalty the property of the state after such final decree was rendered and by reason of such final decree having been rendered. It is clear that prior to the entry of such final decree of distribution the action of partition could not be maintained. Honsinger v. Stewart, 34 N. D. 513, 159 N. W. 12. It is also clear that the final decree of distribution constituted a valid final judgment; that this decree could not be made by any other court or in any other proceeding. Comp. Laws 1913, §§ 8531–8533; Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008; Joy v. Elton, 9 N. D. 438, 83 N. W. 875. It stands of equal rank with any judgment entered by any court in this state. Fischer v. Dolwig, 29 N. D. 561, 151 N. W. 431.

In Sjoli v. Hogenson, 19 N. D. 92, 122 N. W. 1008, court stated: "The decree of distribution is an instrument by virtue of which heirs receive the property of the deceased. It is the final determination of the rights of the parties to a proceeding, and, upon its entry, their rights are thereafter to be exercised by the terms of the decree. There is another reason why the final decree of distribution in the estates of deceased persons must be held conclusive. Under our probate system, all deraignment of title to the property of deceased persons is through the decree of distribution, entered as a final act in the administration of an estate, whether testate or intestate. No one will contend that this decree can be made by any other court, or in any other proceeding. It

constitutes not only the law of the personalty, but also of the real estate. Toland v. Earl, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914. A decree of distribution has, in most respects, all the efficacy of a judgment at law or decree in equity. An action may be maintained upon it for noncompliance with its requirements, and there is no greater necessity for a demand before bringing action than exists in case of suit upon an ordinary judgment at law, or before issuing an execution upon a judgment. Melone v. Davis, 67 Cal. 279, 7 Pac. 703. When a decree of distribution has been made the probate court has no longer jurisdiction of the property distributed, and the distributee thenceforth has an action to recover his estate, or, in proper cases, its value."

The action of partition is in the nature of a chancery action, cognizable under equity powers. 20 Cyc. 170; McArthur v. Clark, 86 Minn. 165, 91 Am. St. Rep. 333, 90 N. W. 369. It is true that the plaintiff, upon his supplemental complaint, seeks to avoid this final decree of distribution by the exercise of the equity jurisdiction of this court to vacate the same upon grounds of mistake, but nevertheless the main purpose of the action is for partition pursuant to a final decree of distribution which respondents seek to revise, and which they claim the right to revise in determining the title of the parties in such proceeding.

The respondents, by this action of partition, invoke a form of action and a proceeding which cannot precede, but must follow and be pursuant to, the final decree, for the evident reason that the deraignment of title to the property of the deceased must be through the decree of distribution. It is apparent from this entire record that if any legal wrong or mistake has been accomplished with reference to the divorce proceedings in California, it has occurred by no acts or mistakes of the parties themselves, but by the acts of the court or of its officers, including the attorneys who are officers of the court. It is further clear that all of the parties to this proceeding, including the deceased, the father of the respondents, have always acted upon the assumption and belief that the appellant was in fact the wife of the deceased, and not living in adulterous relations with him. It is also clear that in California, at various times, legal action has been taken upon the theory that the appellant and said Bonfoey were in fact divorced. The California court so recognized when it certified and permitted the appellant to marry one Gordon. It likewise so certified when it permitted the appellant to marry the de-

ceased in California, and there to reside with him until he died. In equity the respondents come before this court with a claim unconscionable in its nature, which seeks to secure for themselves the distributive share of the appellant by reason of a legal technicality and a legal nicety. In effect, they are seeking in equity for the application of the maxim that "equity follows the law." It so happens in this case that justice may be done between the parties by equity following the law. The attempt of the respondents herein to attack the validity of the final decree of distribution in this action is a collateral attack upon a valid judgment of a court of record in this state. Shane v. Peoples, 25 N. D. 188, 141 N. W. 737; Bradley v. Drone, 187 Ill. 175, 79 Am. St. Rep. 214, 58 N. E. 304; Kavanagh v. Hamilton, 53 Colo. 157, 125 Pac. 512, Ann. Cas. 1914B, 76. See note in Ann. Cas. 1912A, 983; 23 Cyc. 1062; Safe Deposit & T. Co. v. Wright, 44 C. C. A. 421, 105 Fed. 155; Van Fleet, Collateral Attack, ¶ 3. It is well settled that a final judgment is not subject to collateral attack except upon jurisdictional grounds or grounds of collusion or fraud. Joy v. Elton, 9 N. D. 428, 438, 83 N. W. 875; Sjoli v. Hogenson, 19 N. D. 82, 93, 122 N. W. 1008; 23 Cyc. 1323. To set aside such judgment, upon equitable grounds, it is necessary to bring a direct proceeding for that specific purpose. 23 Cyc. 1033, 1323. There is no intimation in this record of lack of jurisdiction of the county court or of any grounds whatsoever of collusion or fraud. The respondents assert that the judgment of the California court, being void on its face, is subject to collateral attack. Though such contention be recognized, nevertheless, this does not mean that they can or are able to collaterally attack the final decree rendered in this state. In the same action the respondents cannot both seek a decree based upon a final judgment of this state and at the same time seek to vacate and set the same aside. Furthermore, in this collateral attack made in this partition proceeding, the final decree of distribution is *res judicata* between the parties. It involved the question of the right of succession which necessarily was passed upon as a prime requisite in the determination made in the final decree of the county court. Upon plain principles of *res judicata,* therefore, the respondents in this proceeding, who were parties to the probate proceeding resulting in the final decree of distribution, are bound thereby. 23 Cyc. 1106, 1114, 1215; Sjoli v. Hogenson, 19 N. D. 82, 93, 122 N. W.

1008; Caujolle v. Ferrié (Caujolle v. Curtiss) 13 Wall. 465, 20 L. ed. 507. It therefore follows that the trial court wholly erred in setting aside or vacating the final decree of the county court in this proceeding, and the judgment rendered is erroneous in that regard. It is therefore ordered that the judgment of the District Court be reversed, with directions to enter judgment of partition in accordance with the final decree of distribution as rendered. The appellant will recover costs.

ROBINSON, J. I concur not only on the grounds above stated, but also on the ground that appellant was the wife of deceased.

GRACE, J., concurs.

BIRDZELL, J. (dissenting). I dissent. This is a civil action originally started for the purpose of securing a partition, but upon the subsequent discovery of some facts indicating that one of the defendants, Louise G. Knight, had not procured a final decree of divorce from her former husband, Bonfoey, an amended complaint was filed, asking, first, that the decree of the county court finding her entitled to a distributive share of the estate of Suel H. Knight be vacated and set aside on account of the mistake; and, second, that the property be partitioned among the heirs according to their respective interests as alleged in the complaint. The majority of this court holds that the action seeking relief from the judgment of the county court on the ground of mistake is a collateral attack on the judgment, and, apparently, the holding is based upon the fact that additional relief in the shape of partition is asked for. It may be observed, too, that while the majority deny the relief sought from the judgment of the county court on the sole ground that it is linked with a prayer for partition, the judgment of this court directs a partition to be had *according to the same final decree of distribution.* Whether or not it is intended that this decision shall be *res judicata* as to the right of the parties hereto to bring a wholly independent action in the district court to set aside the decree of the county court on the ground of mistake does not appear in the opinion. It is singular that the complaint in this action is dismissed, in so far as it purports to state a ground for relief from the judgment of the county court, on the technical ground that there is linked with it a prayer for

partition, and yet the opinion directs that the partition proceed according to a decree which the chancellor knows may subsequently turn out to be wrong, and one from which relief may yet have to be given in a separate action. Or can it be that the majority intend to entirely dispose of the alleged right to vacate the decree of the county court on the purely technical and procedural ground that it was erroneously linked with a prayer for partition? I can scarcely believe that a result so far at variance with modern, liberal, common-sense code procedure was intended. The question, however, is clearly left open by the majority opinion. I dissent principally from the method adopted by the majority in thus disposing of this appeal, and also from the holding on the procedural question made controlling.

The majority, having disposed of this case on what seems to me to be a procedural technicality, have found it unnecessary to discuss the merits of the issues raised by the pleadings and presented on the record relative to the personal status of Louise G. Knight, as the widow of S. H. Knight, and the propriety of granting relief from the decree of distribution entered in the county court upon the ground of the mistake made, if any, in relation to such status. I am disposed to determine the case on the merits of the issues presented; but since the majority of the court is not so disposed, it is obvious that an expression of an individual opinion on the merits of the case is unnecessary and beside the point which is thus made controlling.

The complaint purports to state a cause of action for relief from the final decree of distribution, according to which the majority opinion has directed distribution to be made. Section 8809, Compiled Laws of 1913, provides that an action to set aside a decree directing or confirming a sale or otherwise disposing of the property of any estate may be instituted and maintained at any time within three years of the discovery of fraud or other ground upon which the action is based. The complaint in the action characterizes it as an action to set aside a decree on the ground of mistake. This court held in Fischer v. Dolwig, 29 N. D. 561, 151 N. W. 431, 39 N. D. 161, 166 N. W. 793, that this section authorized proceedings in the nature of equitable actions to vacate or set aside judgments of the county courts on equitable grounds after the time had expired for the correction of errors by motion or appeal. It has also held that the county court had no such equitable juris-

diction. Reichert v. Reichert, 41 N. D. 253, 170 N. W. 621. It is elementary in Code procedure that, so far as pleading is concerned at any rate, there are no distinctions observed between actions at law and suits in equity, and that all forms of action, both at law and in equity, are abolished. Comp. Laws 1913, § 7355. It is equally elementary that all causes of action, whether legal or equitable, which arise out of the same transaction or transactions connected with the same subject of action, may be joined. Comp. Laws 1913, § 7466. The majority has clearly treated as the subject of the action the property sought to be divided, and has ordered a partition. But yet it holds in effect that there is a misjoinder of causes resulting from the statement of another transaction, namely, the decree of distribution, which affects that subject. Furthermore, this action is of the character denominated equitable, and it is axiomatic that when equity acquires jurisdiction for one purpose it will retain jurisdiction for every purpose required to administer complete relief between the parties. So far as my researches go, I am unable to find any instance where, in an equitable suit, one party, who has set forth in his bill or complaint all his grounds for relief touching a given subject-matter, has been directed to start an independent action, also in equity and affecting the same parties, for the purpose of obtaining part of the relief asked in that action, instead of being allowed to pursue it in the one in which it is already included. Lost motion of this character certainly sins against simplified procedure, and invites repetitions of Jarndyce v. Jarndyce.

The principle according to which complete relief is administered in an action is especially applicable where partition is asked for, because in such a proceeding it is important that when the partition is awarded it will result in placing each party in possession of his own proper share. "Hence," says Cyc. quoting from Freeman, Cotenancy & Partition, § 505, "when a suit for partition is in a court of equity or in a court authorized to proceed with powers as ample as those exercised by courts of equity, it may be employed to adjust all the equities existing between the parties and arising out of their relation to the property to be divided." 30 Cyc. 230. Or, as is said in Pomeroy, 6 Pom. Eq. Jur. § 717: "It is characteristic of equity in matters of partition that not only does it afford a more advantageous and adequate relief than is obtainable at law, but it also takes into consideration the various and diverse equities of the respective parties growing out of their ownership

of property in common, and adjusts and disposes of them upon broad principles of fairness and equality. This incidental relief extends only to such equities as arise out of the relation of the parties to the joint property, *but this may include the disposition of matters preliminary to final partition* and to the management of the property pending the partition proceedings. Thus, a deed or devise may be construed, or a mortgage reformed and foreclosed and the manner of its payment be prescribed, or deeds may be corrected and conveyances ordered." See also Ulman v. Iaeger, 67 Fed. 980–985. Under the majority opinion in this case, the preliminary equity to have the decree of distribution vacated or set aside may not be disposed of, and an exception is made to this wholesome rule.

But, says the majority, this proceeding constitutes collateral attack on the judgment of the county court. But they indicate that if that portion of the complaint which asks for partition be stricken out so that it would stand as a mere complaint in an action to vacate, seeking but the single relief, it would not be collateral. The term "collateral attack" is certainly one to conjure with. I cannot understand by what process of logic or reasoning an attack which, when singly stated, is direct, becomes collateral by the circumstance of having an added prayer for consequential relief attached to it. To further test the conclusion of the majority, suppose the action to partition had been brought by Louise G. Knight (?), the heirs of S. H. Knight being made defendants, and an answer alleging the mistake embodied in the final decree of distribution had been interposed by the heirs. This, certainly, on the assumption that the mistake is one authorizing relief, would constitute an equitable reason for denying the plaintiff the relief sought in the complaint. But yet, under the majority holding, the court would be powerless to entertain it because of the magic that would make the statement of such equitable circumstances in an answer in a partition suit a collateral attack upon the judgment. The court would thus be driven by the irresistible logic of its conclusions in this case, not only to deny relief to the defendants according to the equitable circumstances stated in the answer, but it would also be compelled to decree a partition in favor of the plaintiff. Can it be possible that equitable procedure has degenerated to the extent that it renders the court helpless to arrest the

entry of a decree which it knows from facts formally pleaded may turn out to be erroneous and inequitable?

The authorities cited by the majority do not support the conclusion. An examination of them discloses that they are cases where it was attempted to impeach a judgment by facts *dehors* the record and without pleading such facts as constituting a cause for interfering with it. The case of Shane v. Peoples, 25 N. D. 188, 141 N. W. 737, is cited. The complaint in that case was before the court on demurrer, and the primary holding is that the complaint is vulnerable; that it is lacking in equity. In what is said subsequently it must be borne in mind that the court *was dealing with facts insufficient in equity to constitute a ground for relief from the judgment.* Reference to the briefs in that case shows that counsel for the appellants conceded that if the proceedings for the sale of real estate in probate court be regarded as proceedings *in rem,* they were out of court. The court decided that the proceedings were *in rem.* In view of the pleading and counsels' concession, there was only left to the plaintiff a collateral attack on what was apparently a valid judgment. Of course this could avail them nothing. The briefs further disclose that the action was brought long after the three-year limitation provided for in § 8809, Compiled Laws of 1913, had run. But I bring to the aid of the majority the case of Kavanagh v. Hamilton, 53 Colo. 157, 125 Pac. 512, Ann. Cas. 1914B, 76, which is an authority apparently in point in support of the majority opinion. It will be noticed that one of the principal contentions in the case was that the judgment of the county court was void. It also appears that the judgment which was attacked had stood for over fourteen years, so that the court's conclusion that the judgment was being attacked collaterally would probably have been the same had the court considered the attack as being direct.

Van Fleet, in his work on Collateral Attack, § 3, says: "A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law. . . . When a judicial order, judgment, or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack. Familiar instances are where a person relies on a judgment as a justification for a trespass . . . or to show his right or title in . . . ejectment, trespass to try title, or

suit to quiet title. That the objection to the judgment for judicial errors in such cases is a collateral attack, the cases all agree."

The essence of this definition is that any attack in some manner *not authorized by law* is collateral. Judgments may be attacked on account of errors committed in prior proceedings, the usual course of correcting such being by motion for a new trial, appeal, or writ of error. These are not only direct methods of attacking judgments *upon these grounds,* but they are practically exclusive. Judgments may also be attacked when equity requires that they should not be enforced because of the existence of facts which bring the matter within equitable cognizance, and which render their enforcement inequitable. This is direct attack upon equitable grounds, such as is contemplated in § 8809. Fischer v. Dolwig, 29 N. D. 561, 151 N. W. 431, 39 N. D. 161, 166 N. W. 793. The case of Bergin v. Haight, 99 Cal. 52, 33 Pac. 760, affords a good illustration of a direct attack upon a judgment of a probate court in an equitable action to quiet title. The court said (page 55): "It is claimed by appellant that this is a collateral attack upon the orders of the probate court, and that since the record of the proceedings shows that the court had acquired jurisdiction, and that the proceedings were upon their face regular, the order confirming the sale cannot be thus attacked. It is true the court did acquire jurisdiction to administer upon the estate, and to order and confirm the sale of the property; but it does not follow therefrom that this is a collateral attack. The attack is a direct attack upon the sale, on the ground of fraud, and as such is authorized by law. Van Fleet, Collateral Attack, pp. 4, 5, 15, and authorities cited. It is not every species of fraud, however, which may be the basis of an action to vacate an order or judgment. To be actionable, as stated by our chief justice in Pico v. Cohn, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, it must be a 'fraud extrinsic or collateral to the questions examined and determined in the action. . . .'"

Before the attack can be considered collateral it must, within all the authorities, be an unauthorized attack; that is, one recognized as lawful. It frequently happens that one against whom a judgment is entered in a given court has cause to have the judgment vacated. The customary mode of vacating a judgment is by application to the court in which the judgment is entered, setting forth the grounds recognized

as being sufficient for that purpose. Manifestly if an attempt were made in some other court, even a court possessing equitable powers, to vacate a judgment upon grounds which should be presented to the court possessing inherent power over its own judgments, the application would be properly ignored. Not so much because it would constitute collateral attack as because it would intrench upon the inherent power of a court to vacate its own judgments upon proper showing, and because this is the simple and expeditious remedy for that purpose. See Rowe v. Silbaugh, 96 Wash. 138, L.R.A.1918D, 466, 164 Pac. 923. Thus, in an action in the superior court of a certain county to quiet title against a sheriff's deed executed in pursuance of a judgment rendered in the same court, it was held that the attack was sufficiently direct. Krutz v. Isaacs, 25 Wash. 566, 66 Pac. 141. It was also held that the complete relief could be granted; but in an action to remove cloud caused by the issuance of a deed by the sheriff of another county based on a judgment of the latter county, it was held that the attack upon the judgment was not authorized because the action was not instituted in the court of the county where the judgment was obtained. Had it been instituted there, it was stated that complete relief could have been administered in the one action. Rowe v. Silbaugh, supra. The point of these decisions is that it is not the character of the action, in connection with which relief from the judgment is asked, that determines whether or not the attack on the judgment is collateral, but it is rather the consideration as to whether the court in which the application is made can properly assume control over the judgment to the extent of granting the relief sought. In the instant case, it is manifest that no court other than the court in which this action was brought can exercise the equitable jurisdiction necessary to determine the right to set aside the judgment. If, therefore, the suitors which the majority send forth without relief are ever to be relieved from the county court decree, they must turn about, retrace their steps, and apply to the same court from which they have just been sent. See also Lewis v. Mauerman, 35 Wash. 156, 76 Pac. 737.

From what has been said it is not to be assumed that the writer of this opinion entertains views opposed to giving full force and effect to judgments regularly entered by courts possessing the requisite jurisdiction. His views on this subject, as expressed in Fischer v. Dolwig,

39 N. D. 161, 166 N. W. 797, have undergone no change. The sound policy in this regard has perhaps never been better expressed than by Justice Baldwin in the case of Voorhees v. Jackson, 10 Pet. 449, 473, 9 L. ed. 490–499: "The errors of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment. No rule can be more reasonable than that the person who complains of an injury done him should avail himself of his legal rights in a reasonable time, or that that time should be limited by law. This has wisely been done by acts of limitations on writs of errors and appeals; if that time elapses, common justice requires that what a defendant cannot do directly in the mode pointed out by law, he shall not be permitted to do collaterally, by evasion. A judgment or execution irreversible by a superior court cannot be declared a nullity by any authority of law. . . . If, after its rendition, it is declared void for any matter which can be assigned for error only on a writ of error or appeal, then such court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from even reversing. If the principle once prevails that any proceeding of a court of competent jurisdiction can be declared to be a nullity by any court after a writ of error or appeal is barred by limitation, every county court or justice of the peace in the Union may exercise the same right, from which our own judgments or process would not be exempted."

The writer is in full accord with the views above expressed, but they do not apply to a situation in which the statute law of the state recognizes the right of parties affected by a decree of the county court to bring an action to set aside the same upon equitable grounds within a limited time. This is a remedy given in addition to appeal and is as direct as the appeal itself would be, and at the same time more comprehensive than an ordinary appeal (see O'Barr v. Sanders, 113 Ark. 449, 169 S. W. 249) because not limited to errors appearing on the record.

Wholly aside from the question of collateral attack, the decision is erroneous for the reason that the procedural question is not here for decision. It is undisputed that the complaint alleges the facts relied

upon to set aside the decree of distribution. In the answer filed to the amended complaint the defendant Louise G. Knight pleaded a reliance upon the decree of divorce granted in the state of California and the obligation of the courts of this state to give the judgment force and effect under article 4, § 1, of the Federal Constitution; and it was alleged that, as the widow of S. H. Knight, she was entitled to the distributive share assigned to her by the decree of distribution. The only objection to the testimony offered in proof of the allegations of the amended complaint was that it was incompetent, irrelevant, and immaterial, and did not prove or tend to prove any of the issues in the case, and also that it was inadmissible under the pleadings. It is clear that the pleadings framed an issue as to a mistake in the entry of the decree of distribution, on account of which relief was sought, in addition to the allegations showing a right to partition the property. If there was a misjoinder of causes of action, the complaint was susceptible to attack by demurrer under § 7442, Compiled Laws of 1913. Had the demurrer been sustained, plaintiffs would have had the opportunity to strike from the complaint either the allegations supporting the cause for relief from the final decree and the accompanying prayer of relief, or the allegations respecting partition. Or they could have appealed from the order sustaining the demurrer, and obtained a final decision on the procedural question, before proceeding with the merits of the case. Furthermore, had counsel for the defendant Louise G. Knight, upon the trial, conceived the complaint to be multifarious, the question might have been presented to the trial court by a motion that the plaintiffs be required to elect upon which equitable cause of action they would proceed. The complaint, it is clear, purports to state as complete a cause of action for relief from the decree of distribution as it does for partition, and if the question of misjoinder or multifariousness is not raised in the court below, it certainly should not be made the basis of a reversal on appeal after a trial on the merits. It is unnecessary to cite authority in support of a proposition so elementary as this.

For the foregoing reasons I respectfully dissent from the majority opinion. I regard it as the manifest duty of this court to decide the case on the merits of the issues presented by the pleadings and in the record.

CHRISTIANSON, Ch. J. (dissenting). The purpose of this action as stated in the amended complaint is: First, to set aside the decree of distribution; and, second, to partition certain real property. No objection was made in the court below on the ground of misjoinder. It is undisputed that if the facts are as alleged in the complaint and found by the trial court, and the laws of California are as respondents assert, then the appellant was not the wife of the deceased, Suel H. Knight, and the decree of distribution was founded upon a mistake of fact. In my opinion the facts in the case and the laws of California are as contended for by respondents, and the appellant never in fact became the wife of the deceased, Suel H. Knight. Nor do the majority members express any opinion to the contrary. As my brother Birdzell has so well pointed out, they ignore the merits and dispose of this important litigation solely upon procedural grounds. I fully agree with him in his criticism of the majority opinion. Added force to that criticism has been given by the majority members themselves, as, since the decision in this case was filed and pending the time allowed for filing petition for rehearing, they have held that a decree of distribution may be vacated by an action solely on the ground that the county court made a mistake of law in distributing property,—a mistake apparent on the face of the proceedings and which could readily have been corrected by appeal. See Moore v. Palmer, infra, 174 N. W. 93.

HARRY MOORE, Wade Moore, James D. Moore, Darius Moore, Clayton Moore, and Jennie Scott, Appellants, v. CHARLES W. PALMER, as Executor of the Last Will and Testament of Jessie Lodine Moore, Deceased, Richard Moore, Samuel Moore, Grant Moore, as Executor of the Last Will and Testament of Charles Moore, Deceased, Clemena Newton, and Mary Thompson, Respondents.

(174 N. W. 93.)

Executors and administrators — allegations in complaint to vacate decree sufficient.

1. The plaintiffs brought an action in the district court to set aside a cer-

tain decree of distribution of the county court of Barnes county, which decree had been entered more than one year before the bringing of this action. This court has heretofore held that, after the expiration of one year from the entry of the decree of the county court, it is without power or authority thereafter to grant any relief for matters complained of which were determined or disposed of by the decree. Section 8809 of the Compiled Laws of 1913 reads thus: "An action to set aside a decree directing or confirming a sale or otherwise disposing of such property may be instituted and maintained at any time within three years from the discovery of the fraud or other ground upon which the action is based."

The plaintiffs' complaint alleged certain "other grounds" which were claimed to be sufficient to set aside the decree. To the complaint the defendants entered a demurrer which was sustained by the trial court; *held* that the trial court was in error in sustaining such demurrer; *held*, further, that the complaint states facts sufficient to constitute a cause of action.

Opinion filed July 11, 1919.

Appeal from an order of the District Court in and for Barnes County, North Dakota, the Honorable *J. A. Coffey,* Judge, presiding.

Order reversed.

Jno. D. Farrand and *Barnett & Richardson,* for appellants.

In order to bar a right of action under § 8809, it must be shown that the plaintiff had actual notice of the decree complained of, and timely opportunity to protect his rights by an appeal. Fisher v. Dolwig, 166 N. W. 793.

"Except as otherwise provided, the validity and interpretation of wills is governed, when relating to real property within this state, by the laws of this state. When relating to personal property by the law of testatrix's domicil." Comp. Laws 1913, § 5739; Pennefield v. Tower, 1 N. D. 216; Crandoll v. Barker, 8 N. D. 263.

"Nor will a presumption be indulged in favor of the validity of the proceedings of a court, when such presumption does violence to the facts as presented by the records of the court." Comp. Laws 1913, §§ 5685, 5686, 5693, 5694.

Winterer, Combs, & Ritchie, for respondents.

"The final decree of a county court is of equal rank with judgments entered in other courts of record, and the same presumptions exist in its favor." Fisher v. Dolwig, 29 N. D. 564, 151 N. W. 431.

"In an equitable action to set aside the decree, the plaintiff has the

burden of proof, and must overcome the presumptions in favor of the decree by a fair preponderance of all the evidence." Fisher v. Dolwig (N. D.) 166 N. W. 793.

The failure to allege that the decree complained of was irregularly or unlawfully entered, and that no notice of any kind was in any manner given of the hearing of the petition for final distribution, is fatal to the sufficiency of the plaintiff's complaint. 18 Cyc. 664, note 35.

"An allegation of want of actual notice of the settlement of the account of an administrator, or of the decree of distribution, is unavailing where it appears that the notice provided by the act of assembly has been given." Ferguson v. Yard, 164 Pa. 586, 30 Atl. 517; Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99; Paullissen v. Lock, 38 Ill. App. 510.

The complaint must set forth either actual or extrinsic fraud, or it must positively aver that by reason of a wilful failure on the parties charged with that duty to give the plaintiffs lawful notice of the proceedings complained of, the plaintiffs have been deprived of their property. McCaulley v. Dow (Cal.) 63 Pac. 158; Lynch v. Rooney (Cal.) 44 Pac. 565; Hurt v. Hurt, 6 Rich. Eq. (S. C.) 114; McClure v. Miller, 21 Am. Dec. 522; Schaeffner's Appeal, 41 Wis. 260; Sjolie v. Hoganson (N. D.) 122 N. W. 1008.

This provision of the will related to and operated in favor of the surviving uncles and aunts of the testatrix, and such cousins whose parents died after the making of the will in controversy. Comp. Laws 1913, §§ 5704, 5705, 5739; Re Winter, 114 Cal. 186, 45 Pac. 1063; Smith v. Smith, 25 L.R.A.(N.S.) 1045 (for American rule, as declared in this case, see page 1054).

In making them respondents the petitioner simply sought to bring in all parties who might possibly claim to be interested in or entitled to a part of the estate, as well as the surviving immediate relatives of the decedent. Hill v. Lawler (Cal.) 48 Pac. 323; Trescony's Estate (Cal.) 51 Pac. 951; Smith v. Vandepeer (Cal.) 85 Pac. 136; 1 Ross, Prob. Law & Pr. p. 852.

"Whenever the validity of an executed order is drawn in question other than by appeal, writ of error, certiorari, or timely application to the court wherein the order was made, the attack is collateral. Thus actions of ejectment, actions where the title of the party claiming un-

der a sale is attacked, bills in equity to annul sales on any other grounds than fraud, and objections to the final settlement of the executor or administrator, are collateral attacks." 19 Enc. Pl. & Pr. pp. 927, 928, and cases cited; Shane v. Peoples, 25 N. D. 194, 141 N. W. 737.

GRACE, J. This is an appeal from an order of the district court of the county of Barnes sustaining defendants' demurrer to plaintiffs' complaint.

About the 3d day of August, 1910, one Jessie Lodine Moore died; at the time of her death she was a resident in the county of St. Lawrence, state of New York. She left a last will and testament of which Charles W. Palmer was appointed the sole executor. The will was duly proved in the surrogate court of St. Lawrence county and therein duly admitted to probate. Letters testamentary were duly issued to Charles W. Palmer, who duly qualified as such executor and ever since and now is acting in that capacity. At the time of the death of Jessie Lodine Moore, she was seised of certain real and personal property in the county of Barnes, state of North Dakota. The real property consisted of all of Sec. 25, T. 141, R. 57. By the terms of item 2 in the will, the land in Barnes county, North Dakota, was disposed of as follows: "I give, devise, and bequeath my farm in the state of North Dakota, the crops growing thereon, and any other personal property situate thereon in which I have any interest, to the brothers and sisters of my late father, David Moore, share and share alike, and in any instance where a brother or a sister may die prior to my decease leaving a child or children, such child or children shall receive the same share which the parent would have received had such parent been living."

Charles W. Palmer received ancillary letters testamentary in Barnes county. In a petition for such letters, plaintiffs are named with others as legatees. It is alleged in the substance of the complaint that plaintiffs are devisees, legatees, heirs at law, or next of kin of Jessie Lodine Moore, deceased, and entitled to share in her estate; that the plaintiffs Harry Moore, Wade Moore, and James D. Moore are children of James Moore, deceased, who was a brother of the testatrix's father; that James Moore died prior to the testatrix; that Darius Moore and Clayton Moore are children of John Moore, who was a brother of testatrix's father; that John Moore died prior to testatrix; that Jennie

Scott is the daughter of Elizabeth Glanders, who was a sister of testatrix's father; that she died prior to the testatrix.

It appears from the allegations of the complaint that Charles W. Palmer as executor pursuant to authority in the will sold the land in Barnes county for $20,000; he reported the sale thereof to the county court of Barnes county, which sale was by it approved. The balance of the property of the estate in Barnes county was converted into money. On about the 13th day of May, 1916, the executor filed in the county court of Barnes county his final account and petition for final decree of distribution. The final account showed total assets of $20,555.33 and expenditures of $2,800.92, leaving a balance for distribution under the terms of the will of $17,754.41. On the 21st day of August, 1916, the county court of Barnes county made and entered its final decree of distribution, wherein it distributed and gave to the defendants Richard Moore, Samuel Moore, Clemena Newton, Mary Thompson, and Grant Moore, as legatees in the last will and testament of Charles Moore, deceased, the whole of the residue of the estate, share and share alike. No part of the estate by the final decree of distribution was distributed to or given to the plaintiffs herein or either of them, and they were each deprived of their distributive share thereof.

On the 3d day of November, 1916, the county court of Barnes county entered its order closing said estate as to the ancillary proceedings. It is claimed by plaintiffs that they had no actual notice of the entering and making of said final decree of distribution, and of the order closing said estate as to said ancillary proceedings, and no knowledge thereof until about the 20th day of March, 1918.

The foregoing is the substance of the allegations of the complaint. To this complaint the defendants demurred upon three grounds: (1) Because the court has no jurisdiction of the persons of the defendants or the subject-matter of the action; (2) because the court has no jurisdiction of the subject-matter of the action; (3) because the complaint does not state facts sufficient to constitute a cause of action. The court made its order sustaining such demurrer. The reason assigned by the court for sustaining such demurrer was that the complaint did not state facts sufficient to constitute a cause of action. From this order the plaintiffs appeal to this court. The only error assigned in the appeal is the making of the order sustaining the demurrer.

The plaintiffs made no application for a rehearing of the final decree of distribution made on the 21st day of August, 1916. Under the doctrine laid down in the case of Fischer v. Dolwig, 29 N. D. 566, 151 N. W. 431, and Reichert v. Reichert, 41 N. D. 253, 170 N. W. 621, the county court had no authority or power after the expiration of one year to grant the plaintiffs any relief. Plaintiffs claim, however, that they are entitled to relief under § 8809 of the Compiled Laws of 1913. It reads thus: "An action to set aside a decree directing or confirming a sale or otherwise disposing of such property may be instituted and maintained at any time within three years from the discovery of the fraud or other ground upon which the action is based."

Plaintiffs brought this action within that three-year period. The above section may be divided into two parts for the purpose of construction. The first part relates to the setting aside of a decree of the county court directing or confirming a sale on the ground of fraud. It is self-evident that the decree disposing of the property may be set aside if it is tainted by fraud, no matter by whom such fraud was committed nor whether the fraud was actual or constructive.

This case is not predicated upon fraud, and for this reason the decree may not be set aside on that ground. We will confine our discussion to the other part of said section which provides, "or other ground upon which the action is based." What, then, are the other grounds? We can reach but one conclusion with reference as to the meaning of such words, and that is—they mean any other ground which would appeal to the conscience of a court of equity, as where there has been manifest injustice done by entering of said decree or a manifest material mistake therein, etc.

The words, the meaning of which is under consideration, constitute a separate and distinct reason for setting aside such decree for other reasons than that of fraud. It now becomes necessary to determine the meaning of the language used in item 2 of the will, which is quoted above in full. That language means that the property therein described was devised and bequeathed to the brothers and sisters of the testatrix's late father, David Moore, share and share alike, who were living at the time of the death of the testatrix; that is, the brothers and sisters of the testatrix's father would take an equal share of that property if they were living at the time testatrix's death occurred. If, however, any

of them had died prior to the death of the testatrix, then their child or children would receive under the terms of item 2 of the will at the time of the death of the testatrix, the same share which the parent who was the prior legatee under the will would have received had such parent been living at the time of the death of testatrix, when such will would become operative.

This construction of the language of item 2 of the will being correct, the plaintiffs herein, when the will became operative, were entitled to receive the share of the estate described in item 2 which would have been received by the parent if the parent had been living at the time of the death of the testatrix. The complaint alleges plainly that Harry Moore, Wade Moore, and James D. Moore are children of James Moore, deceased, who was a brother of the testatrix's father; that James Moore died prior to the testatrix. A similar allegation is contained in the complaint as to other plaintiffs who are children of another brother and sister of the father of the testatrix. All of these allegations are admitted by the demurrer. The demurrer also admits the allegations of the complaint, that they are entitled to a share in the estate. It also admits that no part of the estate by the final decree of distribution was distributed to or given to the plaintiffs, and that they were deprived of their distributive share thereof. We thus have a case where the plaintiffs, according to the allegations of the complaint, are clearly entitled to a share of the estate, and one where it is admitted by the demurrer they are entitled to a share, and one where it is admitted the estate in which they were entitled to a share was distributed and their share given to others, the defendants herein, who were not entitled under the terms of the will to receive the same. According to the complaint, under the plain terms of the will, the plaintiffs were entitled to their share as defined by the terms of the will. The final decree of distribution totally disregards the provisions of the will. The original petition for probate of the will showed that these plaintiffs were legatees and devisees under the will. The complaint states a perfect cause of action under § 8809 of the Compiled Laws of 1913. It was not necessary that the complaint should allege fraud. It is only necessary to allege fraud where fraud is relied upon; where other grounds "or reasons than fraud are relied upon" it is only necessary to set forth such other grounds and reasons for setting aside the decree.

There remains but one further point to discuss and that is the question of notice. The complaint alleges there was no actual notice or knowledge of the making and entering of the final decree nor of the closing of the estate. The defendants by demurring admit this. To make the matter more plain we may add, however, that the language of § 8809, which says that "an action may be instituted and maintained at any time within three years from the *discovery of the fraud or other ground upon which the action is based,*" means three years from the time when the party seeking to set aside the decree has actual knowledge of the fraud or other ground upon which the action is based. The word "discovery" as used in said section means "to obtain for the first time knowledge of," "to know," "to have ascertained," "to be aware of," "to find out." Actual notice would impart actual knowledge. Knowledge could be acquired without actual notice. Actual knowledge would not be imparted by constructive notice. The Statute of Limitation set forth in § 8809 begins to run from the time of the discovery of or acquirement of actual knowledge of the fraud or other ground for setting aside the decree. Constructive notice will not set said statute in motion, for constructive notice imparts no actual knowledge. In proceedings in the probate court, the law provides in many instances that constructive service is sufficient, and where the law so provides, constructive service is sufficient. There may be, however, exceptions reserved in the law in this regard. It seems certain that § 8809 is one of the exceptions and one of the particular cases in which constructive notice is not sufficient in order to set in motion the Statute of Limitation referred to in said section. It would thus seem certain that the three-year period of time in which to commence an action to set aside the decree for fraud or other ground does not commence to run, by the terms of said section, until actual notice is given or actual knowledge possessed of the fraud or other ground upon which the action is maintained. The section does not say that the action may be maintained any time within three years from the order approving the final decree or from the time of filing or making the final decree, or three years from the time of the order closing the estate, but it says, "three years from the *discovery of the fraud or other ground upon which the action is based,*" and this means three years from the time that one has actual knowledge of facts constituting fraud or facts which constitute other

grounds for setting aside the final decree. The action is one to set aside the decree. It is a direct, and not a collateral, attack upon it. It is one between the parties to the original decree; it is under § 8809 properly maintainable. We have no hesitancy in stating that the complaint states facts sufficient to constitute a cause of action. The demurrer thereto should have been overruled. It was error in the trial court not to do so. The order of the trial court sustaining such demurrer is manifestly entirely wrong, and the same is reversed. The case is remanded to the lower court for further proceedings. The appellant is entitled to statutory costs on appeal.

ROBINSON, J., concurs.

BRONSON, J. I concur in the result.

CHRISTIANSON, Ch. J. (dissenting). I dissent. It is conceded that the final decree of distribution involved in this action was rendered pursuant to legal notice to the plaintiff and other persons interested. The plaintiffs do not deny this. They merely assert that they had no "actual notice of the making and entering of the final decree of distribution and of the order closing said estate." There is no averment of fraud, mistake of fact, or other equitable ground for avoiding the decree. The sole complaint is that the county court made a mistake in determining a question of law properly before it.

The county court is vested with exclusive original jurisdiction in probate and testamentary matters. N. D. Const. § 111. A decree of distribution is a final determination by that court of the rights of the parties to the proceeding. Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008. It is of equal rank with a judgment entered in any other court of record in the state. Fischer v. Dolwig, 29 N. D. 564, 151 N. W. 431. The district courts are vested with original jurisdiction "of all causes both at law and in equity," except as otherwise provided in the Constitution. N. D. Const. § 103. Section 8809, supra, merely recognizes the general jurisdiction of the district court, and limits the time in which an equitable action may be maintained in that court to set aside a decree of the county court directing or confirming a sale or otherwise disposing of property. The rule is well settled that equity will not

grant relief for mere errors of law committed by a court in determining a matter properly before it; nor will it grant relief where the matter might have been litigated there by the exercise of due diligence. Hayne, New Tr. & App. Rev. ed. § 304.

The mistake complained of was one which could have been reviewed and corrected on appeal. Our laws furnish ample means for the review and correction of errors of law committed by a county court, both by motions in such court and by appeal to the district court. Clearly § 8809, supra, was not intended to allow an action to be maintained in the district court to correct errors of law committed by the county court. As was said by this court in Fischer v. Dolwig, 39 N. D. 161, 166 N. W. 797: "While § 8809 of the Compiled Laws of 1913 authorizes an action in the district court to set aside a final decree of the county court for fraud or other equitable ground, it manifestly does not authorize such action to review errors properly reviewable on appeal from the final decree." In his concurring opinion in that case Justice Birdzell said: "The remedy open to a suitor to impeach a judgment for fraud within the time prescribed by § 8809, Comp. Laws 1913, cannot be considered as a mere substitute for an appeal, nor can the statute be given an interpretation which would have the effect of extending the time for appeal."

In his work on Probate Law and Practice, Ross says: "A decree of final distribution, while ordinarily conclusive upon the parties in interest unless appealed from, may nevertheless be vacated or modified on motion in the lower court, at any time within the six months allowed by statute therefor, upon a proper showing of mistake, surprise, inadvertence, excusable neglect, or the like. But after the expiration of six months the probate court has no power to grant relief. Thereafter, the only remedy of the aggrieved party is by an independent suit in equity. The law is settled that the remedy by motion is merely cumulative, and does not displace the jurisdiction of a court of equity to review a decree of distribution, upon a showing that it was procured by extrinsic fraud or mistake, whereby the court and the losing party were imposed upon or misled, and to enforce an involuntary trust against those who have thereby gained an inequitable advantage. *But equity will not grant relief for . . .* mere error." Ross, Prob. Law & Pr. § 544. See also Royce v. Hampton, 16 Nev. 25; Mulcahey v.

Dow, 131 Cal. 73, 63 Pac. 158; Smith v. Vandepeer, 3 Cal. App. 300, 85 Pac. 136; Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317.

BIRDZELL, J., concurs.

MARY REID, Respondent, v. FRED EHR, Appellant.

(6 A.L.R. 586, 174 N. W. 71.)

Damages — personal injuries — judgment — evidence.

1. An action was brought by plaintiff to recover damages by reason of certain injuries suffered and sustained to her person by reason of a dangerous charge and current of electricity passing into and upon her body when she turned on an electric light in a room of a hotel operated by the defendant, which room was being occupied by her as a guest and patron of the hotel. She recovered a verdict for $3,625. She had in a former trial recovered a verdict for $2,800. It is *held* that the judgment appealed from in this case is well sustained by the evidence.

Damages — degree of care required by operators of a hotel — liability to guest.

2. The owner or operator of a hotel lighted by electricity must use ordinary care to provide safe electric lights and appliances which are intended for use by the guests and patrons of the hotel. If he does not do so, and a guest of the hotel is injured by reason of the defects of such electric lights or appliances, he is liable in damages for the injuries sustained by such guest.

Opinion filed July 16, 1919.

Appeal from order denying motion for new trial and from judgment, Ward county, *K. E. Leighton*, J.

Affirmed.

Bradford & Nash, for appellant.

NOTE.—On liability of innkeeper for injury to guest from defective lighting appliance, see note in 6 A.L.R. 590, where it is held that an innkeeper is liable to a guest for injuries resulting from a defective electric lighting appliance intended for the use of the guest, where he has failed to use ordinary care in the installation and maintenance of the same.

"The use of the thing must be dangerous according to common experience, at least to the extent that there is a manifest and appreciable chance of harm from what is done in view of either the actor's knowledge or of his conscious ignorance." Com. v. Pierce, 52 Am. St. Rep. 264.

Again: "Mischief which could by no reasonable possibility have been foreseen and which no reasonable person would have anticipated cannot be taken into account as a basis upon which to predicate wrong." Wabash R. Co. v. Lock (Ind.) 2 Am. St. Rep. 193.

Sinkler & Eide and *Greenleaf, Wooledge, & Lesk,* for respondent.

"The facts speak plainer than the testimony of experts, and say that there was negligence on the part of the defendant which led to the plaintiff's injury. It was a question for the jury. The jury determined it in favor of the plaintiff, and certainly the fact that it happened is evidence of the fact that it could happen." Leiferman v. White (N. D.) 168 N. W. 569.

GRACE, J. Appeal from a judgment and from an order of the district court of Ward county denying motion for a new trial, K. E. Leighton, Judge.

This action is brought by plaintiff to recover damages by reason of certain injuries suffered and sustained to her person by reason of a dangerous charge and current of electricity passing into and upon her body when she turned on an electric light in a room of a hotel operated by defendant, which room was being occupied by her as a guest and patron of the hotel. It is claimed and charged by plaintiff that the defendant negligently and carelessly failed to keep the electric lights and wires, etc., in said room in a safe and proper condition, and negligently and carelessly permitted them to become out of repair; that he carelessly and negligently failed to inspect and put said electric lights in proper repair, and permitted the same to remain in a dangerous and unsafe condition, and that the injuries of the plaintiff were caused thereby. Defendant admits that he was operating a hotel and that plaintiff was a guest therein, and avers the injuries, if any, to plaintiff were caused by her own negligence and contributory negligence. It is further averred in the answer that the plaintiff brought an action for the same injury against the Consumers' Power Company and alleged

that said injury was due to the wrongful act of that company; that she entered into a stipulation and agreement with it whereby she agreed to accept and that company agreed to give the sum of $100 in settlement of said claim from the said injury, and that she agreed to release them from any claims of damage by reason of the injury; that said sum so agreed to be paid should not in fact be actually paid until after the time of this action and trial of the action between plaintiff and defendant herein. This point, we think, now is completely abandoned and will need no further consideration.

This action has been twice tried to a jury. In the first action plaintiff recovered a verdict for $2,800 damages. The trial court set that verdict aside on the ground that it was excessive, and that the same was the result of passion and prejudice on the part of the jury. From the order granting a new trial defendant appealed to this court on the grounds stated; the order appealed from was affirmed, the writer hereof dissenting, and the case was remanded to the lower court for another trial, which has occurred, and a verdict again returned in the plaintiff's favor, at a trial had after the expiration of approximately two years since the first trial. The jury, at the second trial of the action, returned a verdict for plaintiff for $3,625. The second trial having occurred at about two years since the first trial, and the jury having been necessarily composed of men who knew nothing concerning the fact that a former verdict had been returned for $2,800, such fact clearly demonstrates there was no passion or prejudice exercised by the jury which returned the verdict for $2,800. The defendant in this action has appealed from the judgment and from the order refusing to grant the judgment, notwithstanding the verdict, or a new trial.

In his appeal defendant specifies nine assignments of error, and in addition thereto the insufficiency of the evidence to support the verdict. In effect, the same errors and reasons are assigned in support of the motion for a judgment *non obstante* or for a new trial and the appeal from the judgment. In the motion for a new trial it is again claimed that the damages are excessive and appear to have been given under the influence of passion or prejudice. There is no merit in such contention. The defendant assigns as error the admitting as evidence in this trial the testimony of witness, Mrs. Cotta, taken at the former trial. She personally appeared and testified upon the first trial. She was

cross-examined by the same counsel who appeared for defendant upon the second trial. Her testimony was taken down in the ordinary manner at the former trial, and was transcribed and settled as a part of the statement of the case upon the former appeal. At the time of the present trial she was out of the state and beyond the jurisdiction of the court. Under these circumstances it was proper to read into the record in this case the evidence which she gave upon the first trial. It was proper for the trial court to receive and admit the evidence of the witness Cotta, given upon a former trial, and there was no error in admitting such evidence. There was no error in the court's refusal to strike out the testimony of Mary Reid, with reference to the absence of the witness Cotta, or the efforts of Mrs. Reid to procure Mrs. Cotta, who was in Minneapolis, to come to Minot with her as a witness in this action. The defendant maintains in his assignments of error, and in his assignment of the insufficiency of the evidence to sustain the verdict, that it appears from the undisputed evidence that the fixtures involved were the usual and ordinary Edison lamp and socket attached to the usual and ordinary drop cord, and that by no means known to science could this fixture give forth a shock or possibly cause a burn to a person turning on the current key. The defendant further claims the undisputed evidence shows that the only way in which a shock could be obtained from such fixture would be for the person turning on the current to have grasped the brass socket of the lamp at its base, being at the same time connected with the current through the medium of metal or water, and then turning on the current by the means provided. There is considerable expert testimony to this effect. This is, however, not conclusive. The physical facts speak louder than the testimony of the experts. The plaintiff was injured. This cannot successfully be disputed. She was injured by an electric current from the lamp in question. In the face of these physical facts the testimony of the experts becomes of little probative force. The jury must have disbelieved the testimony of the experts, and this they did have a right to do. Jurors, as a rule, are men of average and reasonable minds, and in the face of physical facts expert testimony did not have any great weight with them. The defendant maintains, further, that the plaintiff was guilty of negligence and contributory negligence. This question was

one exclusively for the jury, and it has found against the contentions of the defendant, and that completely disposes of those questions.

We have examined the evidence, and it is quite sufficient to sustain the verdict. There was no error in the court refusing to grant judgment to the defendant, notwithstanding the verdict, nor error in denying defendant's motion for a new trial. We have examined with considerable care all and each of the errors assigned and find no prejudicial nor reversible error. The matters in controversy have been submitted to two separate and distinct juries; the last trial was approximately two years after the former. There is not the least reason to claim any passion or prejudice. There has been no passion nor prejudice shown by the jury. There is no evidence nor any reason upon which to base such a claim. The jury is the exclusive judge of the facts of the case, and it has decided against the defendant. He must abide the result. The order and judgment appealed from are in all things affirmed. Respondent is entitled to statutory costs on appeal.

CHRISTIANSON, Ch. J. (concurring specially). This case is here for a second time. The trial court set aside the verdict returned on the first trial on the ground that it was given under the influence of passion and prejudice. In his memorandum filed with the order granting a new trial the court based this ruling largely upon the insufficiency of the evidence bearing upon the question of permanent injuries. 36 N. D. 556, 162 N. W. 903. On appeal this court held that it had not been shown that the trial court had abused its discretion in granting a new trial. In so holding this court merely recognized the well-settled rule that the trial court was vested with discretionary powers in determining the motion for a new trial on the ground stated, and that this court was limited to a consideration of whether the trial court had abused its discretion. For, as was stated by Mr. Justice Grace in Huber v. Zeiszler, 37 N. D. 556–560, 164 N. W. 131, "a granting or refusal to grant a new trial rests largely in the discretion of the trial court, and unless there is plain abuse of such discretion an order in such matter will not be disturbed."

The second trial took place twenty-seven months after the first trial. Upon the second trial the plaintiff testified that certain nervous symptoms and certain pains in her back to which she had referred on the

first trial still continued and had become worse rather than better. The physician who attended the plaintiff and who testified upon the first trial was also called and testified upon the second trial. The situation upon the second trial, therefore, was that the plaintiff had undergone twenty-seven months more of pain and suffering than she had undergone at the time of the first trial, and manifestly both the permanency of injury and the extent thereof were far better established upon the second trial. So the second verdict clearly rests upon a far stronger basis than the first verdict. The trial court refused to disturb the verdict, and under the rule of law announced by this court in its former decision in this case the verdict and the trial court's ruling should be sustained.

So far as the question of defendant's negligence and plaintiff's contributory negligence are concerned, I am of the opinion that under the evidence these were questions for the jury. It may also be noted that they were held to be so by the trial court upon the motion for a new trial after the first trial. I am also of the opinion that the testimony given by the witness Mrs. Cotta upon the first trial was properly admitted in this case under the rule announced in Felton v. Midland Continental R. Co. 32 N. D. 223, 155 N. W. 23.

W. W. HORTON, Respondent, v. WRIGHT, BARRETT, & STILWELL COMPANY, Appellant.

(174 N. W. 67.)

Appeal and error — rule of stare decisis — application of former decisions — necessity of motion for directed verdict or new trial in trial court to invoke review by supreme court.

The rule of *stare decisis* is especially applicable to decisions on matters of procedure and practice. By applying this rule and following Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 32 N. D. 366, and subsequent decisions of this court, it is *held* that where no ruling of the trial court as to the sufficiency of the evidence to support the verdict has been invoked, either by motion for a directed verdict or for a new trial, there is nothing for this court to review.

Opinion filed July 22, 1919.

From a judgment of the District Court of Ward County, *Leighton*, J., defendant appeals.

Affirmed.

Greene & Stenerson, for appellant.

Where a motion is not made for a directed verdict, or the sufficiency of the evidence to support the verdict is not challenged by motion for a new trial, this court will not inquire into the sufficiency of the evidence to sustain the verdict. However, that the appellant may not be foreclosed of a consideration of the merits, the facts will be reviewed. Morris v. Soo R. Co. 32 N. D. 366; Buchanan v. Elevator Co. 33 N. D. 350; Erickson v. Wiper, 33 N. D. 225; Freerks v. Nurnberg, 33 N. D. 595.

F. B. Lambert, for respondent.

"Where a motion is not made for a directed verdict, or the sufficiency of the evidence to support the verdict challenged by motion for a new trial, the sufficiency of the evidence to sustain the verdict cannot be raised for the first time on appeal and by an alleged specification of error to that effect served with the notice of appeal." Morris v. Soo, 32 N. D. 366, 165 N. W. 861; Buchanan v. Occident Elev. Co. 33 N. D. 350, 157 N. W. 346; Freerks v. Nurnberg, 33 N. D. 595, 157 N. W. 119; Swallow v. First State Bank, 35 N. D. 618, 161 N. W. 207; Erickson v. Wiper, 33 N. D. 225, 157 N. W. 592; Jenson v. Bowers, 37 N. D. 367, 164 N. W. 4; Cranmer v. Christian, 161 N. W. 1086.

"Record which does not show the grounds urged for a new trial will be dismissed on motion." People v. Lenon, 77 Cal. 308, 19 Pac. 521.

"Errors must be pointed out or they will not be considered in this court." French v. Lancaster, 2 N. D. 276.

"Where no assignments of errors are made on the record of the court, the court will direct an affirmance of the judgment; errors in judgment roll will not be considered unless assigned." Ricks v. Bergsuednden, 8 N. D. 578.

"Errors must be assigned or they will not be reviewed." First Nat. Bank v. N. M. Bank, 5 N. D. 161. See 2 Hill's Dig. pp. 90, 91.

"Appellant's counsel having failed to assign errors in this court, the

judgment of the court below is affirmed. Supreme Court Rule, No. 15; O'Brien v. Miller, 4 N. D. 308.

PER CURIAM. Respondent has moved in the alternative that the appeal be dismissed or the judgment affirmed. The motion is made upon the ground that the only error assigned upon this appeal is that the evidence is insufficient to sustain the verdict; and that inasmuch as the sufficiency of the evidence was not challenged in the court below either by motion for a directed verdict, or by motion for a new trial, or at all, that question cannot be raised in this court. In support of the latter contention, respondent has cited the following decisions of this court: Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 32 N. D. 366, 155 N. W. 861; Freerks v. Nurnberg, 33 N. D. 587, 595, 157 N. W. 119; Buchanan v. Occident Elevator Co. 33 N. D. 346, 350, 157 N. W. 122, and Erickson v. Wiper, 33 N. D. 193, 225, 157 N. W. 592. No question has been raised as to whether the objection urged constitutes a valid ground for dismissal or affirmance. Both parties have filed briefs and presented oral argument upon the merits of the motion. Appellant concedes that the former (above cited) decisions of this court sustain the contentions of the respondent, and that if these decisions are adhered to there is nothing for this court to review on this appeal. But appellant contends that the construction which this court placed upon the 1913 Practice Act in the decisions above cited is erroneous, and that these decisions should be overruled. We are frank to admit that, if the question now presented was an original one, we would be inclined to agree with the appellant, and construe the 1913 Practice Act in accordance with the views expressed in the specially concurring opinion filed in Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 32 N. D. 371, 372, 155 N. W. 861. But the question is not a new one. It has concededly been adjudicated in the several decisions cited above. The decision in Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. supra, was filed December 17, 1915, and rehearing therein was denied December 31, 1915. The records of this court show that the appeal in Freerks v. Nurnberg; Buchanan v. Occident Elevator Co. and Erickson v. Wiper, had been perfected and the records therein transmitted to this court before Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. was decided. The fact that the question involved has not been

raised in any subsequent case indicates that the procedure as established by the former decisions has been generally accepted and followed. The former decisions have also been referred to *arguendo* in disposing of other questions in the following late decisions: Swallow v. First State Bank, 35 N. D. 608, 618, 161 N. W. 207 (decided January 16, 1917), and Jensen v. Bowen, 37 N. D. 352, 367, 164 N. W. 4 (decided July 9, 1917). It should also be remembered that two sessions of the legislature have been held since the decision in Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. was announced.

Under the circumstances we deem the doctrine of *stare decisis* specially applicable in this case. "It is especially important for the proper and expeditious conduct of judicial business that the rules of practice and procedure should be stable. If these were subject to constant fluctuation, with the changing views of the judges, the greatest hardship and inconvenience would result. On the other hand, if these rules are well known and uniform, it is ordinarily easy to conform to them, and they could hardly be productive of any serious injury to individuals or their rights, even though founded on a mistaken conception of the law or an erroneous construction of a statute. Hence, it is an almost invariable rule to adhere to former decisions settling the rules of procedure, when they are generally known and acted on, and when they have been established for such a length of time as to make a change injudicious, even though it may have become apparent that they were wrongly decided, or although the court would have reached a different conclusion if the case were before it for the first time." Black, Judicial Precedents, pp. 194, 195.

It follows from what has been said that the judgment in this case must be affirmed. It is so ordered.

GRACE, J. I dissent.

ROBINSON, J. I do strenuously dissent to the building of error upon error. I concur in the result, but not in the reasoning or the *stare decisis*.

J. A. ENGLUND, Respondent, v. A. C. TOWNLEY, J. W. Brinton, W. R. Wyatt, L. H. Avery, M. B. McLaughlin, John Weinberger, John E. Fleeten, and C. E. Gordon, Appellants.

(174 N. W. 755.)

Constitutional law — right of free speech — responsibility for abuse of right.

1. Section 9 of the state Constitution grants to every man the right to freely write, speak, and publish his opinion on all subjects, but makes one who abuses the right responsible for such abuse.

Libel and slander — liability of those who libel or slander another.

2. Under the laws of this state every person has, subject to the qualifications and restrictions provided by law, the right to protection from defamation by libel or slander, and any person who abuses the privilege of freedom of speech and liberty of the press by maliciously publishing libelous matter of or concerning another is liable to the person libeled for the injury occasioned by the publications.

Libel and slander — statute construed.

3. Any "false and unprivileged publication, by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, . . ." is libelous. Compiled Laws 1913, § 4352.

Libel and slander — pleading — effect of general demurrer.

4. A general demurrer to a complaint in an action for libel admits allegations of falsity, publication, and malice.

Libel and slander — sufficiency of pleading.

5. For reasons stated in the opinion it is *held* that the complaint states a cause of action.

Opinion filed July 22, 1919.

Appeal from the District Court of Ward County, *Leighton*, J.

Defendants appeal from an order overruling a general demurrer to the complaint.

Affirmed.

NOTE.—For authorities discussing the question of constitutional freedom of speech and of the press, see note in 32 L.R.A. 829.

On privilege as to words or publication relating to public officer, or candidate for office, see note in L.R.A. 1918E, 43.

William Lemke and *Nestos & Herigstad,* for appellants.

Attorneys' fees under the law are not proper elements of damage, and therefore should be stricken out as surplusage. 25 Cyc. 535; Grotius v. Ross, 24 Ind. App. 543, 57 N. E. 46; Irlbeck v. Bierle, 84 Iowa, 47, 50 N. W. 36.

In all actions of libel where the words charged do not constitute libel per se, special damages must be alleged in order to constitute a cause of action. 17 R. C. L. 391; Gustin v. Evening Press Co. (Mich.) 137 N. E. 674.

Unless the article is libel per se, the plaintiff before he can recover must allege and prove special damages resulting as a proximate result of the publication. Gundram v. Daily News Pub. Co. (Iowa) 156 N. W. 842; King v. Sun Printing & Pub. Co. 82 N. Y. S. 787; R. R. Co. v. Delaney, 102 Tenn. 289.

"That publications respecting political affairs, public officers, and candidates for office, are in a measure privileged, is recognized by the overwhelming weight of authority." 17 R. C. L. 353; Pickett v. Talbott, 211 U. S. 199.

"There has always been a distinction between publications relating to public and private persons as to whether they are libelous. A criticism might reasonably be applied to a public officer which would be libelous if applied to a private individual." Herringer v. Inberg, 97 N. W. 463.

"Every citizen has a right to comment on those acts of public men which concern him as a citizen of the state, if he does not make his commentary a cloak for malice and slander." Arnold v. Ingram (Wis.) 138 N. W. 119; Lyddiard v. Wingate, 155 N. W. 212; Wason v. Walter, L. R. 4 Q. B. 94.

"The meaning of the words cannot be enlarged by innuendo." Huffland v. Journal Co. 60 N. W. 263.

"If a publication is not libelous *per se* on its face, it cannot be made so by innuendo." Scheibley v. Ashton (Iowa) 106 N. W. 618.

"A writing, although charging wrongful conduct or dereliction of duty, is not libelous *per se* within the meaning of the rule unless it imputes a dishonest or fraudulent motive or intent." 25 Cyc. 258; 80 N. W. 1099, 102 N. W. 807.

The words "that he made false affidavit" are not actionable *per se,*

nor can an action be maintained upon them merely by an innuendo that they purport or were intended to purport perjury; in order to be actionable *per se,* they must charge the defendant with a crime. 97 N. W. 460; 42 N. W. 413; 80 N. W. 1098.

McGee & Goss, for respondent.

"It is well settled that to constitute libel, it is not necessary that written statements should contain an imputation of an offense that may be punished as a crime." 17 R. C. L. pp. 286, 287, ¶ 28.

"But a publication to be libelous need not contain a direct and open charge. If taking the words used in the ordinary acceptation, they convey a degrading imputation, no matter how indirectly, they are libelous." Id. p. 287.

"In determining whether or not a charge of dishonesty is actionable, much appears to depend on whether the accusation *is in writing* or is merely oral. . . . So in general there are many authorities holding charges of dishonesty in various forms libelous, when such charges are written or printed, even when the words merely intimate a suspicion of dishonesty." 17 R. C. L. p. 290, ¶ 28.

"The libel of a public officer, affecting him personally, is governed by the same rules that apply to an individual; but if it affects him in his official character, and is of such a nature that, if true, it would be cause for his removal from office, it is actionable *per se.*" 17 R. C. L. 301, p. 40.

CHRISTIANSON, Ch. J. This is an action for libel. The defendants interposed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendants appeal.

The complaint, the sufficiency of which is the sole question here, in substance charges:

That the plaintiff is an elector and citizen of this state, and a state senator from the second legislative district, and during the fifteenth legislative session was such state senator.

That during said legislative session the defendants conspired together and agreed to and did procure the malicious publication of a false, scandalous, and libelous article in many newspapers of the state, reading as follows:

"Be It Further Resolved, that it has been brought to our attention that J. A. Englund, now sitting as a senator in the senate body from this district, is not a citizen of the United States, has sworn allegiance to the King of England, having filed on a homestead in Canada, and in the province of Saskatchewan, which is not 'constitutional' and which is not in harmony with the present Constitution; and, further, that he has again violated our Constitution in accepting, holding, and drawing pay as a deputy bank examiner; and that he has held this office illegally, as the Constitution of North Dakota prohibits state senators from holding such positions, and further that it is not 'constitutional' for subjects of the King of England to act as bank examiners in North Dakota; and

"Be It Further Resolved, that we commend the new state bank examiner, J. R. Waters, for suspending the services of said J. A. Englund as deputy bank examiner and discontinuing his salary; and

"Be It Further Resolved, that we, the farmers of the second legislative district of North Dakota, do hereby ask, request, and demand that the said J. A. Englund immediately resign from the senate and allow his seat to be filled by the proper 'constitutional' procedure and by a citizen of the United States and of this district; and

". . . Be It Further Resolved, that a copy of these resolutions be sent to Governor Frazier, Attorney General Langer, the secretary of the senate, and also to the said J. A. Englund; and, further, that a committee be selected at this mass meeting to sign these resolutions and to request the publication of the same in the Fargo Forum, Fargo Courier News, the Non-Partisan Leader, the Minot Daily News, the Devils Lake Journal, and such other publications as may be deemed proper, including the local Kenmare papers.

"Signed by the Committee—219 Farmers."

That the said defendants maliciously caused and procured said false, scandalous, defamatory, and libelous statement to be published in the named newspapers and others, and at a certain meeting held at Kenmare, in this state, on or about January 30, 1917. That the statement was false, and known by all of the defendants to be false, in the following particulars:

(a) That said mass meeting did not unanimously adopt said resolutions; that no committee of volunteers or others to the number of 219

signed said statement, and that no greater number than ten, including the defendants, signed said statement.

(b) That the plaintiff has never sworn allegiance to, and is not and never has been a subject of, the King of England. But that on the contrary plaintiff is and always has been a citizen of the United States of America, and an elector of his precinct, county, and state.

(c) That plaintiff has never violated the Constitution of North Dakota in accepting, holding, and drawing pay as a deputy bank examiner, nor illegally held said office of deputy bank examiner; and that the statements and inferences in said article to the contrary are false and were known to be false by the defendants when made, composed, and published.

That by reason of the publication of said article plaintiff was held forth to public ridicule, obloquy, scandal, and disgrace; and exposed to the hatred, contempt, ridicule, and obloquy of his fellow citizens, friends, neighbors, and constituents, and the people of this state, all to the plaintiff's injury and damage in good name, reputation, and property.

It is elementary that a demurrer admits the truth of all issuable, relevant, material facts well pleaded. 31 Cyc. 233; 6 Enc. Pl. & Pr. 334; 6 Standard Proc. 943. Hence a general demurrer to a complaint in an action for libel "admits allegations of falsity and publication and malice." 25 Cyc. 469. See also 13 Enc. Pl. & Pr. 91, 92. "The demurrer tests the actionable character of the charge, and it will only be sustained where the court can affirmatively say that the publication is incapable of any reasonable construction which will render the words defamatory." 25 Cyc. 468; McCue v. Equity Co-op. Pub. Co. 39 N. D. 191, 167 N. W. 225.

The Constitution of this state provides that "every man may freely write, speak, and publish his opinions on all subjects, being responsible for the abuse of that privilege. In all civil and criminal trials for libel the truth may be given in evidence, and shall be sufficient defense when the matter is published with good motives and for justifiable ends; and the jury shall have the same power of giving a general verdict as in other cases; and in all indictments or informations for libels the jury shall have the right to determine the law and the facts under the direction of the court, as in other cases." N. D. Const. § 9.

Few rights guaranteed by the Constitution are more valuable than those of freedom of speech and liberty of the press, which are guaranteed by the section quoted. But freedom does not mean unrestrained license. The fact that a right is guaranteed does not mean that there is also granted a license to abuse that right. Our Constitution expressly recognizes this. For while it guarantees to every man the right to "freely write, speak, and publish his opinions on all subjects," and makes it permissive to publish the truth with good motives and for justifiable ends, it also provides that one who abuses that privilege shall be responsible therefor. N. D. Const. § 9.

In conformity with the principles of the Constitution our lawmakers have said that every person has, subject to the qualifications and restrictions provided by law, the right to protection from personal insult and defamation. Comp. Laws 1913, § 4350. Defamation may be affected by libel or slander. Comp. Laws 1913, § 4351. "Libel is a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Comp. Laws 1913, § 4352.

"A privileged communication is one made:

"1. In the proper discharge of an official duty.

"2. In any legislative or judicial proceeding, or in any other proceeding authorized by law.

"3. In a communication without malice to a person interested therein by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.

"4. By a fair and true report without malice of a judicial, legislative or other public official proceeding, or of anything said in the course thereof.

"In the cases provided for in subdivisions 3 and 4 of this section, malice is not inferred from the communication or publication." Comp. Laws 1913, § 4354.

It will be noted that the statement involved in this action specifically charged:

1. That the plaintiff was not a citizen of the United States.

2. That he had foresworn allegiance to the United States of America, and taken an oath of allegiance to, and become a subject of, the King of Great Britain.

3. That therefore he was disqualified from holding the office of state senator, which he was then occupying, and subject to removal therefrom.

4. "That he has *again violated our Constitution*" in holding office as deputy bank examiner, and receiving payment for his services as such.

5. That plaintiff had been suspended from employment as deputy bank examiner and his salary as such discontinued by action of the state examiner.

6. That these charges were made by the people of the legislative district which plaintiff represented, in mass meeting assembled, and signed by a committee of 219 chosen at such mass meeting.

7. That such mass meeting and committee demanded that plaintiff resign his office as state senator.

The statement speaks for itself. There is no room for doubt that the imputations therein were directed against the plaintiff. And of course the demurrer admits that they were so directed. It also admits that the charges were false; that they were published, and that the publication was malicious. 25 Cyc. 469; 13 Enc. Pl. & Pr. 91, 92. The sole question, therefore, is whether the language of the statement standing alone is fairly susceptible of a defamatory meaning. Lauder v. Jones, 13 N. D. 525, 540, 101 N. W. 907. In other words, whether this court can say as a matter of law that the publication of the false charges standing alone could not reasonably have exposed plaintiff to hatred, contempt, ridicule, or obloquy, or caused him to be shunned or avoided, and as a result occasioned him injury.

The Constitution provides that no person shall be a senator who is not a qualified elector in the district in which he is chosen. N. D. Const. § 28. And that no person is an elector unless he is a citizen of the United States of America. N. D. Const. § 121. Our statutes provide that no person is eligible to office in this state who is not an elector (Comp. Laws 1913, § 19); and make it a crime for a person knowing himself not to be a qualified voter to vote or offer to vote at any election. Comp. Laws 1913, § 9259.

The statement under consideration positively charged that the plaintiff was holding office illegally,—that he was occupying an office which the Constitution said he was not qualified to hold. If the charge was true it would have been the duty of the senate to remove him from such office. The statement further charged that he had "again violated the Constitution" by holding the office of deputy bank examiner, and receiving payment as such, and that he had been suspended from such latter office by action of the state examiner. The article further represented that the people of the legislative district from which plaintiff had been chosen had proclaimed these alleged facts in resolutions adopted at a mass meeting and signed by a committee of 219, and that such people and in such resolutions had demanded that plaintiff resign from his office as state senator.

The authorities generally hold that imputations like those contained in this statement are libelous *per se*. 17 R. C. L. 301; 25 Cyc. 260, 346, 347; 18 Am. & Eng. Enc. Law, 905, 909, 920, 949, 950. In our opinion the complaint states facts sufficient to constitute a cause of action. The order appealed from must therefore be affirmed. It is so ordered.

BRONSON, J., did not participate, Honorable W. L. NUESSLE, of the Sixth District, sitting in his stead.

ROBINSON, J. (dissenting). This is an appeal from an order overruling a demurrer to the complaint in a political libel suit. It should be considered from the standpoint that such a suit is commonly a nuisance *per se*. It is the means of stirring up vindictiveness and rancor. It is quite sure to put the public and the parties to an expense for no purpose. The result is commonly a verdict of 5 cents or nothing, the same as the Roosevelt-Barnes suit, which was conducted for thirty days and resulted in a draw, and cost the parties and the public thousands of dollars.

The king of scandal loves a shining mark. All great men, from the President down to the state lawmakers, are continuously subject to libelous publications. It is to them like water on a duck's back. It advertises them and does them no harm. Thus the libelous matter so often published of and concerning Townley has given him an immensity of free advertising; it has done him a benefit, and not an injury.

The gravamen of this libel suit is that at a time when the famous H. B. 44 was before the legislative assembly, the plaintiff being a state senator, to induce him to vote for the bill, defendants conspired to publish of and concerning him certain false and defamatory resolutions, *viz.*,

Be it resolved that it has been brought to our attention that J. A. Englund, now sitting as a senator from this district, is not a citizen of the United States, has sworn allegiance to the King of England, has filed on a homestead in Canada. The rest of the complaint is mere innuendo and stuffing. Now, there is nothing immoral or illegal in swearing allegiance to the King of England or in taking a homestead in Canada. However, under the state Constitution it is illegal for a person to vote or hold office without being a citizen of the United States, but under the territorial statutes the right to vote and to hold office was given not only to citizens of the United States, but also to persons who had declared their intention to become a citizen, and in early days the same rule prevailed in Minnesota, Wisconsin, and in other states. It is only in recent years that the right to vote and hold office has been limited to citizens of the United States. However, without his first papers making him a full fledged citizen, a person might still hold office in good faith. It is not true that every person knows all about the changing laws and constitutions. There was nothing in the charge to seriously shock the sensibilities of the senator, or to injure him either in his own estimation or in the esteem of the people; and the fair presumption is that it did not injure him one particle. It is true the complaint avers that the senator gave the lawyers some money for writing a notice to the newspapers demanding a retraction of the libel because it was false, but the expense was needless and so was the notice; and of course the senator was competent to give such a notice without any expense.

In considering the case the court takes notice of H. B. 44, which must have been submitted as an educational measure. There was no possibility of the bill becoming a law, even though it had received the votes of every member in both houses. It is vain to say that party leaders do conspire to libel a member to gain his vote for such a bill.

The purpose of a complaint in a civil action is to concisely and truly state the facts of the case and to show a proper regard for the truth.

Here the complaint is a gross exaggeration. It charges that the libel has injured the plaintiff in the sum of $25,000—that may be considered as a libel on the plaintiff. His character and reputation would be of little value if it might be injured $25,000 or 25 cents by such a political item. In this case there is nothing to be gained by considering a thousand and one citations on this and that charge. The common law of political libel is undergoing a continuous and daily change. The people are paying less and less regard to such newspaper stuff, so that no one suffers from it, and the courts are no longer disposed to regard mere exaggerations which are manifestly untrue. The libel does not contain any matter sufficient to cause damages to the senator.

Order should be reversed and action dismissed.

GRACE, J. I concur in the result.

WENZEL URBANEC, Plaintiff and Respondent, v. JOSEPH URBANEC, Joseph Kovash, Fannie Kovash, Agnes Kovash, Theresa Kovash, Barbara Kovash, Rosa Kovash, Mary Kovash, and All Other Persons Claiming Any Estate or Interest in or Lien or Encumbrance upon the Property Described in the Complaint, Defendants and Appellants, and WENZEL URBANEC and E. A. Lillibridge, Administrators of the Estate of Franz Urbanec, Deceased, Interveners and Appellants.

(174 N. W. 880.)

Adverse possession — parol gift and delivery of patent does not give color of title.

In an action to determine adverse claims, it is *held:*

1. Possession of land under a parol gift, accompanied by the delivery of a patent evidencing the donor's title, does not constitute color of title which

NOTE.—The law is well settled that a gift of real estate by parol, followed by possession of the property thereunder, and the making of improvements thereon, is valid, as will be seen by an examination of the cases collated in a note in 9 L.R.A.(N.S.) 508, on degree of proof necessary to establish gift of real estate.

On adverse possession of real estate by donee under parol gift, see note in 35 L.R.A. 835.

will enable the donee to obtain the protection of the ten-year Statute of Limitations (§ 5471, Compiled Laws of 1913).

Adverse possession — Statute of Frauds — parol grant to son — improvements of land already conveyed.

2. Where the donee or grantee under a parol grant was a son of the donor or grantor, and the latter had no other relatives in this country and was so aged as to be incapable of caring for himself, the circumstances of the gift or grant indicating that it was made in discharging an obligation arising out of the support of the donor or grantor by the donee or grantee, and the gift was followed by the rendition of support during the life of the donor or grantor, by the making of improvements, payment of taxes, and by seventeen years' adverse possession, equity requires that the parol grant be given effect and that the heirs be precluded from asserting title as against such gift or grant.

Opinion filed July 28 1919.

Appeal from District Court of Dunn County, *Crawford,* J.

Affirmed.

C. H. Starke, for defendants and interveners.

Courts of equity have enforced gifts of real property, notwithstanding the Statute of Frauds, only where the proof of the gift was clear and convincing and where the donee in reliance thereon entered into possession and made valuable improvements. Note in 9 L.R.A.(N.S.) 508.

Equity has enforced the gift in such cases on the principle of equitable estoppel. "The real reason for enforcing such a gift is to prevent fraud being practised upon the donee by his having been induced because thereof to make valuable improvements thereon." Freeman v. Freeman (N. Y.) 3 Am. Rep. 651 (a leading case).

The improvements must be valuable and in an amount exceeding the rental value of the land. 9 L.R.A.(N.S.) 508, note.

Courts of equity have also recognized a parol gift of real property as sufficient upon which to found a title by adverse possession. 35 L.R.A. 835, note.

The objection that the evidence consisting of alleged statements of deceased persons is easily fabricated goes to the weight, not the admissibility. 1 R. C. L. 501.

Declaration of a former owner, made after he has parted with his interest therein, cannot be received in evidence to effect the title. Wigmore, Ev. p. 1289.

Declarations and admissions of an alleged donor in respect to the gift are not in themselves sufficient evidence to establish the gift. 20 Cyc. 1225, 1248; Geer v. Goudy (Ill.) 51 N. E. 623; Polk v. Clark (Md.) 48 Atl. 67; Tannery v. McMurn (Tex.) 68 S. W. 640; Young v. Crawford (Ark.) 100 S. W. 87; Meurin v. Koplan (Tex.) 100 S. W. 984, 9 L.R.A.(N.S.) 508.

Heirs of deceased title holder are tenants in common of the real estate of their ancestor and cannot acquire title to the whole property by adverse possession, except by such actual ouster as to notify his cotenants that he denies their right to the property. Tiffany, Real Prop. 379, 1009; Johnson v. Brauch (S. D.) 35 L.R.A. 835, 168 N. W. 173; note in 15 L.R.A.(N.S.) 1195.

In order to claim under § 5471, Compiled Laws, there must be some title vested in claimant. Power v. Kitching, 10 N. D. 260; Stiles v. Granger, 17 N. D. 502; Wright v. Jones, 23 N. D. 191; Lincoln v. Great Northern, 26 N. D. 504; Page v. Smith, 33 N. D. 369; Woolfolk v. Albrecht, 22 N. D. 36.

M. L. McBride, for respondent.

One who enters upon real estate by virtue of a parol gift, and, claiming as owner, continues for the statutory period in open, exclusive, adverse, and uninterrupted possession of it, thereby acquires a perfect title. Shafer v. Hauser, 35 L.R.A. 835; Vandiveer v. Stickney, 75 Ala. 225; Colins v. Johnson, 57 Ala. 304; Lee v. Thompson, 99 Ala. 95; Bakerfield Towne Hall Asso. v. Chester, 55 Cal. 98; Baldwin v. Temple, 101 Cal. 396; South School Dist. v. Blakeslee, 13 Conn. 227; Comins v. Comins, 21 Conn. 416; Clark v. Gilbert, 39 Conn. 98; Watson v. Tindal, 24 Ga. 494, 71 Am. Dec. 142; Stewart v. Duffy, 116 Ill. 47; Wilson v. Campbell, 119 Ind. 286; Thompson v. Thompson, 93 Ky. 435; Lewis v. Lewis, 5 Ky. L. Rep. 858; Strutton v. Strutton, 10 Ky. L. Rep. 607; Moore v. Webb, 2 B. Mon. 282; Com. v. Gibson, 85 Ky. 566; Spradlin v. Spradlin, 13 Ky. L. Rep. 723; Wheeler v. Laird, 147 Mass. 421; Steel v. Johnson, 4 Allen, 423; Summer v. Stevens, 6 Met. 337; Davis v. Bawmar, 55 Misc. 671; Davis v. Davis, 68 Miss. 478; Goehegan v. Marshall, 66 Miss. 676; Rannels v. Rannels, 52 Mo. 108; International Bank v. Fife, 95 Mo. 118; Allen v. Mansfield, 108 Mo. 343; Jackson Golden v. More, 13 Johns. 513, 7 Am. Dec. 398; Graham v. Craig, 81 Pa. 465; Campbell v. Braden, 96 Pa. 388;

Ewing v. Ewing, 96 Pa. 381; Craig v. Craig (Pa.) 10 Cent. Rep. 375; Kennedy v. Wible, 10 Cent. Rep. 51; Moreland v. Moreland, 121 Pa. 573; Harvey v. Harvey, 26 S. C. 608; Summer v. Murphy, 2 Hill, L. 488; Hunter v. Parsons, 2 Bail. L. 59; Haynes v. Jones, 2 Head, 372; Pope v. Henry, 24 Vt. 560.

It is not essential that the claim of right or title to the land by the adverse occupant should be a valid legal claim in order that the statutes may run in his favor. Pettit v. Black, 13 Neb. 142, 12 N. W. 841; Lantry v. Wolf, 49 Neb. 374, 68 N. W. 494.

"A gift of land by parol, accompanied by an actual entry and possession, manifests the intention of the donee to enter and take as owner and not as tenant, and it equally proves an admission on the part of the donor that the possession is taken." Summer v. Stevens, 6 Met. 357; Pope v. Henry, 24 Vt. 560; Collins v. Johnson, 57 Ala. 304; Potter v. Smith, 68 Mich. 212, 3 N. W. 916; Brown v. Mathews, 98 Tenn. 45, 40 S. W. 480.

Delivery is an element which must be proved by the donee or the one claiming through him although proof need not be a witness who actually saw the delivery made, but may be inferred from facts and circumstances. Olds v. Powell, 17 Ala. 652, 42 Am. Dec. 605; Getz v. People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232; Richards v. Reeves, 149 Kan. 427, 49 N. E. 348; Jones v. Keir, 52 Pac. 429.

"The possession which a lapse of the statutory period will ripen into title must consist of such corporal presence and physical comfort as the land reasonably admits of, as well as a present power and right of domination over it; and usually evidenced by occupation and such use as is appropriate to the locality and quality of the property." Stevens v. Anderson, 87 Ala. 231, 6 So. 285.

"It is ordinarily sufficient if the acts of ownership are of such a nature as a claimant would exercise over his own property, and would not exercise over another's, and that the acts amount to such use or dominion over the land as it is reasonably adapted to. 2 C. J. 56; Clark v. Potter, 32 Ohio St. 49; Merrill v. Tobin, 30 Fed. 741; Jones v. Gaddie, 67 Miss. 769, 7 So. 489.

BIRDZELL, J. This is an action to determine adverse claims to a quarter section of land in Dunn county. In his complaint the plaintiff

alleges that he has been in possession of the real estate in question, under a parol gift made by Frank Urbanec or Orbanez to him, for the period of more than seventeen years. An answer was interposed on behalf of the defendants, who reside in Russia, by Anton Wolf, as Imperial Russian Consul General. The defendants allege that they are citizens and subjects of the Empire of Russia, residing therein, but they do not assert their interest in the property as heirs of Frank Urbanec or otherwise. Pursuant to stipulation, an answer in intervention was filed by E. A. Lillibridge and Wenzel Urbanec as administrators of Franz Urbanec, deceased. The answer in intervention alleges the death of Franz Urbanec; that at the time of his death he was the owner of the property in question; and that he left, as his heirs, the plaintiff, Wenzel Urbanec, and the defendants, all of whom, as such heirs, are alleged to be entitled to the property. The interveners also ask for a judgment for the value of the use and occupation since the death of Franz Urbanec. The record reveals the following facts: Between twenty-five and thirty years ago, Franz Urbanec, then an elderly man (about seventy years of age), and his son, Wenzel Urbanec, migrated to this country from Russian Bohemia. Upon their arrival in North Dakota they filed upon adjoining homesteads in Dunn county and later became citizens. Wenzel brought with him his family. Franz, on account of his age, was more or less dependent upon his son, and he recognized his obligation at various times by telling friends and neighbors that he expected to give the land upon which he had filed to his son. After final proof was made and the patent issued, he delivered the patent to his son, gave up his residence on the land, and went to live with Wenzel. The latter went into possession of the land, relying upon the parol gift and the patent which had been delivered to him. He has paid the taxes for fifteen years.

The plaintiff relies upon § 5471, Compiled Laws of 1913, which reads: "All titles to real property vested in any person or persons who have been or hereafter may be in actual open, adverse and undisputed possession of the land under such title for a period of ten years and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding." We are of the opinion that this statute does not support the plaintiff's claim. It will be noticed that the statute

protects *titles* when persons have gone into actual open, adverse, and undisputed possession under them and have paid taxes for the period of ten years. As was said by this court in Power v. Kitching, 10 N. D. 254–260, 88 Am. St. Rep. 691, 86 N. W. 737, the first requisite of the statute is that "the claimant must be vested with some sort of title." The plaintiff here does not claim to have been in possession under any sort of title but rather as a donee of an executory gift. The plaintiff's wife, who was present when the patent was delivered, testified: "My husband wanted him to give him some more in writing and he said that was enough. He gave him the patent and he said that was good."

The patent was, of course, not an instrument of conveyance from the father to the son, and the change of possession thereof did not invest the son with any title paper which would serve in his hands to give color of title. It is unnecessary here to determine all of the requisites that may go to make up color of title. Whether, for instance, it is necessary in every case that there should be some sort of a paper title or whether one going into possession in good faith, on the supposition that he is the sole heir of the person last seised, might be considered as holding under color of title so as to draw to his possession the benefits of the ten-year statute (M'Call v. Neely, 3 Watts, 69), we do not determine. Suffice it to say here that there must at least be presented that which, in appearance, is title, but which, in reality, is not title. Wright v. Mattison, 18 How. 50, 15 L. ed. 280.

The respondents rely principally upon the case of Rannels v. Rannels, 52 Mo. 108, and other similar cases which define the term "color of title" in such broad language as to include practically every transaction whereby one may be put in rightful occupancy of real property under circumstances entitling him, in good faith, to consider it as his own. The supreme court of Missouri, in a later case,—Allen v. Mansfield, 108 Mo. 343, 18 S. W. 901,—found it necessary to qualify the broad holding of the Rannels Case, as appears from the following quotation from the latter decision: . . . "Claim of title does not necessarily include color of title. The definitions and descriptions of color of title given in the books are various and conflicting. It is, we think, safe to say that any writing which purports to convey land and describes the same is color of title, though the writing is invalid and conveys no title. Fugate v. Pierce, 49 Mo. 441; Hamilton v. Boggess, 63 Mo. 233;

Hickman v. Link, 97 Mo. 482, 10 S. W. 600. In Fugate v. Pierce, it was said constructive possession is never based upon a claim merely; 'there must be a deed purporting to convey the whole, or some proceeding or instrument giving color and defining boundaries, as well as actual possession.' This doctrine was approved in Long v. Higginbotham, 56 Mo. 245. . . . These cases all lead to the conclusion that to constitute color of title there must be some documentary evidence, and so it is generally held. Sedgw. & W. Trial of Title to Land, 2d ed. §§ 769, 772."

Immediately following the above, the Rannels Case is referred to as apparently inconsistent, and the authority of that decision is limited to the result in the particular case.

We are also cited to a line of authority in 35 L.R.A. 835, to the effect that one who enters upon real estate by virtue of parol gift, and who claims as owner, may claim the benefit of the Statute of Limitations after he has been in the open, exclusive, adverse, and uninterrupted possession for the statutory period. These authorities are collected in a note to Schafer v. Hauser, 35 L.R.A. 835, and are cited as being in accord with that decision. But all that is held therein is that one taking possession of land under a parol gift holds it adversely as to the donor and all others. The holding of the court in that case is clarified by an expression in 1 Am. & Eng. Enc. Law, 280, which it quotes with approval. It is said: ". . . *That such a parol gift conveys no title,* and only operates as a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar is complete, is immaterial; it is evidence of the beginning of an adverse possession by the donee, which can only be repelled by showing a subsequent recognition of the donor's superior title."

And it may be remarked, too, that the question before the court in the Michigan case, as well as in most of the others cited in the note, was not a question of color of title, but simply as to whether or not a donee, taking land by parol gift, could be considered as being in adverse possession within the twenty-year statute. It is well settled that color of title is not needed where adverse possession under the twenty-year statute is relied upon. 1 R. C. L. 708. Claim of right is essential but not title, colorable or otherwise. For authorities adhering to the rule that there must be at least color of title in one seeking the protection

of the short-term Statute of Limitations, however, see 15 L.R.A.(N.S.) 1223. We are of the opinion that the plaintiff in the instant case had no title which was capable of being protected by the ten-year statute. § 5471, Compiled Laws of 1913. But there is another matter that is fairly presented on the record.

It appears in the testimony, however, that the plaintiff's father lived to the age of about ninety years; that, in mentioning to a friend the gift of the homestead in question to his son Wenzel, he recognized that he was receiving from the son, in return, that which he would perhaps otherwise have been unable to obtain; namely, support and care in his declining years. The testimony shows that he lived with the son for five years before his death, dying in 1904, and that during this time he was unable to perform the labor necessary to make a living. It appears, also that the father gave to the son the muniment of his title, and that the son, in reliance upon the gift, went into possession, paid the taxes, and made improvements to the extent of building a fence upon the land. It thus appears that the right of Wenzel rests upon something much more substantial than a mere unexecuted parol gift of land. In fact, it was a gift upon consideration of support, followed by the rendition of the support and the making of improvements. Under the circumstances the Statute of Frauds would not stand in the way of an action by Wenzel Urbanec to secure specific performance of the contract after he had completely performed as he has in this case. The heirs are as effectively barred from asserting the title derived from Franz Urbanec as Franz himself would be were he asserting the legal title as against the plaintiff. See Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031. Equity, therefore, requires that the title be quieted in the plaintiff.

Judgment affirmed.

GRACE, J. I concur in the result.

CHARLES H. LAVELL, Trustee in Bankruptcy of Everybody's Store, a Corporation, Bankrupt, Plaintiff and Respondent, v. F. G. BULLOCK et al., Defendants, and F. G. BULLOCK, Appellant.

(174 N. W. 764.)

Corporations — evidence as to balance due on stock.

This is an appeal from a judgment under the statute which makes a stockholder liable for the unpaid balance due to the corporation on his corporate stock. As trustee in bankruptcy the plaintiff brings the action to recover from the appellant $700 and interest as the balance due on 14 shares of common stock in Everybody's Store. *Held:*

1. The evidence clearly shows that on such stock there never was any balance due to the company.

Corporations — stock issued contrary to state Constitution — void.

2. Stock issued as bonus stock in violation of § 138 of the Constitution, which prohibits corporations from issuing stock or bonds except for money, labor, or property received, is void.

Corporations — liability of purchasers of stock illegally issued as to creditors.

3. Purchasers of stock issued in violation of the constitutional prohibition are not, under the circumstances in the instant case, precluded from asserting the void character of the stock as against creditors of the corporation.

Corporations — effect of § 4554, Compiled Laws 1913 — rights of creditors against bona fide purchasers of stock illegally issued as fully paid.

4. Section 4554, Compiled Laws of 1913, which provides that each stockholder is liable individually for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him, is construed, and held to create no cause of action in favor of creditors as against a bona fide purchaser of stock originally issued as fully paid contrary to law.

Opinion filed August 2, 1919.

NOTE.—On effect of transfer of shares of stock on liability for unpaid subscription, see notes in 47 L.R.A. 246, and L.R.A.1918D, 1049.

On liability of transferee of corporate stock on unpaid subscriptions, see note in 30 L.R.A.(N.S.) 283.

On creditor's knowledge that stock is unpaid as affecting stockholders' liability, see note in 7 A.L.R. 972.

On liability of stockholders on subscription for stock, see note in 40 Am. Dec. 358.

On liability of stockholders to the creditors of an insolvent corporation for the amount due on their unpaid stock, see note in 35 L. ed. U. S. 227.

Appeal from judgment of the District Court of Cass County, *Cooley*, Special Judge.

Reversed and dismissed.

Lawrence & Murphy, for appellant.

The action is not one properly triable in a court of equity under the circumstances here presented, but should be in the form of an action at law in which this defendant has the right to have the facts determined by a jury. Comp. Laws 1913, § 7608; Kohler v. Agassiz (Cal.) 33 Pac. 741.

The ordinary action for the recovery of a call is an action at law. 4 Thomp. Corp. pp. 351, 352.

"The remedy to collect subscriptions was held not to be in equity, although the defense was interposed that the board of directors released the subscription, but the corporation claimed that such release was fraudulent." 4 Thomp. Corp. p 352.

The basis of this action is the purported call by the referee which is simply a demand for a debt due on contract, and therefore if the basis for an action at all is a basis for an action at law. Porter v. Northern F. & M. Ins. Co. The meaning of the word "call" or "instalment" strictly speaking means the action of the board of directors or of a corporation demanding the payment of all or a portion of unpaid subscriptions. 4 Thomp. Corp. § 3686.

"An action by a receiver to collect unpaid subscriptions is an action at law, and it is not proper practice to join all delinquent stockholders as defendants in one action." See also Johnston v. Allis, 71 Conn. 207, 41 Atl. 816.

"On the contrary the probability or even the possibility of a multiplicity of suits is negatived by the facts in the case, nor are any facts averred showing that the remedies provided by law are not entirely adequate." Bismarck Water Supply Co. v. Barnes, 153 N. W. 458.

"We venture to say that it would not be seriously suggested that a common interest in any such question of law, where the legal interests of the parties were wholly distinct, could constitute any ground of equitable jurisdiction, when the several controversies affected by the question were purely legal controversies. Suits do not become of

equitable cognizance because of their number merely." Youngblood v. Sexton, 20 Am. Rep. 657; Marshall-Wells Co. v. New Era Co. 13 N. D. 396.

The stockholders' liability is not conditional nor secondary under said section. It is a primary liability, and accrues as soon as the debt is contracted. It may be enforced as a personal liability by the procedure laid down in §§ 5767, 6770, Revised Code 1899. Comp. Laws 1913, §§ 7997, and following; Burke v. Schoer, 33 L.R.A.(N.S.) 1057, 130 N. W. 962.

Subscriptions to the stock of a corporation do not constitute trust funds for the benefit of its creditors, so as to give chancery jurisdiction of a suit to reach them for the creditors' benefit.

"Compelling creditors of a corporation to elect between a pending garnishment proceeding and suit in chancery to reach unpaid stock subscriptions will not confer jurisdiction on the chancery court if it did not otherwise exist." Hall v. Henderson, 63 L.R.A. 673; O'Bear Jewelry Co. v. Volfer, 28 L.R.A. 707.

"The general rule supported by a great number of cases is that the stockholders' statutory liability does not pass either to a receiver or to an assignee in insolvency, and cannot be enforced by either." Hammond v. Cline, 170 Ind. 453, 84 N. E. 827; Wallace v. Milligan, 110 Ind. 498, 11 N. W. 599; Runner v. Dwiggins, 147 Ind. 238, 36 L.R.A. 645, 46 N. E. 580. See also Lane v. Morris, 8 Ga. 468; Abbey v. Grimes Dry Goods Co. 44 Kan. 415, 24 Pac. 426; Howell v. First Nat. Bank, 52 Kan. 133, 34 Pac. 395; Hanson v. Konkersley, 37 Mich. 184; Patterson v. Stewart, 41 Minn. 84, 42 N. W. 926, 16 Am. St. Rep. 671, 4 L.R.A. 745; Re People's Live Stock Ins. Co. 56 Minn. 180, 57 N. W. 468; Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 38 L.R.A. 415, 69 N. W. 331; Olson v. Cook, 57 Minn. 552, 58 N. W. 625; Palmer v. Bank, 65 Minn. 90, 67 N. W. 893; Liberty Female College Asso. v. Watkins, 70 Mo. 13; Hamilton Nat. Bank v. American Loan & T. Co. 66 Neb. 67, 92 N. W. 189; Wright v. McCormack, 17 Ohio St. 86; Umstad v. Buskirk, 17 Ohio St. 113; Cushing v. Perot, 175 Pa. 66, 34 Atl. 447, 52 Am. St. Rep. 835, 34 L.R.A. 737; Parker v. Carolina Sav. Bank, 53 S. C. 583, 31 S. W. 673, 69 Am. St. Rep. 888; Colton v. Mayer, 90 Md. 711, 45 Atl. 874, 78 Am. St. Rep. 456, 47 L.R.A. 617.

"It does not exist in favor of a subsequent creditor who has dealt with the corporation with full knowledge of the arrangement by which the bonus stock was issued, for a man cannot be defrauded by that which he knows when he acts." Hospes v. N. W. Manufacturing & Car Co. 15 L.R.A. 474.

"But the law implies such a promise only in favor of the subsequent creditors who are presumed to have extended credit to the corporation on the faith of the increased stock, and they alone are entitled to enforce their claims against those accepting that stock." Anglo-American Land, M. & A. Co. v. Lombard, 132 Fed. 735. See also Hadley v. Stutz, 139 U. S. 417–435, 34 L. ed. 706.

Where the plaintiff placed no reliance upon the supposed full-paid capital of a corporation, on an increase in the number of shares of its capital stock, it was held, in Coit v. North Carolina Gold Amalgamating Co. supra, that he would have no cause of complaint by reason of the subsequent recall of such shares. Easton Nat. Bank v. American Brick & Tile Co. (N. J.) 8 L.R.A.(N.S.) 271, 272; Anglo-American Land, M. & A. Co. v. Lombard, 132 Fed. 733.

"The fact that stock certificates cite that the stock is 'fully paid up and nonassessable' was held to be no protection to the assignee thereof as against corporate creditors where such assignee had notice that it was not in fact paid up, or where the circumstances are such that a person of average intelligence would know the facts in relation to the stock being paid up, but the rule does not apply to an innocent purchaser." 4 Thomp. Corp. 1327; Davies v. Ball, 116 Pac. 833; note in 38 L.R.A. 494.

Fowler & Green and *Pfeffer & Pfeffer,* for respondent.

"The stockholder is liable to the extent that the subscription represented by his stock requires him to contribute to the corporate funds, and when sued for the money he owes, it must be in a way to put what he pays, directly or indirectly, into the treasury of the corporation, for distribution according to law." Patterson v. Lynde, 106 U. S. 519, 27 L. ed. 265.

"Unpaid subscriptions on the capital stock of a corporation pass, like other assets, to the trustee in bankruptcy, and he is the only party that can bring an action or proceeding thereon." Sanger v. Upton, 91

U. S. 56, 23 L. ed. 220; Re Crystal Spring Bottling Co. (D. C.) 96 Fed. 945; Lane v. Nickerson, 99 Ill. 284.

"It is only through the instrumentality of the trustee, when the corporation has been adjudged a bankrupt, and the estate is in process of settlement in the bankrupt court, that the creditor can reach and subject such assets to the payment of his debt." Glenny v. Langdon, 98 U. S. 20, 25 L. ed. 43; Peery v. Carnes, 86 Mo. 652; Lane v. Nickerson, supra; Blair v. Hanna, 87 Ind. 298; Perkins v. Cowles, 157 Cal. 625, 30 L.R.A.(N.S.) 283, 108 Pac. 711.

"The amount due from the stockholders for the subscribed stock of the corporation is a trust fund for the creditors of the corporation, and such unpaid subscriptions to its stock are a part of its assets, and may be collected for its creditors." Vermont Marble Co. v. Declez Granite Co. 135 Cal. 579, 56 L.R.A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; Walter v. Merced Academy Asso. 126 Cal. 583, 59 Pac. 136; Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

"By purchasing from the original stockholders, the transferees assumed as a matter of law all the liabilities that the transferrers of the stock to them were under, and took it subject to all their obligations. Visalia & T. R. Co. v. Hyde, supra. Hence the defendants were liable to a call for payment of the unpaid subscriptions in the bankruptcy proceedings, and the trustee had a right to maintain this action to recover on the calls." Babbitt v. Read, 137 Fed. 712, 215 Fed. 395; Re Remington Automobile & Motor Co. 153 Fed. 345; Allen v. Grant (Ga.) 50 S. E. 494 (opinion by Judge Lamar); Re Bothe, 173 Fed. 597.

As to the necessity of an assessment, and as to the amount necessary to be assessed upon each share of stock, the finding of the referee is conclusive. To this extent the authorities are unanimous. Re Remington, 153 Fed. 345; Re Munger, 168 Fed. 910; Re Newfoundland Syndicate, 201 Fed. 917; Re Stipp Const. Co. 221 Fed. 372. (This is a late case approving procedure followed here.)

The equity jurisdiction should be sustained upon the ground that a multiplicity of suits thereby was avoided, if for no other reason. 1 Pom. Eq. 3d ed. chap. 269; Wyman v. Bowman, 127 Fed. 257; Patterson v. Lynde, 106 U. S. 519, 520, 27 L. ed. 265, 1 Sup. Ct. Rep. 432; Van Pelt v. Gardner, 54 Neb. 711, 75 N. W. 874.

Any shareholder who pays more than his proportion of the corporate debts may enforce contribution of his cosubscribers. Van Pelt v. Gardner, 54 Neb. 709, 75 N. W. 874; Dill v. Ebey, 27 Okla. 584, 46 L.R.A.(N.S.) 440, 112 Pac. 973.

"Each and every stockholder shall be personally liable to the creditors of the company to the amount of what remains unpaid upon his subscription to the capital stock, and not otherwise." Patterson v. Lynde, 106 U. S. 519, 27 L. ed. 265; Hayden v. Thompson, 71 Fed. 60; Kelley v. Fourth of July Min. Co. (Mont.) 42 L.R.A. 621; Allen v. Grant (Ga.) 50 S. E. 494; Van Cleve v. Berkley (Mo.) 42 L.R.A. 593; Bailey v. Tillinghast, 99 Fed. 801.

On proper rule as to equitable jurisdiction to avoid multiplicity of suits, see dissenting opinion of Judge Marshall of Wisconsin in Illinois Steel Co. v. Schroeder, 113 N. W. 51; N. Y. L. Ins. Co. v. Beard (D. C.) 80 Fed. 66; Cook v. Carpenter (Pa.) 1 L.R.A.(N.S.) 900.

"An arrangement by which the stock is nominally paid and the money immediately taken back as a loan to the stockholder is a device to change the debt from a stock loan to a loan, and is not a valid payment as against creditors of the corporation, though it may be good as between company and the stockholders." Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731 (syllabus); Webster v. Upton, 91 U. S. 65, 23 L. ed. 384; Upton v. Tibilcock, 91 U. S. 45, 23 L. ed. 203; Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 189; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968.

"A contract of a corporation limiting the liability of its stockholders to a portion of the par value of their stock is void both as to creditors and the assignee in bankruptcy." Edwards v. Schillinger (Ill.) 33 L.R.A.(N.S.) 895, 91 N. E. 1048.

"The experience and good will of the partnership which it is claimed were transferred to the corporation are of too unsubstantial and shadowy a nature to be capable of pecuniary estimation in this connection." Cambden v. Stuart, 144 U. S. 104, 36 L. ed. 363.

Doctrine reinforced by statute similar to ours in some respect. Easton Nat. Bank v. American Brick & Tile Co. (N. J.) 64 Atl. 917, 8 L.R.A.(N.S.) 271, opinion by Judge Pitney; Peninsular Sav. Bank v. Black Stove Polish Co. (Mich.) 63 N. W. 514 (services by way of "influence" consideration for stock, held not valid as to creditors; re-

views authorities); German Mercantile Co. v. Wanner, 25 N. D. 479, 142 N. W. 463.

The acceptance of a certificate of stock issued to the person who accepts it implies a promise that he will pay for the shares, and that thereby the party stands liable to pay assessments, although he has not yet made any express promise to do so. 10 Cyc. 381; Van Cleve v. Berkey (Mo.) 42 L.R.A. 593; Re M. Allemen Co. 172 Fed. 611; Vermont v. Declez (Cal.) 56 L.R.A. 728, 67 Pac. 1057; Elyton v. Birmingham (Ala.) 12 L.R.A. 307; Kelly v. Fourth of July Min. Co. (Mont.) 42 L.R.A. 621.

ROBINSON, J. This is an appeal from a judgment under the statute which makes a stockholder liable for the unpaid balance due on his corporate stock. As trustee in bankruptcy the plaintiff brings this action to recover from appellant $700 as the balance due on fourteen shares of common stock in "Everybody's Store." The Constitution says that no corporation shall issue stock or bonds except for money, labor done, or money or property actually received. § 138. The statute says, "Each stockholder in a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him." Comp. Laws 1913, § 4554. In the consideration of this case it is not necessary to enter upon any debatable grounds or to discuss any nice points of law. The purpose of the statute is to protect parties who deal with and trust corporations relying on obligations of stockholders to pay what they owe to their corporation. Under the statute a stockholder is not merely a person who picks up and holds stock that he may find lying on the street. He is a person who takes the stock under a contract to pay for it. When the corporation has received its pay for stock it may be sold and transferred the same as any chattel or chose in action. Neither a corporation nor its trustee or assignee can maintain an action for a balance due on stock unless there is a balance due the corporation. In this case the proof does not show any balance due the corporation. All the common stock was bought and paid for by the president of the company. Then he traded some of it to Barney, who transferred to appellant fourteen shares of his common stock, which reads on its face that it is fully paid and nonassessable. And it is stipulated that ap-

pellant paid full and fair value for this stock. He is a purchaser in good faith.

Here is the history of the case:—In October, 1913, at Fargo, one H. M. Cornell opened a trading house known as "Everybody's Store." At the end of three months he was in debt about $12,500 with assets of $25,000. Then he concluded to unload his debts and assets by turning himself into a trading corporation. Accordingly in the name of himself, his wife, and one E. C. Hamilton, he filed with the secretary of state articles of incorporation fixing the capital stock at $100,000. This included 500 shares of preferred stock at $100 a share, and 1,000 shares of common stock at $50 a share. The purpose of the corporation was to do a general trading business, to assume debts and liabilities, and to borrow money in unlimited amounts.

The company at once proceeded to assume the debts and obligations of Cornell and took over his business. The 1,000 shares of common stock it issued to Cornell in payment of his lease and the good will of his business; 250 shares of preferred stock it issued to Cornell in payment of all his assets. Cornell at once elected himself president and treasurer. To his good wife, who became a director, he gave 20 shares of common stock; to E. C. Hamilton, 125 shares; to one Flick of Minneapolis, 125 shares. On the books of the company—the journal and the ledger—it does appear on several pages that for the lease and good will of the business the company was charged $50,000. On the trial the books were put in evidence. Cornell was called as a witness for plaintiff and testified that he bought over the common stock in exchange for the lease and good will of the business. He says, "I gave for the common stock my lease and the good will of the business, the location and establishment of the business." (17.)

Q. "What were the 250 shares of common stock issued to Flick and Hamilton for?"

A. "That really belonged to me and I turned them off to them gratis. (17.) The 20 shares of stock issued to my wife I just gave her as a present."

Q. "What was the value of the good will and lease?"

A. "I figured it was worth what we sold it to the company for, $50,000. I think we figured it at $50,000. We estimated it was worth that amount." (102.)

In a written contract on December 29, 1913, it is recited and agreed that Cornell sold to the company the good will of the business and the lease of the premises and property amounting to $25,000. That in consideration of such sale the company agreed to issue to the seller certain certificates of fully paid stock to the amount of $75,000, namely, 250 shares of preferred stock and 1,000 shares of common stock. In a subsequent written agreement of January 2, 1914, it is recited that the corporation has sold and delivered to Cornell 1,000 shares of common stock and he agrees to replace in the hands of the treasurer 250 shares of the common stock to be retained by the treasurer and allotted to purchasers of preferred treasury stock as an inducement to buy the preferred treasury stock. Doubtless the company assumed the great load of debts and paid too much for its whistle. But that was the purpose of its organization and this is not an action to rescind the contract of sale, and the mere inadequacy of the price does not make the contract void. As the record shows, Mr. Cornell purchased and paid for all the common stock, which reads on its face that it is fully paid and nonassessable. Then he transferred to one Barney 15 shares of stock and Barney transferred 14 of his shares to appellant. But on said 14 shares there is nothing due to the corporation. It never had any cause of action against the appellant. It had no dealings with him.

Suing as the representative of the corporation and its creditors of course the plaintiff can assume no rights only such as belong to the corporation and its creditors. Furthermore, the purpose of the statute is to protect parties who deal with and give credit to a corporation on the faith and credit of its stockholders, to the amount of their corporate stock. In this case it appears that after the incorporation the business taken over was conducted in the same name and in the same manner as before the incorporation. And there is no showing that the creditors in dealing with the corporation knew that it was a corporation or that it had any stockholders. Certainly there is nothing to show that they were in any way deceived in regard to the holders of the common stock. The records of the company were open to them, and those records were very brief. They clearly showed that Cornell had purchased and paid for all the common stock; and that on such stock no balance

was due to the company. Hence the judgment must be reversed and the action dismissed, with costs.

BRONSON, J., concurs.

GRACE, J. I concur in the result.

BIRDZELL, J., and HANLEY, Special Judge (concurring specially). The certificates of stock involved in this case were issued without consideration. It was bonus stock for which no consideration was given, promised, or expected; it being stock that was used by the corporation as an inducement to purchasers to buy the preferred treasury stock. The Constitution of this state provides: "No corporation shall issue stock or bonds except for money, labor done, or money or property actually received; and all fictitious increases or indebtedness shall be void." Const. § 138. The Code provides: ". . . No corporation shall issue any certificate or stock under an agreement or with an understanding that full par value shall not be paid." Comp. Laws 1913, § 4527. Also, "No corporation shall issue stock or bonds except for money, labor done or property estimated at its true money value actually received for it." Comp. Laws 1913, § 4528. When the Constitution and laws passed in conformity thereto forbid corporations to issue stock except for labor done, services performed, or money or property actually received, and make all fictitious increases of stock void, such an issue of stock is fraudulent; and persons to whom it is issued, for which they do not pay or do not expect to pay anything, do not thereby become shareholders of the corporation in any sense. 4 Thomp. Corp. p. 154; Arkansas River Land, Town & Canal Co. v. Farmers' Loan & T. Co. 13 Colo. 587, 22 Pac. 954. The instant case is not one in which stock was subscribed for any payment agreed upon and full payment not made, nor a case in which stock was issued for more than the value of the property, money, or labor turned over. If such were the facts then a different proposition would be presented and the cases cited by the respondent would be in point. However, since the question is fully argued, it will be later considered. In this case, there is no subscription for the common stock, no agreement to pay, but the stock involved in this action was, as shown by the record, set aside by the corporation

to be "used as an inducement to purchasers to buy the preferred treasury stock of the company." It is bonus stock and clearly comes within the prohibition of the Constitution and the statutes above cited. The meaning and language of the constitutional provision is clear and unmistakable. If stock is issued "except for money, labor done, or money or property actually received," such issue is in direct violation of the Constitution and the statutes, and is *ipso facto* invalid. The object of the provision in the Constitution is to prevent reckless and unscrupulous speculators from fraudulently issuing and putting on the market stocks that do not and are not intended to represent money or property of any kind. Arkansas River Land, Town & Canal Co. v. Farmers' Loan & T. Co. supra. The Colorado court in that case cites with approval the language of the Wisconsin court in the case of Clarke v. Lincoln Lumber Co. 59 Wis. 655, 18 N. W. 492, to the effect that such constitutional and statutory provisions are clearly in the interest of public morals and tend to the protection of those dealing with corporations. Most of the corporations created under the laws of this state have no fund or capital which their creditors can reach except that derived from the issuance and sale of their stock; and, if this law be strictly followed, in every case corporations will not have credit upon the false pretense of having a large paid up capital when in fact only a small percentage of the par value of the stock issued has ever come into the treasury of the company. The law is undoubtedly a salutary one, and its violation is clearly an illegal act. In none of the cases cited by respondent's counsel do we find that the stock involved was strictly bonus stock, and the cases are not in point for that reason.

Counsel for respondent argue that the principle involved has a different application where the action is brought by creditors to impose their right, as distinguished from an action brought by stockholders, and argue that the cases cited by the appellant are shareholder, and not creditor, actions. It seems clear, however, that constitutional provisions prohibiting such issues of stock are as available to the stockholders in defense of a creditor's action as they are to a cause of action for stockholders against the corporation. And it is so expressly held in J. F. Lucey Co. v. McMullen, 178 Cal. 425, 173 Pac. 1000. Nor does this constitutional provision making such shares of the stock void leave creditors without a remedy. For, under the laws of this

state, officers of a corporation who issue stock in violation of the constitutional prohibition become liable to the creditors. Comp. Laws 1913, § 4528. It being clear that the shares of stock upon which this action is based were issued in violation of the Constitution and laws of this state, such shares are void, and, being void, no rights and no liabilities can be predicated thereon.

There is another conclusive reason why the present action cannot be maintained. The action is predicated upon the liability of a stockholder for the debts of the corporation as expressed in § 4554, Comp. Laws 1913. In so far as applicable to the present action that section provides that each stockholder is liable individually for the debts of the corporation "to the extent of the amount that is unpaid upon the stock held by him," and the liability is determined by the amount unpaid at the time the action is commenced, which liability is not released by a subsequent transfer of the stock. The respondent argues that under this statute every stockholder is liable for corporate debts to the extent of the difference between the par value and what was originally paid to the corporation for the stock. Or, in other words, that the amount unpaid upon the stock within this statute is the amount originally unpaid to the corporation. If this construction is correct it would follow that every purchaser of stock from a stockholder in a corporation, regardless of the price he pays for it, whether par, below par, or above par, is liable for the corporate debts, if as a matter of fact the corporation did not receive full value when the stock was originally issued, and this liability would attach even though the subsequent purchaser had no notice of the circumstances surrounding the original issuance of the stock. It would also follow that no one would be safe in purchasing corporate stock, no difference how prosperous the corporation, without examining the transaction in which the stock was originally issued. Furthermore, no one would be safe in accepting corporate stock as a gift without a similar examination. We are of the opinion that the statute does not mean what the respondent contends it means, and that a different meaning is apparent from the section itself. (And especially so when considered in connection with the other statutes concerning the transfer of shares of stock.)

It will be observed that the liability provided in the statute is determined at the time the action is commenced. The clear implication

from this provision is that one who was a stockholder prior to the commencement of the action, but who had ceased to be such before the action was brought, is not liable for corporate debts. So, the statute does not purport to give to corporate creditors the right to collect from intermediate holders of stock which was originally not fully paid. It thus recognizes negotiability to the extent of making the stock salable and transferable before action brought upon the assumption of nonliability for corporate debts. In the light of this recognition in the statute itself and of the well-settled law aside from statutes, what is the meaning of the expression "the amount that is unpaid upon the stock held by him?" It seems clear to us that it can mean but one thing, and that is the amount that a stockholder is owing to the corporation upon the stock which he holds.

Under fundamental principles of contract law, how does the stockholder become indebted to the corporation for stock? He becomes indebted to the corporation when he subscribes for the stock for the amount of his subscription, or, if he purchases from a stockholder stock for which the latter has not paid the corporation and he has knowledge of the fact, he is liable.

It will be noticed, however, that the statute in question says nothing concerning the liability of the original subscriber for the amount of his subscription, nor concerning the liability of an intermediate owner of the stock who purchased knowing of the unpaid subscription obligation and assuming it. These are liabilities which the corporation could clearly enforce. The first as the immediate party to the subscription contract, and the second as the beneficiary of a promise by the intermediate stockholder to pay the amount of the subscription. Such obligations are not discharged by a mere transfer of the stock. They rest upon well-established principles of contract law, and may be enforced by the corporation or made available to creditors. See §§ 4526 and 7998, Comp. Laws 1913. But where one buys in good faith relying upon the representation that the stock is fully paid for, and the certificate of stock bears the indorsement that the statute requires to be placed upon fully paid stock (Comp. Laws 1913, § 4527), there is not as to him anything unpaid upon the stock. Ann. Cas. 1914B, 748, 755; 6 Fletcher, Cyc. Corp. § 3771; 3 Thomp. Corp. § 3222; 1 Cook,

Stock & Stockholders, 3d ed. § 50; 7 R. C. L. § 389; Brant v. Ehlen, 59 Md. 1.

We find nothing in the statute which fairly indicates a legislative intention to depart from the well-settled rule, that a bona fide transferee of stock which has been sold to him as fully paid is not liable for any portion of the unpaid subscription or for any difference there may be between the par value and the amount received by the corporation at the time the stock was originally issued. A similar question has been presented to the courts of last resort in at least two states,—Illinois and Washington.

Section 8 of the Illinois Corporation Act, which was passed in 1872 and which has been in force ever since, provides, among other things, that "every stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him." And further provision is made for the joint liability of an assignor and assignee of stock "until the said stock be fully paid." The language of this statute concerning the stockholders' liability for debts is substantially the same as that contained in § 4554, Comp. Laws 1913. In several well-considered cases arising under this statute, the supreme court of Illinois has held that a good-faith purchaser of stock which was issued as fully paid is not liable to corporate creditors for any unpaid balance. Coleman v. Howe, 154 Ill. 458–471, 45 Am. St. Rep. 133, 39 N. E. 725; Sprague v. National Bank, 172 Ill. 149–167, 42 L.R.A. 606, 64 Am. St. Rep. 17, 50 N. E. 19; Higgins v. Illinois Trust & Sav. Bank, 193 Ill. 394–399, 61 N. E. 1024; Gillett v. Chicago Title & T. Co. 230 Ill. 373–411, 82 N. E. 891.

In the case of Higgins v. Illinois Trust & Sav. Bank, 193 Ill. 400, 42 L.R.A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, the court refers specifically to the rule and to the statute, saying: "If, however, the stock has been issued as fully paid and the assignee has acquired the same in good faith, and without notice that it has not been fully paid, he is not liable to the creditors of the corporation for any unpaid balance due upon the stock. 3 Thomp. Corp. § 3222; Kellogg v. Stockwell, 75 Ill. 68; Thebus v. Smiley, 110 Ill. 316; Coleman v. Howe, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725; Sprague v. National Bank, 172 Ill. 149, 42 L.R.A. 606, 64 Am. St. Rep. 17, 50 N. E. 19; Webster v. Upton, 91 U. S. 65, 23 L. ed. 384. Nor is this rule changed

by § 8 of the Corporation Act, which only fixes the liability of assignors and assignees to the corporation, and *not between themselves.*" Thus, where the liability to the corporation depends upon the contract of parties other than the corporation, and where, by its express intendment, no such liability arises, the statute does not change the relation of the parties to the contract and impose an uncontemplated burden upon the purchaser. The rights of the corporation and of creditors to this extent remain derivative.

In Davies v. Ball, 64 Wash. 292, 116 Pac. 833, Ann. Cas. 1914B, 750, the rule of nonliability of a bona fide purchaser was adhered to and the decision was made in the light of the state Constitution, § 4, article 12, which provided that "each stockholder should be liable for the debts of the corporation to the amount of his unpaid stock." See also Wishard & Cole v. Hansen, 99 Iowa, 307, 61 Am. St. Rep. 238, 68 N. W. 691.

We are of the opinion that the expression in our statute, § 4554, "the amount that is unpaid upon the stock held by him," refers to the amount which a stockholder has rendered himself liable to pay to the corporation upon principles of contract or in conformity with public policy where he has notice of nonpayment, and that it does not impose a liability upon a bona fide purchaser which is entirely outside of his contract of purchase. If any other meaning had been intended it would seem that the statute would have rendered every intermediate holder of the stock liable until the capital were fully paid in.

In so far as the respondent's argument is based upon § 4527, Compiled Laws 1913, which renders officers issuing stock in violation of the provision requiring payment in money, property or services, liable to purchasers in good faith, we deem it founded upon a misconception of the statute. The argument is that there would be no occasion to provide for such officers being liable to purchasers of stock unless it were contemplated that good-faith purchasers might sustain damages by reason of being held liable to creditors. This assumption is unfounded. It is manifest that a good-faith purchaser of stock, taking it upon representation that it is fully paid for, may be damaged by reason of becoming a co-owner of the corporate assets which are represented to be, or to have been, equivalent to the par value of the stock, when as a matter of fact the corporation never had been the recipient

of assets to this measure. So, the damage a good-faith purchaser of stock might sustain would be the difference between the value of his interest in a corporation upon the assumption that it had received money, property or services equivalent to the par value of the stock issued and the value of his interest in the same corporation whose stock was actually issued without receiving such an equivalent. This is a damage that would be occasioned by the breach of a duty imposed upon the officers, and the statute makes them liable therefor. See Van Slochem v. Villard, 154 App. Div. 161, 138 N. Y. Supp. 852.

For the foregoing reasons we concur in the order of reversal.

Bronson, J., concurs.

CHRISTIANSON, Ch. J., being disqualified, did not participate, Honorable J. M. HANLEY, Judge Twelfth Judicial District, sitting in his stead.

BOVEY-SHUTE LUMBER COMPANY, Respondent, v. DODGE ELEVATOR COMPANY, Appellant.

(174 N. W. 88.)

Chattel mortgages — evidence of lien on crop.

1. In an action by a chattel mortgagee for the conversion of grain by an elevator company, where it appears that the former record owner of the land in order to protect her rights in the land against a foreclosure of a realty mortgage thereupon, made arrangements whereby the holder of the sheriff's certificate, after the year of redemption, made a contract for a deed to a third party who took the same for the use and benefit of the record owner, and to secure moneys and securities advanced by him, and where such former record owner, in 1915, secured a cropper, furnished the seed grain, and managed the land in such year through the cropper and erected for such cropper a house and barn on the land for which a note and chattel mortgage were given upon their share of the crop to the plaintiff for the lumber furnished, and where, further, it appears, after the execution of such chattel mortgage, the cropper made a written contract with such third party and such record owner also made a written contract with such third party transferring her crop rights to him, and thereafter, the share of the crop involved was threshed and de-

livered to the defendant elevator and the proceeds thereof paid to such third party after direct notice of plaintiff's mortgage and demands, it is *held* that the jury upon the evidence were justified in finding that the plaintiff had a valid lien upon the crop so delivered.

Chattel mortgages — evidence as to owner of land when chattel mortgage was given.

2. In such action, it is *held* that the jury were warranted in finding upon the evidence that the former record owner of the land continued the owner thereof at the time the chattel mortgage to the plaintiff was made and filed.

Chattel mortgages — evidence of conversion of mortgaged grain.

3. In such action, it is *held* that the verdict of the jury is justified, even though the possession, or the right of possession, of such former record owner is based alone during the year 1915, at the time such mortgage was made and filed, upon the consent and acquiescence of the contract holder.

Opinion filed June 23, 1919. Rehearing denied September 8, 1919.

Action for conversion of grain.

From a judgment entered in favor of the plaintiff and from an order of the District Court, Ward County, *Leighton*, J., denying judgment *non obstante*, or, in the alternative, for a new trial, the defendant appeals.

Affirmed.

F. B. Lambert, for appellant.

"An action for the conversion of personal property cannot be maintained unless the plaintiff was in possession or held a legal right to the immediate possession of the property converted, at the time of the conversion." Parker v. Bank, 3 N. D. 87.

"A mortgagee of chattels having present right of possession may maintain an action against a wrongdoer for the conversion of the property embraced in the mortgage." Donovan v. St. Anthony, 7 N. D. 513; Bowers, Conversion, § 123.

"The grantee or devisee of real property subject to a trust acquires a legal estate in property as against all persons except the trustee and those lawfully claiming under them." Comp. Laws 1913, §§ 5273, 5375, 5378.

"Where a person pays a part only of the purchase money of realty, and the title is taken in the name of another, such part must have been paid for some aliquot part of the property to raise a resulting trust for the benefit of the person paying it." Re Wood (D. C.) 5 Fed. 443.

"Where land is purchased, and a party pays a part of the consideration, and another takes the title to the whole land, he becomes a trustee of the person paying such consideration *pro tanto*." Somers v. Overhulser, 67 Cal. 237, 7 Pac. 645; Barroilhet v. Anspacher, 68 Cal. 116, 8 Pac. 804.

"Property purchased by one under the direction or on behalf of another must be taken to be held in trust for the benefit of the principal, on repayment of the money advanced." Rothwell v. Dewees, 2 Black, 613, 17 L. ed. 309; Pindall v. Trevor, 30 Ark. 249; Loomis v. Loomis, 60 Barb. 22.

"If a party purchase for another, and afterwards be reimbursed by that other, a trust results from the reimbursement." Poulet v. Johnson, 25 Ga. 403.

"The conveyance of one holding land in trust to a purchaser without notice for a valuable consideration passes the legal title discharged of the trust." Daggs v. Ewell, 3 Woods, 344, Fed. Cas. No. 3,537; Sorrels v. Sorrels, 4 Ark. 296; Griffin v. Blanchar, 17 Cal. 70; Ricks v. Reed, 19 Cal. 551; Learned v. Tritch, 6 Colo. 432; Saunders v. Richard, 35 Fla. 28, 16 So. 679; Lewis v. Equitable Mortg. Co. 94 Ga. 572, 21 S. E. 224; Prevo v. Walters, 5 Ill. 35; Moore v. Hunter, 6 Ill. 317; Pratt v. Stone, 80 Ill. 440; Hoffman Steam Coal Co. v. Cumberland Coal & I. Co. 16 Md. 456, 77 Am. Dec. 311; Clark v. Rainey, 72 Miss. 151, 16 So. 499; Booraem v. Wells, 19 N. J. Eq. 87; Bracken v. Miller, 4 Watts & S. 102; Wamburzee v. Kennedy, 4 Desauss. 474; Bass v. Wheless, 2 Tenn. Ch. 531; Stewart v. Greenfield, 16 Lea, 13; Ranney v. Hogan, 1 Posey, Unrep. Cas. 253; Cain v. Cox, 23 W. Va. 594; Atkinson v. Greaves, 70 Miss. 42, 11 So. 688.

B. A. Dickenson and *Greenleaf, Woodledge, & Lesk,* for respondent.

In a case such as we have at bar the ownership of the crops is a question of fact for the jury. See also Harris v. Frink (N. Y.) 10 Am. Rep. 318; 12 Cyc. 977; 6 Cyc. 1048; Comp. Laws 1913, §§ 5535, 6731; Ellestad v. Elevator Co. 6 N. D. 88.

Bronson, J. This is an action by the mortgagee for conversion of grain covered in a chattel mortgage upon the crop of 1915. A verdict was rendered for the plaintiff. From a judgment entered pursuant thereto, and from an order denying judgment *non obstante* or in the al-

ternative for a new trial, the defendant has appealed. The facts necessary for a consideration of the rights of the parties herein substantially are as follows:

In 1913 one Mrs. Helgerson was the owner of 280 acres of farm land in Ward county. On March 13, 1913, pursuant to a mortgage foreclosure sale, a sheriff's certificate of sale was issued to the Second National Bank of Minot. Before the year of redemption expired some arrangement was made between Mrs. Helgerson and the bank by which she was granted the right to make a sale of the premises. Pursuant thereto, and pursuant to an agreement with one Holm, on September 2, 1914, the bank on September 2, 1914, executed a contract for a deed to said Holm and received from him a note and mortgage for $3,000 on other lands as security. In this contract there was no reservation of title to the crops to be raised on the premises in the year 1915. On the same day the bank wrote Mrs. Helgerson that sale had been made, through her efforts, of this land to Holm for $6,400, and that one half of the 1914 crop belonged to her providing that the threshing and twine bill was paid, and the first payment of $1,500 and interest to be paid by Holm on December 1, 1913, was so paid. It is not disputed nor claimed by the appellant herein that settlement was not made for the threshing and twine bill and other payments specified. On January 24, 1915, one John Christianson wrote Mrs. Helgerson for the purpose of renting the land in the year 1915. Pursuant to such negotiations said Christianson did enter and take possession of the land as a cropper for the year 1915, pursuant to the usual croppers' plan upon shares. Mrs. Helgerson agreed to erect a frame house and barn upon the premises for the use of such cropper. She accordingly so did, procuring the lumber therefor from the plaintiff herein. To secure payment of the same she gave to the plaintiff on March 30, 1915, a note for $308.05 and a chattel mortgage covering the house and frame barn so built, and her one-half interest in the crops to be grown on the lands during the year 1915. The note became due September 15, 1915. The chattel mortgage was duly filed July 21, 1915. The cropper secured seed grain from Mrs. Helgerson, and seeded and raised a crop of wheat and oats upon the land.

On May 17, 1915, a written croppers' contract was made between said Christianson and said Holm, pursuant to the arrangements made

by Mrs. Helgerson with said Christianson. In the fall of 1915, apparently in November, when the crops raised on the land were threshed, the wheat and oats, covering the share due either Mrs. Helgerson or Mr. Holm, were hauled at the time of the threshing from the land to the elevator of the defendant at Ryder, North Dakota.

Mrs. Helgerson testified that when this grain was being hauled she advised the agent of the defendant that one half of the crop belonged to her, and that she had given security to the plaintiff for the lumber furnished upon such grain. That she advised such agent not to sell such grain without her consent. The agent of the plaintiff also testified that he saw the agent of the defendant about the time that the first load of grain was hauled to the elevator. That the defendant was advised concerning the chattel mortgage upon such grain and that the plaintiff would look to the elevator to protect it; that a few days later he saw the agent again; that settlement had not been made then for the grain, it not having all been hauled in; that he made demand for the grain or the money. In carrying on the threshing operations Mrs. Helgerson arranged for and got help. On October 28, 1915, Mrs. Helgerson and said Holm made a written agreement which provided for settlement of their property rights and transferred to Holm from Mrs. Helgerson her right and interest in the crop of 1915, with the provision, however, that the proceeds of the crop should be applied on the indebtedness of Mrs. Helgerson owing to said Holm, and on a certain $500 note owing by the parties to the Second National Bank. After this time the crop was threshed. On December 18, 1915, the defendant made settlement for such crop by paying Holm on certain storage tickets some $649. There is testimony in the record given by Mr. Holm that he took this contract for the use and benefit of Mrs. Helgerson and in trust for her; that he did it to help her get her title back; that he did not figure on keeping the land and intended to give it back to her.

The defendant has made nineteen specifications of error challenging the rulings of the trial court in the admission of evidence, its instructions to the jury, and its action in denying the plaintiff's motions. These specifications are principally concerned with the contentions of the appellant herein, that upon the record, as a matter of law, Mrs. Helgerson was not the owner of the land; that, therefore, she was not the owner of the crop and could not give a valid mortgage thereupon; that

the oral negotiations had, preceding the cropper's contract and the agreement with Holm in October, 1915, were all merged and expressed in such written agreement and therefore controlling concerning her rights in the land and in the crop; that the agreement between Mrs. Helgerson and Holm, if construed to be a trust, was an express trust and invalid under the statute; that, in any event, Holm, as a trustee, had the title and the right of disposition. We have examined the specifications of error and find the trial court to have committed no error in regard thereto. Upon this record the contentions of the appellant are without merit. The appellant has entirely misconceived the principles of law that apply upon the evidence as adduced. The controverted questions of fact were determined by the jury adversely to the contentions of the appellant. There is ample evidence in the record to justify the finding of the jury that Mrs. Helgerson in the year 1915, when the chattel mortgage was executed and filed, was the owner of the land, and that she was entitled to the possession of the same. There is ample evidence in the record to justify the jury in finding that the title to the lands was taken in the name of Mr. Holm for the purpose of security, and that, pursuant to the agreement between the parties, she was not only the owner of the land, but was entitled to the possession and entitled to farm and make arrangements for farming the land in the year 1915. Upon the verdict of the jury, therefore, Mrs. Helgerson clearly had a right in, and to mortgage, the crop on March 30, 1905. The fact that she subsequently made a written agreement concerning this land after the execution of the mortgage which merged some of the oral agreements theretofore had between the parties, concerning which oral agreements there is substantial conflict in the testimony, did not preclude the jury from finding and determining her rights of ownership as they existed when the mortgage was filed. Even though she was not the owner of the premises under the arrangements made, nevertheless if she were granted the right to farm and crop the land in 1915, with the consent and acquiescence of Holm, she would be the owner of and entitled to such crop. 17 C. J. 382. As bearing on the question of crop rights, see Ellestad v. Northwestern Elevator Co. 6 N. D. 88, 69 N. W. 44; Harris v. Frink, 49 N. Y. 24, 10 Am. Rep. 318; Mitchell v. Tschida, 71 Minn. 133, 73 N. W. 625; Roney v. H. S. Halvorsen Co. 29 N. D. 13, 149 N. W. 688; Gunderson v. Holland, 22 N. D.

258, 133 N. W. 546. There is ample evidence in the record to warrant a jury in so finding.

This is particularly so when it is considered that no reservation of title to the crop of 1915 was made in the contract given to Holm. The record further shows ample notice to the defendant, of plaintiff's rights in, and its demands for, this grain. The judgment and order of the trial court is in all things affirmed, with costs to the respondent.

GRACE, J. I concur in the result.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant, v. SARGENT COUNTY, Respondent.

(174 N. W. 811.)

Drains — intercounty drains and ditches — special assessment for construction of same — powers of drain commissioners.

1. In an action to determine adverse claims, which seeks to test the validity of a lien existing by virtue of a special assessment made in the construction of an intercounty drain, where, from the proceedings had, it appears that the drain commissioners of the defendant county, upon an original petition for an intracounty drain, first made an order establishing such drain, and, thereafter, pursuant to proceedings had in co-operation with other counties for the establishment of an intercounty drain for three counties, abandoned such order and proceedings had thereon, and made a new order, upon such original petition, establishing a drain as a part of the intercounty drainage project, it is *held*, under §§ 1836 and 1841, N. D. Rev. Codes 1905, Comp. Laws 1913, §§ 2479, 2485, that the drain commissioners of the defendant county had jurisdiction so to do.

Drains — intercounty drains — validity of special assessment for construction — attack on special assessment for drainage purposes — laches.

2. Where such action to determine adverse claims has been instituted evidently for the sole purpose of determining the validity of the special tax assessed, and where the record unmistakably shows that the railway company, possessing actual knowledge of the drain, during its construction, availing itself of its benefits, and being actually benefited thereby, has neither offered proof of what its assessment should equitably have been, nor tendered payment therefor, and where, further, such railway company has been guilty of laches, apparent in the record, in instituting and maintaining such action extending

over a period of over six years, equity will not assist in setting aside the assessment where the drain commissioners had jurisdiction to establish the drain.

Drains — assessment on railroad right of way.

3. Following Northern P. R. Co. v. Richland County, 28 N. D. 172, it is *held* that a special assessment for a local drain upon a railway right of way, if benefited, is not violative of the 14th Amendment, or the commerce clause of the Federal Constitution.

Opinion filed June 26, 1919. Rehearing denied September 8, 1919.

Action to determine adverse claims involving a special assessment for the construction of an intercounty drain.

Appeal from judgment of District Court, Sargent County, *Allen*, J., entered for the defendant for $3,189.70 and interest.

Affirmed.

Watson, Young, & Conmy and *A. G. Divet*, for appellant.

"The petition prescribed the extent of their power, and everything beyond that was without authority of law and void. The assent of the owner for this improvement was never obtained. No petition was ever made for it and no power given to the board to make it." Watkins v. Griffith (Ark.) 27 S. W. 234; People v. Drake, 23 N. Y. Supp. 264; Waples v. Waukegan (Ill.) 53 N. E. 618; Page & Jones, § 1017 and notes 1–4; Gilman v. Milwaukee, 21 N. W. 640; Pennsylvania Co. v. Cole, 132 Fed. 668, and cases cited; Rector v. Board, 6 S. W. 519; Balfe v. Lammers, 10 N. E. 92; Coggeshall v. City, 41 N. W. 617, 42 N. W. 650.

"The proceeding in which the petition was filed having terminated by the board rejecting the report of the commissioners appointed in pursuance of the petition, the petition has no further force and could not be the foundation of a second proceeding." Vennum v. Milford (Ill.) 66 N. E. 1040; Clark v. Chicago (Ill.) 57 N. E. 15; Pacific Paving Co. v. Sullivan (Cal.) 70 Pac. 86; City Street Improv. Co. v. Babcock, 55 Pac. 762; Union Paving Co. v. McGovern, 60 Pac. 169.

Upon petition to establish and construct a definite improvement, a public board acquires no jurisdiction to construct a different improvement either of greater or less extent than that petitioned for. Jones & Page, § 800; App v. Stockton (N. J.) 39 Atl. 921; Hutchinson v. Omaha (Neb.) 72 N. W. 218; Watkins v. Griffith (Ark.) 27 S. W.

234; People v. Drake, 23 N. Y. Supp. 264; Waples v. Waukegan (Ill.) 53 N. E. 618; Gilman v. Milwaukee, 21 N. W. 640.

Also on joinder of two separate movements. Arnold v. Cambridge, 106 Mass. 352; Mayall v. St. Paul, 15 N. W. 170; Baker v. Ashland, 50 N. H. 27; Weckler v. Chicago, 61 Ill. 142.

"The law of sufficiency of the notice is whether it furnishes an effective opportunity to be heard and gives a reasonable notice thereof." Stewart v. Palmer, 74 N. Y. 183; Re Amsterdam, 126 N. Y. 158; Norfolk v. Young (Va.) 47 L.R.A. 574.

"The assessment roll must show the amount of the assessment with such certainty that the amount can be readily determined therefrom."

The principle has been applied to assessments omitting the dollar sign. Peoples v. S. F. Sav. Union, 31 Cal. 132; People v. Hastings, 34 Cal. 571; Chicago v. Walker, 24 Ill. 494; Etchinson v. Ditch Assn. 40 Ind. 408.

The court cannot speculate as to what error the board may have made. McChesney v. People (N. J.) 34 N. E. 432.

That lack of jurisdiction renders the whole proceeding void and beyond the operation of the doctrine of estoppel, we think, is established beyond all question. App v. Stockton (N. J.) 39 Atl. 921; Hutchinson v. Omaha, 72 N. W. 218; Watkins v. Griffith, 27 S. W. 234; People v. Drake, 23 N. Y. Supp. 264; Waples v. Waukegan (Ill.) 53 N. E. 618; Gilman v. Milwaukee (Wis.) 21 N. W. 640.

Knowledge of an agent is only imputed to the principal when the knowledge is of such matters as are within the scope of the agent's authority and then upon the theory that because within the scope of his agency he is presumed to have communicated it to his principal. 31 Cyc. 1587, note 40, 1590, note 41; Ætna Indemnity Co. v. Schroeder, 12 N. D. 110.

Fraud will vitiate an assessment. Erickson v. Cass County, 11 N. D. 507; Surnquist v. Drain Com. 11 N. D. 518; State v. Fisk, 15 N. D. 225; Hackney v. Elliott, 23 N. D. 373.

S. A. Sweetman, State's Attorney, and *Wolfe & Schneller,* for respondent.

The plaintiff must bring into court and tender the very assessments it attacks, before the court will entertain the suit. Farrington v. N.

E. Invt. Co. 1 N. D. 118; Schaffner v. Young, 10 N. D. 245; Soo R. Co. v. Dickey County, 11 N. D. 107.

"The right to pay and recover back is the remedy which precludes the right to injunction or other equitable relief." Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; Bismarck Water Supply Co. v. Barnes, 30 N. D. 555.

This suit is a collateral attack. Courts will not inquire into the correctness of their judgment in the assessments of benefits. Erickson v. Cass Co. 11 N. D. 494; Trunquist v. Drain Comrs. 11 N. D. 514; Hackney v. Elliott, 23 N. D. 373.

The statute involved,—the drainage laws,—authorizing or permitting the levying of special assessments against plaintiff's "property" for benefits to that property by a local improvement, violates the 14th Amendment to the United States Constitution. Pacific v. Richland County, 28 N. D. 172; Sioliah v. Carmack, 17 N. D. 393, affirmed in 222 U. S. 522; Erickson v. Cass County, 11 N. D. 494.

BRONSON, J. The appellant railway company has appealed from the judgment of the district court of Sargent county, entered December 22, 1916, adjudging a valid lien in favor of Sargent county for $3,189.70 and interest upon the railroad right of way of the appellant pursuant to a special assessment made for the construction of a tricounty drain in such county.

In January, 1909, the railway company instituted this action to determine adverse claims to its right of way. The defendant, in its answer, claims a lien upon such right of way, by virtue of the special assessment levied for the construction of the drain in question.

To this answer the railway company replied, setting up allegations to the effect that the proceedings in the establishment and construction of the drain and the assessment made therefor were illegal, null, and void.

Pursuant to the provisions of chap. 23, N. D. Codes 1905, Comp. Laws 1913, chap. 37, concerning drains, and chap. 97, Laws 1905, certain proceedings were initiated for the construction of a drainage ditch in the counties of Ransom, Richland, and Sargent. On July 27, 1905, a petition for a ditch in Sargent county was filed. Pursuant thereto, on October 17, 1905, an order was made by the drain commissioners

of that county establishing a ditch and changing somewhat the course of said ditch as outlined in the petition.

In Ransom county, a petition for a ditch beginning on the east bank of the Sheyenne was filed May 28, 1905,[1] and another petition for a ditch in such county was filed December 26, 1905, to start at the northwest corner of section 13.

Likewise, pursuant to a petition filed, the drain commissioners of Richland county on July 26, 1905, made an order establishing drain No. 6 therein. Each of these petitions so made was for ditches in each of the respective counties. On February 28, 1906, a meeting at Wyndmere of the drain commissioners of the respective counties was held. On March 15, 1906, these drain commissioners, in a joint meeting agreed to co-operate in the construction of a proposed drain. On March 30, 1906, at a joint meeting of these drain commissioners at Wahpeton it was agreed to co-operate in the construction of a ditch in such counties pursuant to chap. 97, Laws 1905, and that the steps already taken in the respective counties and the work already done would not operate to bar such co-operation, and that certain portion of the proceedings already had could be vacated for the purpose of beginning new proceedings. Between that time and August 27, 1906, various joint meetings were held by these drain commissioners to consider the construction of the proposed drainage ditch in the counties, the classification of the lands for assessment purposes, matters concerning the construction of such ditch involving the securing of a right of way along the ditch and across the appellant railway, and the assessment of benefits to be made against the railway company, as well as against the various townships and municipalities. At one of these meetings the road master of the appellant appeared and promised to put in culverts in the right of way. On August 27, 1906, a joint meeting of the drain commissioners was held at De Lamere. There a resolution was adopted reciting that the joint board has proceeded under § 1836, N. D. Codes 1905, Comp. Laws 1913, § 2479 (chap. 97, Laws 1905), to establish a tricounty drain to be known in Richland county as Drain No. 6, in Sargent county as Drain No. 1, and in Ransom county as Long Drain No. 1; that

[1] NOTE.—Appellant states that Ransom county petition for drain was filed May 28, 1906. Ex. "E," the copy before this court, the original not being here, shows the date May 28, 1905.

the proceedings theretofore taken were insufficient to confer jurisdiction, and that these original proceedings be abandoned.

That, furthermore, notice should be given under § 1841, N. D. Codes 1905, Comp. Laws 1913, § 2485, for the adjustment and settlement of the value of the services rendered, labor done, and money expended under the invalid attempt to establish such drain.

Accordingly on August 27, 1906, the joint drain commissioners made and issued a notice of hearing and letting of the contract for the construction of the tricounty drain designated as Long Drain No. 1 in Ransom county, Sargent-Richland Drain No. 1 in Sargent county, and Wyndmere and Sargent Drain No. 6 in Richland county. Therein notice was given of the abandonment of the original proceedings for the individual drains in Sargent and Richland counties and of the assessment dated October 17, 1905, made therefor. Such notice also recited the resolution of the joint board of drain commissioners concerning such abandonment. Such notice further stated, concerning the tricounty drain, the apportionment made to the counties, townships, cities, villages, and other corporations in the percentage of costs and in the percentage of benefits. It also stated that a hearing would be held on September 25, 1905, before the drain commissioners of Sargent county in De Lamere for the purpose of hearing objections or complaints; and, further, that on September 26, 1906, the contract would be let for the construction of the drain by the drain commissioners. This notice was signed by the drain commissioners of the respective counties.

On August 27, 1906, the drain commissioners of Sargent county made an order establishing the drain to be known as Tricounty Drain No. 1. This order was based on the petition for the location and establishment of a drain filed with such drain commissioners on July 27, 1905. The order changed somewhat the course of the drain and further provided that the same should be continuous of the Ransom county ditch, and should connect with the Richland county end of the tricounty drain.

On August 28, 1906, a committee of the joint drain commissioners apportioned the costs of the ditch among the respective counties in the following proportions: Ransom county—.5032; Sargent county—.2093; Richland county—.2875. Thereafter some fourteen or fifteen

meetings of these joint drain commissioners were held with reference to the construction of this tricounty drain and the assessments to be made therefor. The last meeting apparently being held on January 13, 1908, when one Cook appeared before the joint board and filed a protest against the assessment made to the appellant railway company. Pursuant to the actions of the joint drain commissioners, the drain commissioners of the defendant county adopted a so-termed percentage for the specific assessment to be made against the lands to be benefited by the drain in Sargent county, and thereupon made a specific assessment in money against the various lands involved including those of the appellant railway company herein. The only assessment involved in this case is that made against the appellant; the other assessments levied have been paid.

The appellant contends:

1. That there was no petition for a joint drain in Sargent county, and that the board in its action upon the improvements finally determined upon, acted as volunteer and without any petition.

2. That the Sargent county board in its final action establishing the drain in question in that county, so determined without any petition before it, either for an intracounty or an intercounty drain.

3. That a separate and distinct intracounty drain in Ransom county entered into the costs of the intercounty drain constructed, and that the joint drainage boards deliberately acted so as to make such distinct drain to be considered a part of the joint drain, for purposes of taxation.

4. That there was no order of necessity made for the improvement or any opportunity given for objection to the petition.

5. That there was no notice of review of assessments posted as required nor published or posted as required by law.

6. That no assessment of any property in Sargent county was ever made by anybody or a board.

7. That the joint board did not make an apportionment of the cost of the drain between the several counties.

8. That the drainage boards of the counties and the joint board of such counties acted in bad faith and in fraud of the rights of Sargent county landowners, and especially of the appellant, with the intention of inflicting an undue, unjust, and arbitrary assessment.

This tricounty drainage project has been before this court in the

cases of Hackney v. Elliott, 23 N. D. 373, 137 N. W. 433, and in Northern P. R. Co. v. Richland County, 28 N. D. 172, L.R.A.1915A, 129, 148 N. W. 545, Ann. Cas. 1916E, 574. In the former case the validity of the proceedings had in Richland county was upheld as against the attack of the plaintiff, asserting the invalidity of the same in an action to remove, as a cloud on his title, the lien of certain tax certificates issued upon the special assessment made. In the latter case, an action to determine adverse claims to its right of way brought by the appellant herein, this court held that the appellant's right of way, if actually benefited, was subject to assessment for the construction of the drain. In both of these cases the same attorney appears of record for the contesting party as appears herein for the appellant.

We do not deem it necessary to enter into an extended discussion concerning the record facts upon the points raised by the appellant herein, in view of certain controlling features that seriously impress this court in its determination of this appeal.

We are satisfied upon an examination of the entire record in this case, that the Sargent county drain commissioners had jurisdiction to order the establishment and construction of the drain described in its order dated August 27, 1906; that this order so made was based upon the petition for a drain theretofore filed with such drain commissioners in the month of July, 1905; that such drain commissioners had jurisdiction to make such order pursuant to § 1841, N. D. Codes 1905, Comp. Laws 1913, § 2485, and § 1836, N. D. Codes, 1905, Comp. Laws 1913, § 2479; Hackney v. Elliott, supra.

This question concerning the jurisdiction of the drain commissioners involves the consideration of the action taken by such commissioners with relation to the petition filed July 27, 1905. As stated before, the appellant contends that the drain commissioners abandoned the petition so filed, and that their action of August 27, 1906, was not, from the record, an action upon such petition, and, if it were or should be so construed, the drain commissioners had no jurisdiction to make an order for an intercounty drain upon a petition for an intracounty drain, which was to form a part or portion of a joint drain to be constructed by the co-operation of three counties. The record discloses that the drain commissioners did abandon the proceedings that

they took upon such petition under their first order, establishing a drain dated October 17, 1905. We do not construe the action taken by the joint drain commissioners, or by the drain commissioners of the defendant county, to mean or to have been intended to mean that they abandoned the right to proceed upon the petition as filed under the law. In fact the subsequent proceedings disclose that they did proceed upon such petition as filed. The appellant contends, however, concerning the question of jurisdiction, in effect, that the drain commissioners could not establish an intercounty drainage project based upon a petition for an intracounty drain. If the drain in question had been constructed just as it is as an intracounty drain, there ought to be no question that the drain commissioners had both the power and the jurisdiction so to do under law then existing. N. D. Codes 1905, §§ 1821 and 1841, Comp. Laws 1913, §§ 2464, 2485. The law which permits drain commissioners of two or more counties to co-operate in the construction of an intercounty drain does not destroy the unity of action by the drain commissioners of one county when proceeding with relation to that portion of the project situated in such county. The co-operation is joint, but the action of each of the counties concerned is the individual action of such county. Hackney v. Elliott, 23 N. D. 373, 392, 137 N. W. 433. Therefore, as far as the question of jurisdiction and power is concerned, we are satisfied that the drain commissioners of Sargent county did possess jurisdiction.

Although there is much merit to many of the contentions raised by the appellant herein concerning the irregularities of the proceedings of the drainage board, we are nevertheless satisfied from the entire record that the appellant herein is not in a position in this action to take advantage of the irregularities in the proceedings concerning which it has entered complaint.

This action was commenced by service of process on January 22, 1909. It was not brought to trial until the 19th day of October, 1915, after a lapse of over six years. The action is the equitable action to determine adverse claims. The appellant in such action prays that the court through equity determine the defendant to have no lien or encumbrance upon its property. In this action the only party named as defendant is the defendant, Sargent county. Manifestly this action was instituted for the sole purpose of determining the legality and

validity of the proceedings had in Sargent county in the construction of the drain in question. Manifestly, the gist of the action was and is to determine the legality of this special tax. The proceedings looking toward the construction of this ditch began in 1905. In 1906 the road master of the appellant railroad appeared before the drainage board and promised to put in culverts in the course of the construction of the drain in question. In 1907 this drain was constructed in Sargent county; for 2 miles it runs parallel to the railway tracks of the appellant, just north of its tracks, and within 200 feet of the center thereof. A spur ditch emptying into this ditch parallels at an equal distance therefrom, the right of way for another mile. During the construction the railway company through its employees opened up its right of way for this drain to pass through and across such right of way. In January, 1908, the railway company appeared before the joint drain board to protest against the assessment made. Since the construction of the ditch some ditches from the railroad right of way into the big ditch, so constructed, have been dug. The record amply sustains the finding of the trial court that the appellant had actual knowledge of, and has been benefited by, the construction of such drain. In the record the appellant stipulates on its own side, that the tax department of the railway company had no actual notice of the assessment until 1907, after the assessment was levied. This is an admission that it did have notice in 1907. The record discloses no action of any kind taken by the appellant to question this assessment, or the amount of it, excepting the action involved herein. Already all special taxes assessed for the construction of this ditch in Sargent county have been paid excepting those assessed against the railway company. Outside of the voluminous exhibits introduced, the record in this case is not long. No evidence is introduced on behalf of the appellant to show what its assessment should equitably have been. In the record the appellant complains and seeks to elicit evidence that the assessment was so made by men who were not experienced railroad men and who were not acquainted with valuations or benefits that might accrue to railroad property, and yet no attempt is made to show to the trial court what its assessment justly ought to have been through its own experts which it produced at the trial. The appellant, seeking equity, must be subject to equity. Upon plain principles of estoppel

and laches, the appellant's action herein and its contentions in regard thereto cannot be sustained.

The equitable action to determine adverse claims cannot be used for the sole purpose of determining the validity or invalidity of a special assessment, where the record unmistakably shows that the plaintiff, possessing actual knowledge of the construction of the drain, and actually benefited thereby, has been guilty of laches both before and after the institution of the action extending over a period of time exceeding six years, and where, furthermore, the plaintiff has not offered to the court any proof of what its assessment equitably should have been, and has not made any tender to the court to pay for the actual benefits it has received. Under such circumstances, equity will not aid him, where the jurisdiction of the drain commissioners to act is established. Hackney v. Elliott, 23 N. D. 373, 137 N. W. 433; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66; Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, L.R.A.1916A, 965, 153 N. W. 454.

The appellant also raises the contention in this appeal that the railroad right of way cannot be assessed in any event for the construction of this drain, because such action is violative of the 14th Amendment and the commerce clause of the Federal Constitution. This matter was decided in the case of Northern P. R. Co. v. Richland County, 28 N. D. 172, L.R.A.1915A, 129, 148 N. W. 545; Ann. Cas. 1916E, 574. We reaffirm the holding in that case on this question.

The appellant further contends that in any event the judgment should be reversed and the case remanded to the district court, with directions to vacate all proceedings of the drain board commencing with the apportionment of August 27, 1906. Equity will in no manner aid the appellant so to do. The appellant, with actual knowledge of the construction of this drain, having received actual benefit therefrom for years, having permitted over twelve years to elapse since the assessment was made without making any offer to pay any amount whatsoever as its just contribution for benefits received, is in no position to request or seek such equitable consideration.

The judgment of the trial court is affirmed, with costs to the respondent.

CHRISTIANSON, Ch. J. (dissenting). I dissent. It is undisputed that the petition presented to the drain commissioners of Sargent county prayed for the establishment of a drain wholly within that county. It is also undisputed that it was the purpose of the petitioners to petition for the establishment of an intracounty drain only, and that a drain extending into other counties was not within their contemplation. The drain commissioners of Sargent county on October 17, 1905, made an order establishing the drain as petitioned for, except that the starting point was located a half mile further south and a half mile further west. Such starting point was half a mile from the Ransom county line, and precluded the possibility of connection with a Ransom county drain. In fact it is not contended that the drain as petitioned for or established was intended to carry waters from Ransom county lands; and the record clearly shows that the Sargent county drain commissioners did not intend such drain to connect with or be a part of a drain into Ransom county. In March, 1906, however, the Sargent county drain commissioners met jointly with the drain commissioners of Richland and Ransom counties, and an arrangement was made among the three boards for the construction of a joint drain. Some work was done and expense incurred under this arrangement, but on August 27, 1906, the drain commissioners adopted the following resolution: "Whereas in the proceedings leading up to the original establishment of said drain *it has been found by the commissioners aforesaid that the original petitions for the establishment of such drain in the counties of Sargent and Ransom were insufficient in law to confer jurisdiction upon said commissioners;* and, whereas, new proceedings have been commenced and are being carried forward for the establishment of said drain along substantially the same route . . .; and, whereas, in the judgment of said drain commission it is necessary that all proceedings under the original invalid proceedings be abandoned, vacated, and set aside; now, therefore, be it resolved that all proceedings had for the establishment of said drain prior to and which culminated in the assessment levied upon the lands to be benefited by the said drain on the 17th of October, 1905, *be and the same are voluntarily abandoned.*" After having adopted such resolution, the drain commissioners issued a written notice over their signatures to the effect "that all proceedings under the original attempt to establish and construct the said tricounty

drain . . . have been by the said boards of drain commissioners voluntarily abandoned because of jurisdictional defects in such proceedings." It is true that the board of drain commissioners of Sargent county subsequently made an order establishing what they designated Tricounty Drain No. 1. It is conceded, however, that no new petition was filed asking for such drain, and that the only basis for the order establishing it was the petition filed July 27, 1905, which petition had been characterized by the drain commissioners in their resolution (quoted above) as being "insufficient in law to confer jurisdiction upon said commissioners." It is not denied that Tricounty Drain No. 1 is wider, and that its construction required greater expense, than the drain contemplated by the signers of the petition. The extra width became necessary by reason of the extension of the drain into Ransom county.

In view of all these facts can it be said that there was any petition before the drain commissioners of Sargent county for the establishment of the so-called Tricounty Drain,—the drain involved in this action? I think not. Of course if they had no petition, they had no jurisdiction. And where there is no jurisdiction there can be no estoppel against assailing the validity of the proceedings. See Hamilton, Special Assessments, § 726. The fact that the railway company knew the drain was being constructed merely conveyed notice of this fact, and it had the right to believe that the drain commissioners would proceed in the manner provided by law, and in such manner only, and that its property would be assessed only for such share of the cost of the improvement as was legally chargeable against it. It has been held that even the signer of a petition for the construction of an improvement is not estopped to assail the validity of the proceedings, where the officers to whom the petition is addressed have not acted in accordance with law. It has been said that in such case "there is no presumption that by asking for the improvement he desired it done other than according to law, or that he intended to bind his property for more than his share of a legal assessment." Hamilton, Special Assessments, § 725. Of course if the property of the plaintiff has been benefited by the improvement, it should pay its just share of the cost of the improvement, not exceeding the amount of such benefits. But inasmuch as the drain commissioners had no jurisdiction, their assessment against the

plaintiff's property fails, and it is entitled to have the amount of such assessment determined in the manner provided by law.

ROBINSON, J. (dissenting). The plaintiff owns the railway bed, the right of way, a strip of land 100 feet wide on the northern boundary of sections 10, 11, and 12, in township 132 of range 53. It is just 30 miles due west of the city of Wahpeton, on the railway from Wahpeton to Oakes. In 1906 and 1907, under statutory proceedings for the construction of a tricounty drain, against said roadbed, special benefits exceeding $1,000 a mile were assessed against the strip of land in each section. From a judgment confirming the same, with interest and costs, the plaintiff appeals.

Council for plaintiff contends that from the beginning to the end there was no compliance with the statute; that the special assessment is grossly excessive, and that is true.

The drain is about one half in Ransom county and the other half in Sargent and Richland counties. The drainage board estimated the entire cost of the drain at $60,000, and apportioned the share of cost to each county in decimal figures thus: Ransom county, .5032; Sargent county, .2093; Richland county, .2875.

The apportionment seems to be entirely fair, and it is of no consequence that in Ransom county the drain consists of two parts, one running northerly and the other southerly. In Sargent county the total length of the drain is 4½ miles. In Richland county it is 5 miles. While the total cost of construction in the three counties was estimated at $60,000, by some means, possibly by the charge of excessive fees, it amounted to $72,000. In this, as in all drainage cases, a large portion of the cost is for commissioners' fees. Thus in lump sums we find these charges: December 2, 1905, Commissioner Blake, services, $64.30; March 1, 1906, Commissioner Blake, services, $21; March 1, 1906, K. N. Myhre, services, $76.20; March 30, 1906, D. E. Blake, services, $14.75; March 30, 1906, K. N. Myhre, services, $25.70; October 5, 1906, K. N. Myhre, services, $60.45; October 5, 1906, D. E. Blake, services, $58.90.

In the Cass County Drainage Case, 11 N. D. 494, 92 N. W. 841, the total cost of the drain was $42,000, and the commissioners' fees and expense about $15,000.

On the books it appears that on August 27, 1906, a certain sum was

charged against each tract of land on the estimate of the total cost. Then on June 1, 1907, and before the drain was completed, about 10 per cent was added to the original sum charged. Then the board made a list of the lands, with the amount charged against each tract, and to the same annexed a warrant to the county auditor. It required him to extend on the tax list for the year 1907 the amount set opposite to the description of each tract of land. That was done under § 1831, Statutes of 1905, as amended in 1907. Of course the amounts were extended as per the decree of the commissioners, acting as judges in their own case and allowing themselves large lump sums, and this was done without any pretense of notice or a hearing. Upon the legality of such proceedings several decisions have been made by the supreme court of this state without due consideration.

The case of Erickson v. Cass County, 11 N. D. 498, 92 N. W. 841, is a blind leader of the blind. Holding the procedure conclusive, the court said: "It is well settled that where provision is made 'for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the taxes shall be assessed upon his land, there is no taking of his property without due process of law.'" Now that is not true and the cases cited do not sustain it. The mere proportion of expense, graft, and loot that may be charged is of less consequence than the amount. The cases cited do merely sustain a special assessment on regular proceedings, when the owner has a chance to appeal from the amount or when the amount is confirmed by a court, after due notice. However, in *this case it is not seriously contended that there was a compliance with the requirements of the statute. There was neither a proper petition for the drain,* nor a *legal notice of the apportionment of the benefits and the letting of contracts.* Nevertheless, it is a fact that the drain was a necessity, and it was fairly well constructed, and it does serve a good purpose, and it is of special benefit to the roadbed and roadway of the plaintiff. And though the *plaintiff has not had legal notice, there was no lack of actual notice.* Each day while the drain was being constructed opposite to its roadbed, the plaintiff's trains were run back and forth within 200 feet of the construction.

Now, regarding the review of special assessments in such cases, whatever may have been the previous rulings, it is now clearly made

the *duty of the court to review the levy and assessment and to determine the just amount of the special benefits.* Act March 14, 1919. That is the only question here presented. The evidence on this point is not all that it should be, because the parties relied too *much on technical points.* However, there is some evidence, and it is probably better for both parties to end the litigation than to remand the case for additional testimony.

It does appear that each mile strip contains only 12½ acres, and the assessment charged against the 12½ acres is the same as that charged against any 640 acres of adjacent land. For ten years, commencing with 1906, the average assessed valuation of the *roadway from Wahpeton to Oakes was $500* a mile, and it is certain that at the time of the construction of the drain and at all times since then the real value of the roadway in question—the average value in said years—did not exceed $1,000 a mile, or $80 an acre. And we may well take official notice of the way in which railroads are constructed and the fact that such construction through the low land in question did much to drain it. The roadbed was made by throwing the earth onto the center from each side of the road, and thereby making a ditch on each side. In arguing counsel say that in the big drain the waters run east at the rate of 4 miles an hour. If that is true, then the two railway ditches must have carried off a large flow of water which drained into Elk creek.

From the testimony of Commissioner Blake it appears that in making the special assessment the commissioners considered not only the actual benefits to the roadway and roadbed of the company, but also the indirect *benefits likely to result from improvements in the country, giving the company more freight to haul.* As the assessment is grossly excessive and out of all proportion to the assessments on other properties, it must be that it was made on some wrong basis of remote or speculative benefits. Though it is certain that the drain has been a real and substantial benefit to the roadway and roadbed yet and of course, there is no possible way of determining the real benefits, and it would still be a matter of conjecture and opinion though we *should hear the testimony of a thousand witnesses.* Bearing this in mind and all the facts and circumstances, we conclude that the real and special benefit is approximately $300 a mile, or $900 for the 3 miles, and that plaintiff should pay the same, with interest at the

legal rate from March 1, 1908, and that neither party should recover any costs on this action, because neither party has prevailed and each party has made a large amount of needless cost. Hence, judgment should be that the special assessment be reduced to $900 on the roadway in said three sections, and that defendant do have and recover from the plaintiff the sum of $900, with interest from March 1, 1908.

As there was no compliance with the law, so as to give the drainage commissioners jurisdiction, their decision has no evidential force. It is *corum non judice.* Hence, the burden was on the county to charge the plaintiff by showing the amount of the actual benefits to its roadway. If there is no evidence to show the benefits, then the case should be remanded for further evidence.

J. W. COMER, A. C. Dakin, J. B. Benson, Administrator of the Estate of Iver Brudevold, J. B. Benson and Ob. B. Gray, Individually and as Beneficiaries in Their Own Behalf and in Behalf of All Other Persons Similarly Interested, Appellants, v. T. A. THOMPSON, Individually, and as Trustee, E. O. Stoudt, et al., Respondents.

(174 N. W. 212.)

Trusts — disposal of assets of insolvent parties by agreement.

In this case the several parties plaintiff and defendant were small creditors of an insolvent estate,—a half section of land well mortgaged. At their request Thompson, one of the creditors, took title in his own name, took charge of the estate, and pursuant to a written agreement he sold it at $34.50 an acre,—a fair and reasonable price,—so that each party received and retained his advances with 33 per cent on his worthless claim. The findings of fact and conclusions of law are well sustained by the evidence.

Opinion filed June 27, 1919. Rehearing denied September 8, 1919.

Appeal from the District Court of Cass County, Honorable *A. T. Cole,* Judge.

Modified and affirmed.

Barnett & Richardson, for appellants.

In many states it is the absolute rule of law that a trustee can under no circumstances purchase the trust property. See 39 Cyc. 366 (5).

No such purchase can be sustained unless there has been the utmost

good faith, and further than that, unless all beneficiaries in the trust have been expressly and specifically acquainted and advised of all of the facts in connection with the purchase of the trust property by the trustee; and further than that, that there is nothing of misrepresentation, concealment, fraud, or misunderstanding in connection therewith. 39 Cyc. 368 (62); N. D. Civ. Code, § 6281; note in 9 L.R.A. 792; Gates v. Kelly, 15 N. D. 648; Cardiff v. Marquis, 17 N. D. 118; Patterson Co. v. Lynn, 27 N. D. 409; Krause v. Krause, 30 N. D. 66.

It is immaterial what the value of the trust property was. 39 Cyc. 366 (5); Johnson v. Bennett, 39 Barb. 237; Brothers v. Brothers, 42 N. C. 150; Armstrong v. Cambell (Tenn.) 24 Am. Dec. 556.

It is immaterial whether the deal was advantageous or disadvantageous to the beneficiaries. Harrington v. Gilchrist (Wis.) 99 N. D. 909; Clay v. Cummings (Ala.) 77 So. 328.

It is immaterial whether the trustee acted in good faith or bad faith. Bank v. R. R. (Ia.) 74 Am. Dec. 302; Dugan v. Capner (N. J.) 15 Atl. 819; Newcomb v. Brooks, 16 W. Va. 32; Lynch v. Henry, 25 W. Va. 416.

"To a possessor, whose title originated in fraud, or is attended with circumstances of circumvention and deception, no compensation for improvements is ever allowed." Jackson v. Ry. Co. 99 U. S. 537; Ry. Co. v. Soutler, 13 Wall. 517; Hawley v. Tesh, 59 N. W. 677; German Soc. v. Tull, 136 Fed. 1; Morrison v. Robinson, 31 Pa. 456; Van Horn v. Fonda, 5 Johns. Ch. 416; Ensign v. Batterson, 36 Atl. 51; Gaebel v. O'Connor, 61 N. W. 134; Gilbert v. Hoffman, 26 Am. Dec. 103; Re Hayes, 28 Atl. 158; Gulkenheior v. Angline, 81 N. Y. 394; Johnson v. Moore, 5 Pac. 406; German Bank v. United States, 148 U. S. 573–580; Russell v. Blake, 2 Pick. 505; Tatum v. McLellan, 56 Miss. 352; Thompson v. Thompson, 16 Wis. 91; Hughes v. Williams (Va.) 38 S. E. 138.

"There is no need of equitable proceedings to set aside a deed executed in breach of trust." Bourquin v. Bourquin (Ga.) 35 S. E. 710. See also Raich v. Lindebek, 161 N. W. 1026.

It is the prevailing rule of law that no tender is necessary to a fiduciary who has violated the terms of his trust, as a condition precedent to a suit against such fiduciary for such breach of trust. Raleigh v.

Fitzpatrick (N. J.) 11 Atl. 1; Beck v. Uhrich, 16 Pa. 499; Garaig v. Garard (Ind.) 34 N. E. 442; Powell v. Powell (Ill.) 2 N. E. 162; Goodwin v. Whitehead (Ala.) 11 So. 65; Hungerford v. Cushing, 8 Wis. 332; Taylor v. Calvert (Ind.) 37 N. W. 531; Newcomb v. Brooks, 16 W. Va. 32; Slingluff v. Dugan (Md.) 56 Atl. 837.

Spalding & Shure, for respondents.

The rule is well established that fraud must be proven by clear and convincing evidence, and be made by facts which are inconsistent with an honest purpose. We submit that the evidence in the case at bar is anything but clear and convincing of fraud. Reitsch v. McCarty, 35 N. D. 575; Graham v. Graham, 184 Mich. 638; Kvello v. Taylor, 5 N. D. 76, and fraud is not presumed in a case of this kind; Krause v. Krause, 30 N. D. 54.

When trustees act honestly and legally proper, they receive the protection and favor of the court. The legal presumption always is that a trustee has faithfully executed his trust unless the contrary is proven. Burrill, Assignments, 568; Valentine v. Decker, 43 Mo. 583; Jefferies's Appeal (Pa.) 1 Am. Lead. Cas. 303 notes; McLaughlin v. Park City Bank (Utah) 63 Pac. 589. Equity will not aid avarice in purloining property. Anthes v. Schrouder (Neb.) 92 N. W. 196; May, Fraud. Conv. 689; Richardson v. Welch, 47 Mich. 309; Williams v. Nierenberg (N. D.) 115 N. W. 510.

When one gives his agent ambiguous instructions which the latter executes in good faith according to a reasonable interpretation of them, the principal is estopped to say that he intended them to be construed otherwise. The agreement was in effect like delivering deed with name of grantee blank, with authority to fill in. Anderson v. First Nat. Bank, 4 N. D. 182; Ormsby v. Johnson (S. D.) 124 N. W. 436.

"Unless the defendant was deprived of all rights to protect himself unless they could compel him to make all the payments and run all the risks, and then, after waiting as long as they chose, adopt or reject his acts as subsequent events might dictate, they must be held to have abandoned the purchase." Spoonheim v. Spoonheim, 14 N. D. 389. See also Kennedy v. Dunn, 58 Cal. 339; De Cordora v. Smith (Tex.) 58 Am. Dec. 136.

Plaintiffs were concluded by their signature to the deed. They there-

by assented to its terms, and there is no proof of fraud on the part of Thompson or Stoudt. Bowen v. Ins. Co. 20 S. D. 103; Indianapolis Rolling Mills Co. v. St. L. Ft. S. & W. R. Co. 120 U. S. 256; Patterson v. Ward, 6 N. D. 609.

Where the beneficiaries consented beforehand to a transaction with the trustee and the transaction was clearly for the benefit of the trust property, which received the full benefit thereof, they cannot afterwards be heard to object to the transaction. Shelby v. Crighton, 101 Am. St. Rep. 630, 636 and note, 639; Johnson v. Erlandson, 14 N. D. 522; Spoonheim v. Spoonheim, 14 N. D. 139; as to effect of reading instrument before signing, see Bower v. Jones (S. D.) 128 N. W. 470; Farlow v. Chambers, 21 S. D. 128, 110 N. W. 94; Gulf, C. & S. F. R. Co. v. Feim (Tex.) 76 S. W. 597; Lewis v. Whitworth (Tex.) 54 S. W. 1007; Rud v. Coughram, 21 S. D. 257, 111 N. W. 559; Haag v. Burns, 22 S. D. 51, 115 N. W. 104; Hammond v. Hopkins, 143 U. S. 224; Scott v. Freeland (Miss.) 45 Am. Dec. 310.

Where the subject-matter of the representation is patent and opportunity to investigate and the means of acquiring knowledge thereof are easily available to the complaining party, he is presumed to have knowledge thereof. 6 Enc. Ev. 71; Van Velsor v. Geeberger, 25 Ill. App. 598; Martin v. Harwell, 115 Ga. 156.

One cannot receive a benefit under a conveyance and then turn around and claim that the conveyance is fraudulent and void. By receiving the benefit he affirms the conveyance and is estopped from setting up fraud or other facts in avoidance of it. Reitsch v. McCarty, 35 N. D. 574.

Standing by and seeing valuable improvements erected estops the plaintiffs. Iverson v. Saulsbury, 65 Ga. 724; Warner v. Blakeman, 76 Barb. 501; Sloan v. Frothingham, 65 Ala. 593; N. W. Mut. Hail Ins. v. Fleming, 12 S. D. 36.

Fraud without damage, or damage without fraud, gives no cause of action, but the two must concur and the fraudulent representations must have been made with intent to deceive. Kountz v. Kennedy (N. Y.) 49 Am. St. Rep. 651; Marriner v. Dennison, 78 Cal. 202; Simmons v. Hill, 77 Iowa, 378.

By accepting and retaining the consideration the grantor ratifies his deed. Ormsby v. Johnson (S. D.) 124 N. W. 436; State v. Engle, 111

Iowa, 246; Turner v. Fryberger, 99 Minn. 236; Copsey v. Sacramento Bank, 133 Cal. 659; Re Robbins (Minn.) 109 N. W. 229 and authorities cited in opinion.

Where fraud is claimed as a basis for canceling a deed, at least an offer to reimburse the amount paid by the holder of the title is necessary, and failure to make such offer is alone sufficient to defeat a recovery. Williams v. Nierenberg (N. D.) 115 N. W. 510.

A trustee who is also a creditor has a right to purchase. Leavell v Leavell, 4 Ky. L. Rep. 889.

Where property is transferred to trustee to be sold for the payment of debts named, it is delivered as an assignment, and not a deed of trust, and the deed of the trustee conveys a good title to the purchaser.

There is nothing tending to show that Stoudt had any intimation of fraudulent purposes. His statement related to his interest in the land as creditor of the Waldorf estate, and he was the largest creditor. Gale v. Mensing, 22 Mo. 461; Goodrich v. Proctor, 1 Gray, 567; Purdy v. Whitney, 20 Pick. 25; State v. Benoist, 37 Mo. 508; Tuttle v. Merchants Nat. Bank, 19 Mont. 11; Martin v. Hausman, 14 Fed. 160.

And even though Thompson's conveyance was made in breach of his trust, it passed legal title to Stoudt. Bristol Sav. Bank v. Judd, 116 Iowa, 26; Schanewerk v. Hoberecht, 117 Mo. 22; Robinson v. Pierce, 118 Ala. 273; Bollin v. Furman, 28 Mo. 427.

Robinson, J. This is an appeal from a judgment quieting the title of T. A. Thompson and E. O. Stoudt to a half section of land in town 142, range 54. In 1914 one Waldorf died leaving no property except written contracts with Mr. Harvey and Mr. Parsons for the purchase of said land. It was in process of foreclosure on a mortgage for about $5,000. Waldorf left small debts due and owing each of the parties to this action. To obtain payment, in whole or in part, the several creditors of Waldorf took over the land contracts and the title acquired by a foreclosure of the mortgage, and took title in the name of T. A. Thompson, and it was in writing agreed that Thompson and each and every one of the several parties should try to obtain a purchaser for the land so as to pay each party his advances with 33⅓ per cent on his claim. In time Thompson obtained quitclaim deeds from the plaintiffs and sold the land to Stoudt, retaining a half interest. The sale was made at

$34.50, from which each party received the amount of his advances, with 33⅓ per cent on his original claim. Thompson did all, or nearly all, the work, and made considerable advances without making any charge for the same. In that way each party plaintiff received one third of the debt, which was practically worthless. The defendants owned the greater part of the claim against the Waldorf estate. Without the least objection the plaintiffs received and retained the just dividends in full of their claims against the land, and then, after the lapse of time, when Thompson and Stoudt had made large and permanent improvements, and when the land had increased in value, the plaintiffs bring this action claiming that Thompson was a trustee and that he was barred from any sale of the land in any way inuring to his benefit; but, as the trial court found, the case does not properly involve any question of trusteeship. It was a combination or quasi partnership between the several creditors for the purpose of realizing something from the insolvent estate. Each and all of the creditors had a right to find a purchaser for the land, and no one found anyone willing to pay $34.50 an acre, and the land was subject to a large and pressing debt which no one cared to pay. Stoudt was the principal creditor. Thompson and Stoudt had the largest investment, and it behooved them to close the deal, and it was done fairly and openly and in good faith. The facts are clearly stated in the findings of the court, which are well sustained by the evidence and justify the conclusions of law. However, it appears that costs were taxed in favor of Thompson and Stoudt, $74.20; Farmers State Bank, $22; R. C. Lindsey, $22; W. Jorgenson Company, $22. The last three items should be stricken, and no costs allowed excepting the $74.20, because there was only one defense and one trial. But, as the cost is a small incident and does not involve the merits of the appeal, neither party is entitled to recover costs on the appeal. The judgment is modified by striking out the three items of costs, amounting to $66, and as thus modified it is affirmed, without costs to either party.

GRACE, J. I dissent.

F. G. BOETTCHER, Suing on Behalf of Himself and All Other Persons Similarly Situated, Appellant, v. T. E. McDOWALL, Wm. Wade, Wm. Eastman, Constituting the Board of County Commissioners of Grant County; J. G. Patterson, County Treasurer; Robert D. Berry, County Auditor; Grant County, a Municipal Corporation; and J. Henry Bellman, Respondents.

(174 N. W. 759.)

Counties — division of counties — construction of courthouse by new county — right of new county to apply surplus from taxation fund to building fund.

In an action to enjoin the construction of, and payment for, a courthouse, where no temporary injunction forbidding the construction was issued, and where, at the time of the trial on the merits, the courthouse was practically completed, it is *held:*

1. Where a new county is organized and, in the settlement with the county from which the territory comprising the new county was severed, the taxes previously levied by the original county are assigned to and collected by the new county, such taxes being in excess of the expenditures for the various purposes for which the same were levied during the current fiscal year, the balance so existing at the end of the fiscal year are subject to transfer to the building fund, under §§ 3287 and 3288, Compiled Laws of 1913.

Counties — contract for construction of bridges not a lien on balance in bridge fund.

2. Where, prior to the close of the first fractional fiscal year, the county commissioners of a new county take preliminary steps looking toward the construction of bridges during the succeeding fiscal year, and a written contract is executed with a successful bidder in the succeeding fiscal year, such contract does not create a special charge upon the balance in the bridge fund as it existed at the close of the fractional fiscal year, but is a proper item entering into the county budget of the current fiscal year.

Counties — control of emergency fund, not subject to payment of warrants drawn upon other funds.

3. An emergency fund created by tax levy is subject to the control of the board of county commissioners, upon whom is imposed the duty of directing the fiscal affairs of the county; and in the absence of a statute so requiring, such fund is not automatically subject to the payment of warrants drawn upon other funds of the county which may be overdrawn at the time the warrants are issued.

Counties — construction of courthouse in new county — when vote is not required.

4. Section 3280 of the Compiled Laws of 1913 does not require a vote upon the question of the construction of a courthouse in a new county, where the same is constructed from a building fund comprised of unexpended balances in funds assigned to the new county by the county from which the territory is segregated.

Counties — injunction proceedings — court of equity will not interfere where new county has sufficient funds and building is practically completed.

5. Where, during the pendency of litigation started for the purpose of enjoining the construction of a courthouse, the building is practically completed and the place at which it is located is fixed by popular election as the county seat, there being no fraud shown and no contention that the building is not well worth the contract price, and it appearing that the county had sufficient funds legally applicable to the discharge of the contract and that the commissioners had ample authority to proceed with the work, there is no equity in favor of the plaintiff to support his prayer for injunction against payment on the ground that the contract was not legally let.

Opinion filed June 28, 1919. Rehearing denied September 8, 1919.

Appeal from District Court of Grant County, Honorable *W. C. Crawford,* Judge, sitting at request of Honorable *J. M. Hanley,* District Judge.

Affirmed.

Jacobsen & Murray, for appellant.

The diversified farming fund, the road fund, the county bridge fund, and the poor fund, and the county road fund (special road) fund, are not transferable under § 3287, because there is no provision under this section for so transferring. Union P. R. Co. v. Cheyenne Co. 90 N. W. 917.

They are not special funds because they are created by law and not by act of the board, or expressly limited in the amount of their receipts. Comp. Laws 1913, § 2150; Potter v. Fowzer, 21 Pac. 119; Hughes v. Board of Commissioners, 127 N. W. 613.

That the funds derived by levy under § 1945 cannot be transferred is clearly apparent from the language of that section. Oakley v. Valley County, 59 N. W. 368; Union P. R. Co. v. Cheyenne Co. supra; Molley v. New Rochelle (N. Y.) 30 L.R.A.(N.S.) 126, 92 N. E. 94; (Mo.) 109 S. W. 656, 37 L.R.A.(N.S.) 1045.

A contract for the construction of a courthouse which cannot be paid for out of the annual revenue of the current year if not submitted to a vote of the people is void. Comp. Laws 1913, §§ 3280, 3294; Tekama County v. Sisson (Col.) 99 Pac. 64; McKinnon v. Robinson, 24 N. D. 367; Bannock County v. C. Bunting & Co. 37 Pac. 277; State ex rel. v. Butler Co. 94 Pac. 1004; Dunbar v. Canyon Co. 49 Pac. 409; Spencer v. Taylor, 77 Pac. 276.

"Current year," as used in the statute, means the year between levies. Clark v. Lancaster County (Neb.) 96 N. W. 599.

The bridge fund and the road fund and other funds described in § 2150 for which separate levies are made can only be used for the purposes for which levies thereunder are made. N. D. Const. § 175; Smith v. Haney (Kan.) 85 Pac. 550; Northrup v. Hoyt (Or.) 49 Pac. 754; Union P. R. Co. v. Cheyenne Co. 90 N. W. 917; Stinson v. Thorson, 34 N. D. 372, especially opinion on the petition for rehearing commencing on page 383 of that report.

Notice should have been published at least thirty days prior to the opening of bids for at least four publications. Comp. Laws 1913, § 3296.

The contract provided for an incompleted building. It was void. McKinnon v. Robinson, 24 N. D. 367; Hoffman v. Board of Com. (Mont.) 44 Pac. 973.

Sullivan & Sullivan (*W. F. Burnett,* of counsel), for respondents.

There is no claim of fraud, no claim that all persons were not given an opportunity to bid, and no claim, nor can there be any claim, that anyone was prejudiced thereby. Upon this statement of fact, the law is well settled. Newport News v. Potter, 58 C. C. A. 483, 122 Fed. 321; Connersville v. Merrill, 42 N. E. 397, 48 N. E. 1042.

There is nothing in the contract prejudicial to the rights of the county, and minor variances in the contract, not prejudicial to interested parties, will not invalidate the contract. 28 Cyc. 1037, note 8; Joyce v. Falls City Artificial Stone Co. 64 S. E. 912; Mankato v. Barber Asphalt Co. 142 Fed. 329; Commissioners v. Cincinnati Steam Heating Co. 12 L.R.A. 502.

BIRDZELL, J. This is an appeal from a judgment entered in the district court of Grant county denying a permanent injunction against the

construction of a courthouse and against the payment therefor. The case is in this court for trial *de novo*. From the record it appears that Grant county was organized in November, 1916; that the territory embraced within it was taken from Morton county and consists of forty-seven full and eleven fractional congressional townships. Prior to the organization of Grant county and at the appropriate time for levying taxes for the then current fiscal year, the board of county commissioners of Morton county made an annual tax levy for the various purposes for which levies are authorized, aggregating $265,555, which levy constituted the basis of county taxes for the tax lists of the fiscal year beginning July 1, 1916, and ending June 30, 1917, applicable to all of the territory at that time embraced within Morton county. After the organization of Grant county, in November, 1916, a settlement was effected between the county commissioners of Grant county and Morton county, according to which Grant county was to receive the taxes available under this levy as assessed against the property falling within its jurisdiction. The Morton county debt was also adjusted, and the portion assigned to Grant county liquidated as required by §§ 3212 and 3221–3225, Compiled Laws of 1913, inclusive, the indebtedness so assumed amounting to $30,595-.21. The county of Grant began its fiscal operations on January, 1917, and at this time there was in process of collection the proceeds of the tax levy previously made by the county commissioners of Morton county, and which, under the settlement, fell to Grant county; that is, the tax, both current and delinquent, spread against the property within the limits of Grant county constituted the assets of Grant county, and the proceeds were not subject to disbursement by the board which levied them. An audit made by the accountant Carl O. Jorgenson, as of July 1, 1917, shows that various funds of Grant county might properly be credited with $85,430.93, against which liabilities existed amounting to $53,963.69, making a total favorable balance in all funds of $32,-477.24. It also shows that from the various funds showing favorable balances, there was transferred to the building fund $38,702.40. It seems that there was no attempt made to transfer from the county revenue fund and that this fund was overdrawn on July 1, 1917. Transfers were made in specific amounts, and in some instances exceeded slightly the balances left in the funds from which transfers were made, and in

other instances all of the balances were not transferred. The existence of some of the credit balances as shown in the Jorgenson report is disputed, and in so far as the disputed items are material to the determination of the case, they will be later considered.

Anticipating the existence of balances that it would be possible to transfer in July, 1917, and recognizing the need for a suitable building to accommodate the various offices and to properly keep the records of the new county, the county commissioners, on April 6th, instructed the county auditor to advertise for bids for the construction of a county courthouse, the bids to be opened on May 8th following, and to be in accord with plans and specifications on file. The bids were received on May 8th, and on July 7th following the board passed resolutions transferring certain funds to the building fund, accepting the bid of J. H. Bellman, and directing the county auditor to enter into a contract with him for the erection of the courthouse.

The appellant contends that the injunction should issue as prayed for on three grounds,—first, that there was no money in the funds which the defendants transferred to the building fund, or if balances existed they were not sufficient in amount to discharge the contract obligations; second, that the county commissioners had no legal authority to transfer the various balances to the building fund; and, third, that the letting of the contract was illegal and in excess of authority for the reasons, (a) that it was not approved by a majority of the voters of Grant county; (b) that it involved an extraordinary expenditure, or one greater than could be paid out of the revenue of the current year; (c) that the advertisement for bids was not legal; (d) that proposals were not in accord with the specifications; (e) that the contract was not let to the lowest bidder; and (f) it provided for an incompleted courthouse.

It is argued that the report of the expert accountant employed by the plaintiff T. H. Poole shows that the various funds from which transfers were made in July were in fact previously overdrawn, or to such an extent subject to obligations contracted prior to July 1st that, taking the most favorable view, it could not be said that there were sufficient balances in them to be transferred for courthouse construction purposes. The audits of the experts for both parties for the most part agree, but a difference arises as to the propriety of considering certain items as charges against the funds. An instance of this discrepancy that may

be said to be somewhat characteristic is found in connection with the bridge fund. The Jorgenson report shows that the bridge fund balance on July 1st was $15,671.96, whereas the Poole report shows that the fund was overdrawn at that time on account of two bridges assumed to have been purchased before July 1st, for the price of $12,170. (This report credits the bridge fund with $11,393.24.) But an examination of the commissioners' proceedings shows that the auditor was instructed to advertise for the purchases in question on May 11th; that the bids were opened on June 11th; that on June 13th the auditor was instructed to order the lowest bidder, the Fargo Bridge & Iron Company, to erect the proposed bridges. It further appears that formal contracts were executed on July 12th, or subsequent to the close of the previous fiscal year. We need not consider whether or not the acceptance of the proposal of the Fargo Bridge & Iron Company resulted in a contract, or whether the action of the board on June 11th, in instructing the auditor to order the construction of bridges, resulted in a contract (Bayne v. Thorson, 37 N. D. 187, 163 N. W. 822; Edge Moor Bridge Works v. Bristol County, 170 Mass. 528, 49 N. E. 918); for the parties, by subsequently entering into formal contracts, merged their prior negotiations. These contracts being made after the close of the fiscal year, on July 1st, did not create special charges against the fund remaining from the previous year from which the transfer was later made. See Cooper v. Wait, 106 Ky. 628, 51 S. W. 161. The work contemplated was to be done during the fiscal year 1917–1918, and it would be the duty of the county commissioners to take into consideration the amount to be so expended in levying for the bridge fund for that year. It was therefore proper for the county commissioners, assuming that they had authority to transfer funds, to consider the unexpended balances in the bridge fund to be fixed as of July 1st, and as not subject to the charge of the subsequent bridge contracts, even though the same were in contemplation prior to the close of the fiscal year. From this it would follow that there was a balance of $11,000 or more subject to transfer if the transfer were authorized.

There was also transferred from the emergency fund $2,832.70. The Jorgenson report shows that there was at the time a favorable balance in this fund of $4,167.33, while the Poole report shows a credit balance of $2,842.60, or a sum slightly in excess of the balance so transferred.

But it is contended by the appellant that, since the county general revenue fund was overdrawn, the emergency fund was necessarily subject to the payment of outstanding warrants drawn on the general revenue fund, and that this credit balance would consequently be entirely wiped out. By § 172 of the Constitution and § 3276, Compiled Laws of 1913, the duty to supervise and control the fiscal affairs of the county is imposed upon the county commissioners. There is no statute which makes it the mandatory duty of the board to apply the emergency fund to the payment of warrants drawn on other funds when the same happen to be overdrawn, nor do we find any provision of law which subjects the emergency fund automatically to the payment of warrants drawn on overdrawn funds. Thus, the emergency fund is left subject to the control of the board to the same extent as is any other fund, and the duty of deciding whether or not it shall be applied in liquidation of warrants drawn upon other funds is a duty devolving upon the commissioners, and one which is not ordinarily to be judicially controlled. The commissioners may decide whether they will levy sufficient moneys for the general revenue fund to meet outstanding warrants, or whether they will turn balances from the emergency fund or from other funds into the county general revenue fund. It follows from this that the balance in the emergency fund was subject to whatever authority the commissioners had to transfer.

The foregoing conclusions, denying the contentions of the appellant as to the balances in the bridge fund and the emergency fund, result in a finding that there was subject to transfer on the date of the making of the contract in each of the two funds amounts in excess of the sum transferred by resolution, the amount thus transferred being $13,832.70. This is more than the apparent liability under the contract. But if there be added some smaller balances, the existence of which is not seriously questioned, there is no doubt that the contract and its incidentals do not exceed the available funds. It is unnecessary, therefore, to examine the further contentions of the appellant with respect to the condition of other funds transferred at the time and subsequently. Neither do we deem the exact date of transfer material; for if the balances existed, the power could be exercised at any time during the regular meeting in July, or, as to special funds, at any meeting. Comp. Laws 1913, §§ 3287, 3288.

Passing, then, from the first proposition, the contention that the board of county commissioners had no legal authority to transfer the various balances to the building fund must be considered.

Section 3287, Compiled Laws of 1913, authorizes the board of county commissioners, at any regular meeting and whenever, in their judgment, there is immediate need for the erection of a courthouse or other necessary buildings, to create a building fund by resolution; and at their regular meeting in July following to transfer to this fund any unexpended balances "belonging to the road and bridge fund, penalty and interest fund, or emergency fund, after current bills or authorized expenditures against said funds have been audited and paid," etc. Section 3288 authorizes the transfer of any "unexpended balance of any special fund . . . to any other fund of the county or subdivisions to which such balance belongs." It is argued that § 3287 does not authorize the transfer of the bridge fund. True, under § 2150, Compiled Laws of 1913, separate levies are authorized for roads and bridges. One is made as a bridge tax (not to exceed 2 mills on the dollar), and one as a road tax (not to exceed 5 mills on the dollar). Additional provision is made for a poll tax of $1.50 for every male person between the ages of twenty-one and fifty "for roads and bridges." But whether the expression "road and bridge fund" in § 3287, authorizing the transfer, refers only to the fund resulting from the poll tax provided by § 2150, or whether it was really intended as a short designation of the funds resulting from the separate levies for roads and bridges, we need not determine; for, in our opinion, if the transfer of $11,000 from the bridge fund was not authorized by § 3287, it was authorized by § 3288; as the bridge fund would then be a special fund within the meaning of that section. But it is contended that, since § 3288 only authorizes the transfer when all claims against such funds have been fully paid and the purpose for which it was created fully subserved, no transfer could be made of the bridge fund as a special fund under this section so long as there was any claim whatsoever outstanding against the fund. In our opinion, this contention is without merit, although it must be conceded that it finds plausible support in the literal construction of the section. But the literal meaning is not to be followed in preference to a reasonable construction where it can serve no purpose whatsoever and where it might tend to defeat the manifest object of the section. The manifest interest

to be subserved by a statute of this character is to permit the immediate employment, in some authorized direction, of balances which would otherwise presumably lie unused. It thus avoids the necessity of levying added taxes for immediate use while ample funds levied for other purposes lie unused. The wisdom of this policy was foreshadowed in the Constitution by the express recognition in § 130 of the probable need for transferring money from one fund to another, with the limitation that it should not be diverted from the original purpose "except by authority of law." To adopt the literal construction contended for would necessitate going the full length of the appellant's argument, wherein it is contended that no transfer could be made, no difference how large the certain balance, so long as any claim, no matter how small, was outstanding. The statute secures to creditors the right to collect their claims against the special funds levied, for the purpose of accomplishing which the debts were contracted; and obviously any attempt to transfer a special fund in such manner as to embarrass the collection of a claim would be futile. But no attempt to defeat creditors is shown here.

The fact that the fund in which the balance exists was one that would prospectively require added revenues to meet anticipated expenditures for a similar purpose in the current fiscal year does not limit the authority to transfer the unexpended balance, under either § 3287 or § 3288, as each levy is presumably based upon a separate budget of anticipated needs. See §§ 3312–3314, Compiled Laws of 1913. For the foregoing reasons we are of the opinion that ample authority existed for the transfer referred to.

The main argument on the illegality in the letting of the contract is drawn from § 3280, Compiled Laws of 1913, which makes it the duty of the county board to submit to the people of the county, at a regular or special election, any question involving an extraordinary outlay of money, or an expenditure greater in amount than can be provided for by the annual tax, or the construction of any courthouse, jail, or other public building, "by establishing a building fund to aid in the construction of the same." Section 3280 must be read in connection with § 3294, which provides as follows: "The board shall have authority under the provisions of this article to provide for the erection and repairing of courthouses, jails and other necessary buildings within and for

the county, and to make contracts on behalf of the county for the building and repairing of the same; but no expenditure for the purpose herein named greater than can be paid out of the annual revenue of the county for the current year shall be made unless the question of such expenditure shall have first been submitted to a vote of the qualified electors of such county and shall have been approved by a majority of the votes so cast; and the board shall determine the amount and rate of taxes to be submitted to a vote for such purpose."

This statute operates as a restriction upon prospective expenditures and contracts involving a sum in excess of the annual revenue. As the contract in question is not to be discharged by expenditures of future annual revenue, it does not involve a violation of that section, and for the same reason it is not within the rule applied in State ex rel. Diebold Safe & Lock Co. v. Getchell, 3 N. D. 243, 55 N. W. 585. Section 3280, upon the other hand, is designed in part, at least, to prevent the construction of courthouses, jails, or other public buildings without a vote of the people, when it is planned to construct them out of a building fund created for the purpose and which may be comprised of the proceeds of special building taxes levied under § 3284, as well as unexpended balances transferred under §§ 3287 and 3288. It does not contemplate a situation where the unexpended balances in any one year will be great enough to accomplish the desired object. And it is hardly conceivable that such a situation would arise except in a new county and under circumstances such as are present in the instant case.

That this statute was not intended to apply to a situation such as is presented in this case is further evidenced by the fact that it refers expressly to the building of courthouses and other public buildings by establishing a building fund "when the board shall consider the permanent buildings of the county, aforesaid, inadequate for the needs of its business." In the instant case it is obvious that the county had no permanent buildings. It had expended an amount of money for records which was more than twice the cost of the new building, and this could clearly be done without a vote. Furthermore, the same section provides for a vote upon the question of "whether it will aid in constructing or construct any highway or bridge." Section 3283 provides for a vote upon the question of establishing a building fund which must be accompanied by a proposition to levy a tax in addition to the usual tax re-

quired to be levied, and § 3284 provides that the rate of tax for the building fund shall be sufficient to raise the fund to the required amount within six years, and it further provides that when the "object is to construct or aid in constructing any road or bridge, the annual tax shall not exceed 1 mill on the dollar of valuation." Considering the various sections referred to together, it is apparent that the vote referred to in § 3280, as being a prerequisite to the construction of public buildings or aiding in the construction of highways and bridges, is a vote upon such questions when the levying of taxes to provide the funds therefor is contemplated; or, possibly, it was intended, in the case of county buildings, where such buildings already exist, to require a vote before a new building could be built by using a building fund accumulated by gradual accretions of unexpended balances. It may be that it was designed to prevent the use of such balances without popular vote where they result from levies for other purposes which had purposely been made high with a view to the subsequent transfer. So construed, the statute would defeat any attempt to thus evade the requirement of a popular vote on a building tax. That does not apply in this case, for the building fund was manifestly legally created under §§ 3287 and 3288.

To apply the statute literally would result in making it necessary to call a popular election before any road could be constructed or bridge built from the proceeds of the taxes regularly levied for those purposes. This absurdity was clearly not intended. We are of the opinion that § 3280 was not violated in the instant case.

The foregoing discussion considers all questions raised by the appellant which go to the authority of the board of county commissioners to proceed with the construction of a courthouse. Some minor questions are also raised which, in view of the state of the record and of facts of which the court may well take judicial notice, we deem it unnecessary to consider. The record shows that the building was practically completed at the time of the trial of the action, and the trial court found that approximately one half of the contract price had been paid. It is not contended that the building is not well worth the contract price. The court takes judicial notice of the fact that, at the time this suit was started, a contest had either begun or was in immediate anticipation to determine the permanent location of the county seat, and that during

the pendency of this appeal this question has been determined in favor of Carson, the temporary county seat, at which place the building in question was erected. From this it follows that the county is obtaining the benefit of the building so constructed. This has a proper bearing upon the equity of the plaintiff, who still claims the right to enjoin payment for the building.

For the foregoing reasons, the judgment appealed from is in all things affirmed.

GRACE, J. (dissenting). Section 3280 of the Compiled Laws of 1913, which relates to the power of the board of county commissioners, reads thus: "It shall submit to the people of the county at any regular or special election any question involving an extraordinary outlay of money by the county or any expenditure greater in amount than can be provided for by the annual tax, or the construction of any courthouse, jail or other public building by establishing a building fund to aid in the construction of the same when the board shall consider the permanent buildings of the county aforesaid, inadequate for the needs of its business, and that it is not to the best interests of the county to issue bonds to aid in such construction or for the construction of such buildings by any other procedure as is, or may be provided by law, or whether it will aid in constructing or construct any highway or bridge."

The above section was wisely enacted by the legislature to place it beyond the power of boards of county commissioners to expend any large or extraordinary sum of money for any purpose without first having submitted the proposition of expending such extraordinary outlay of money at a regular or special election. The board is not prohibited from expending any amount of money that is not greater than the amount that can be provided for by the annual tax. Whatever amount of money the annual tax for a given purpose may be, that the board can expend without any further authority and without the necessity of a vote by the people and be approved by them by a majority vote. State ex rel. Diebold Safe & Lock Co. v. Getchell, 3 N. D. 243, 55 N. W. 585. In the Getchell Case, this court construed § 607 of the Compiled Laws of 1887. Section 607 of the Compiled Laws of 1887, which is practically identical with §§ 3280 and 3294, reads thus: "Said board shall have authority and power under the provisions of this chap-

ter to provide for the erection and repairing of courthouses, jails, and other necessary buildings within and for the county, and to make contracts on behalf of the county for the building or repairing of the same; but no expenditure for the purpose herein named greater than can be paid out of the annual revenue of the county for the current year shall be made unless the question of such expenditure shall have first been submitted to a vote of the qualified voters of such county and shall have been approved by a majority of the votes so cast; and the board shall determine the amount and rate of taxes to be submitted to a vote for such purpose." This court in the opinion in that case, speaking through Judge Corliss, used the following language: "The contract was made in October, 1891, and it was admitted upon the hearing that the question of making such expenditure was never submitted to a vote of the people of such county. It is practically conceded that under these facts the contract is void under § 607, Compiled Laws, unless the illegal action of the board of county commissioners in making this contract was subsequently ratified. But the court had no evidence of ratification before it. It is true that it is stated in the petition and affidavit of relator that the board of county commissioners accepted the work. But this does not constitute ratification. What the board could not do in the first instance it could not thereafter make valid by ratification. *The power must come from a higher source,—the vote of the people.* It is not a case where there has been some irregularity in the exercise of a power vested in the board. It is a usurpation of power by the board which the legislature in express terms has withheld from the board and vested in the people and in the people alone."

Section 3294, Compiled Laws of 1913, cited in the opinion, is largely the same as § 3280, so far as not permitting any extraordinary outlay of money without first submitting the proposition to the voters and obtaining their approval thereof by a majority vote. So far as these two sections are concerned in the respect we have discussed them, they are completely and wholly nullified. Under the majority opinion, county commissioners can expend any sum of money they see fit without submitting the proposition of expending such money to a vote of the people. The majority opinion is in strict opposition to the plain letter and spirit of each of said sections, and most assuredly is strictly against public policy. It also, in effect, overrules the case of State ex rel. Die-

bold Safe & Lock Co. v. Getchell, above cited. The language of § 3280 is also very plain, to the effect that every proposition for the construction of a courthouse, jail, or other public building should be submitted to a vote of the people and approved by a majority vote thereof.

THE STUBBINS HOTEL COMPANY, a Foreign Corporation, Plaintiff and Respondent, v. E. BEISSBARTH and J. V. Williams, Defendants, E. BEISSBARTH, Appellant.

(174 N. W. 217.)

Appeal and error — instructions of trial court.

1. Certain instructions of the trial court examined and *held* to be without prejudicial error to the appellant.

Appeal and error — bills and notes — when evidence not set out in appeal judgment presumed supported.

2. Where an appeal is taken to this court from a judgment of the district or county court and the evidence is not made a part of the record on appeal, every reasonable presumption will be indulged in support of the judgment. Under te instructions in this case, one of the main issues was whether the defendant Beissbarth signed the note in question as an accommodation maker for Williams or the Linden Hotel and the Stubbins Hotel Company, they being one and the same company. The jury found in favor of the plaintiff, and thus, in effect, found that Beissbarth signed the note as an accommodation maker for Williams, and, in accordance with the rule above stated, it is presumed the evidence sustains the judgment entered upon the verdict returned by the jury.

Opinion filed June 28, 1919. Rehearing denied September 8, 1919.

Appeal from the County Court of Benson County, *O. D. Comstock,* J. Affirmed.

Sinness & Duffy, for appellant.

"The party for whose benefit accommodation paper has been made acquires no rights against the accommodation party, who may set up the want of consideration as a defense to an action by the accommodated party, since as between them there is no consideration, a fact which is always a defense to a suit on negotiable paper between the immediate

parties. He is not liable to the party accommodated although he also signed for the accommodation of another person, or although a comaker received value from the party accommodated." 8 C. J. 260.

In the absence of statute, the great weight of authority is that the burden of proving considerations is upon the plaintiff. 3 R. C. L. 928; Best v Rocky Mountain Nat. Bank, 37 Colo. 149, 7 L.R.A.(N.S.) 1035, 85 Pac. 1124.

"The burden of showing a want of consideration sufficient to support any instrument lies with the party seeking to avoid it." Comp. Laws, § 5882; Re Garcelon (Cal.) 43 Am. St. Rep. 134; 8 C. J. 994–996; Hammon, Ev. pp. 3, 4.

The instrument imports consideration. When plaintiffs read it in evidence, they became entitled to a presumption, that it was "a valid obligation based upon a good and legal consideration, and the burden of showing that there was want of consideration rested upon the defendant." Bringman v. Von Glahn, 75 N. Y. Supp. 845, cited in 1 Dan. Neg. Inst. 6th ed. p. 221.

"It is of course elemental that a contract has no validity until it is delivered, and if the delivery is conditional the contract has no validity until the condition is fulfilled." 6 R. C. L. 642; 3 R. C. L. 859; Beach v. Nevens, 18 L.R.A.(N.S.) 288, 162 Fed. 129; 13 C. J. 307; First State Bank v. Kelly, 30 N. D. 95; Wilbur v. Stoepel, 82 Mich. 344, 21 Am St. Rep. 568, 46 N. W. 724; Jones v. Jones, 101 Me. 447, 115 Am. St. Rep. 328, 64 Atl. 815.

"As between the accommodated and the accommodation party, the paper is given gratuitously. Between them there is no binding contract, because the accommodation paper is not based upon a consideration." Norton, Bills & Notes, 2d ed. p. 173.

"A promise to answer for the debt, default, or miscarriage of another, in order to be binding, must be in writing, and be supported by a consideration. It is *nudum pactum* unless some benefit accrues to the debtor or to the promisor." Wright v. Threatt, 146 Ga. 778, L.R.A. 1918C, 541, 92 S. E. 640.

One who signs as an accommodation maker after credit has already been extended on the note to the original debtor cannot be held liable because his signature was without consideration. Bank v. Latting (Okla.) 130 Pac. 144, 44 L.R.A.(N.S.) 481 and note; Citizens Trust

Co. v. McDougald, 132 Tenn. 323, L.R.A.1917C, 840, 178 S. W. 432.

Victor Wardrope and *L. L. Butterwick,* for respondent.

No consideration need pass to the accommodation maker in order to bind him on a written instrument. Comp. Laws 1913, § 6914; First State Bank v. Kelly, 30 N. D. 84.

The rule is very clearly stated in First State Bank v. Meyer, 30 N. D. 388, 397.

Under the decisions of our supreme court, a defendant setting up new matter by way of an affirmative defense has the burden of proof in regard thereto. Pease v. McGill, 17 N. D. 171; Logan v. Freirks, 14 N. D. 138. The rule is stated in 16 Cyc. 923; State v. Kelly, 30 N. D. 98.

When evidence is not before the court, it will be presumed that the instructions conformed to the evidence submitted. State v. Wood, 24 N. D. 156; State v. LaFlame, 30 N. D. 489; Mills v. Lehmann, 28 S. D. 347, 133 N. W. 807.

"Every presumption and intendment is in favor of the correctness of an instruction under a record on appeal which contains none of the testimony, unless under no possible theory could the same be correct." An appellate court will not presume error. State v. Campbell, 7 N. D. 58; Gress v. Evans, 1 Dak. 387, 46 N. W. 1132.

GRACE, J. Appeal from the county court of Benson county, C. D. Comstock, Judge.

This appeal is from the judgment of the county court of Benson county and from an order denying a motion for a new trial. The action is one to recover upon a promissory note for $347.42, together with the interest at the rate of 8 per cent, signed by the defendants jointly. Williams was not served with the summons. Beissbarth answered separately, denying any consideration for the note; alleging that it was signed by him as an accommodation to the plaintiff, the payee in the note. Defendant also alleges that it was mutually agreed by and between defendant and the plaintiff, the payee, that the payee would not hold this defendant liable on the note and would save the defendant harmless. The court instructed the jury that the sole issue was whether the note was signed as an accommodation to the payee; that upon this question the burden of proof was on the defendant. The only ques-

tion raised by this appeal relates to the correctness of that instruction. It reads as follows:

"Gentlemen of the jury, it is admitted by the plaintiff and the defendant in this action that the Linden Hotel and the Stubbins Hotel Company are the same parties, or that the Linden Hotel is owned by the Stubbins Hotel Company.

"The court instructs you, gentlemen of the jury, that it is admitted by the pleadings and appears conclusively from the evidence and pleadings that said note in controversy was executed on or about the 15th day of February, 1916, by the defendants E. Beissbarth and J. V. Williams, that is, was signed by them and delivered to the plaintiff; that said note has not been paid by either the defendant E. Beissbarth or the defendant Williams; that demand has been made upon the said defendants for the payment of said note, and that said plaintiff is the owner and holder of said note, and that there is due thereon the sum of $347.-42, and interest thereon at 8 per cent since the 15th day of February, 1916. You should take these matters as the conceded facts in this case. They require no further consideration from you. The only matters in dispute in this case which must be passed upon by you are the conditions under which the note was executed and delivered; as I said before it is the contention of the plaintiff that said note was executed and delivered by the defendant E. Beissbarth as an accommodation maker for the defendant J. V. Williams, and that the consideration therefor was the cancelation of a prior and existing indebtedness for a like amount due plaintiff from Williams, and the acceptance of the note in payment therefor. This the defendant E. Beissbarth denies and contends that he signed and delivered the note as an accommodation maker to the plaintiff, the Linden Hotel, at plaintiff's request and that he did not receive any consideration therefor. Gentlemen of the jury, that is the only issue in this case.

"Gentlemen of the jury, you have heard all of the testimony relating to this case and it is for you to determine which view of the matter is correct. In determining this matter you will take into consideration all the evidence offered, and the court instructs you that the burden of proof is upon the plaintiff to maintain the issue in this case on his part by a preponderance of the evidence. It may be in a case that after the plaintiff has gotten in sufficient facts to entitle him to recover by a

preponderance of the evidence that recovery may be defeated by other facts set up in the answer by said defendants amounting to an affirmative defense in avoidance of the facts set up and proven by the plaintiff. In this case the defendant has set up that notwithstanding the fact that the note was executed and delivered by him, that he is not responsible thereon because at the time of the execution of the note it was executed by him solely as an accommodation maker for the benefit of the Linden Hotel, and that it was made without consideration and that it was agreed between himself and the Linden Hotel that he should not be held liable upon the said note.

"Gentlemen of the jury, I charge you it is incumbent upon the defendant to prove all of the facts set up as an affirmative defense in avoidance of the facts set up by the plaintiff by a preponderance of the evidence.

"I instruct you, gentlemen of the jury, that the mere fact that the plaintiff in this action received a benefit through Mr. Beissbarth signing the note in evidence would not make the plaintiff the accommodated party nor excuse Mr. Beissbarth from paying the note. If the defendant E. Beissbarth executed and delivered the note sued upon to plaintiff for the purpose of paying the debt, if any, which Mr. Williams owed plaintiff, then the defendant is liable on the note, even though he was not personally indebted to the plaintiff."

The execution of the note is admitted by the answering defendant. It is admitted by both parties to the action that the Linden Hotel and the Stubbins Hotel Company are the same party; that the Linden Hotel is owned by the Stubbins Hotel Company. The case was tried to the court and a jury. The jury returned a verdict in favor of the plaintiff. From this, in the state of the record before us, the presumption is that the plaintiff offered competent proof of all the material allegations of the complaint. The evidence in the case is not before us and is no part of the record on appeal, and every reasonable presumption must be indulged in favor of the judgment. The presumption is that competent evidence was offered at the trial to prove the material allegations of the complaint. An accommodation note is one, as a matter of law, upon which the accommodating party has placed his name without credit. His name is placed on the note for the purpose of accommodating the person to whom he lends his name and credit, and, in the absence of a

special agreement, without expecting to receive any benefit. The real issue in this case is whether the defendant signed the note as an accommodation to Williams or to the Linden Hotel, which is conceded the same as delivering it to the Stubbins Hotel Company. This question was fairly and fully submitted to the jury and the instructions of the court above set forth. The jury found in favor of the plaintiff. It must have found, therefore, that the defendant signed the note as an accommodation to Williams, and we must presume such finding is supported by the evidence, the evidence not being before us. Defendant also relied upon a special agreement with the payee, which is to the effect that it was mutually agreed by and between the defendant and the payee named in said note, that the said payee would not hold this defendant liable thereon, but would save him harmless from the effects thereof. The jury having returned a verdict in favor of the plaintiff, it must be presumed that the defendant failed to introduce competent testimony to sustain the alleged special agreement. In other words, the evidence not being in the record, we must indulge every presumption in favor of the judgment. We think there was no error in the instruction with reference to the burden of proof. The plaintiff established a prima facie case. Defendant denies he received any consideration for the signing of the note, and alleges he was an accommodation maker for the payee, and sets forth the alleged circumstances under which he signed the note. In such case, as a general rule, the burden of proof is upon the defendant to establish his defense. A plea of no consideration is an affirmative defense. Section 5882, Compiled Laws 1913, is as follows: "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."

Where, in the defense to a promissory note, there is evidence that the note is obtained by fraud, duress, force, fear, or other unlawful means, or for an illegal consideration or under such circumstances as amount to fraud, it would seem it would be incumbent upon the holder of a note in a suit thereon to prove by a preponderance of the evidence the good faith of the transaction and all the other material allegations of his complaint. We are clear, under all the circumstances in this case and considering the further fact that the evidence is not before us, that there is no error in the instruction given. The assigning of errors upon in-

structions without making the evidence a part of the record on appeal is not looked upon with favor and has been repeatedly disapproved by this court. State v. LaFlame, 30 N. D. 489, 152 N. W. 810; State v. Uhler, 32 N. D. 483, 156 N. W. 220, and in South Dakota in Mills v. Lehmann, 28 S. D. 347, 133 N. W. 807.

Judgment and an order denying a motion for a new trial appealed from are affirmed, with costs.

CHRISTIANSON, Ch. J. (dissenting). This is an action on a promissory note. The defendant pleaded want of consideration. The evidence was such as to make it a question for the jury whether there was any consideration. The trial court instructed the jury that it was incumbent upon the defendant to establish, by a preponderance of the evidence, that he had received no consideration for the note. Defendant predicates error upon this instruction. The majority hold that the instruction was proper. I believe that it was erroneous. There is no question but that the holding of the majority has some support in the authorities. But much of such support is more apparent than real. Corpus Juris (8 C. J. 996) says that the decisions sustaining the views of the majority, "while for the most part apparently without qualification on their face, are subject to explanation, at least according to the rules laid down in many jurisdictions, by adding that what is meant is that defendant must produce some evidence to overcome the presumption of consideration arising from the production of the instrument, in order to shift to plaintiff the necessity for proving facts relating to the consideration. In other words the rule, at least in most of the states, is that although a bill or a note imports in itself a consideration, yet when evidence has been introduced to rebut the presumption of consideration the burden shifts to plaintiff to show by a preponderance of the evidence that there was a consideration; and this is so even where the instrument on its face recites a consideration as by the use of the words 'value received.'" Ruling Case Law (3 R. C. L. p. 928) says: "There has been much discussion, not a little confusion, and some real conflict among the decisions, respecting the party on whom rests the burden of proof as to consideration *vel non*. There seems to be no doubt, however, but that the burden of proof is upon the plaintiff to establish the fact that the instrument was given for a valuable consideration. While the produc-

tion of the note, with the admission or proof of the signature, makes a prima facie case, and upon the evidence of the instrument itself, the plaintiff is entitled to a verdict, unless there is some other evidence to affect it; yet when consideration is denied in the answer, there is an issue made upon that point, on which the plaintiff has the affirmative; and the presumption being prima facie only, and not conclusive, the burden of proof necessarily rests upon the plaintiff to show a consideration by a preponderance of the whole evidence given on the trial of the issue. There being other evidence on both sides, which has a bearing upon the question of consideration, the burden remains upon the plaintiff upon all the evidence produced, including the note itself and the presumption that arises from it, to establish what he, in the declaration in his writ, has necessarily alleged. The weight of the evidence, or, as it is otherwise expressed, the preponderance of the evidence, may vary from side to side as a trial progresses; but the burden, which rests upon the plaintiff, to establish the material averments of his cause of action by the preponderance of all the evidence, never shifts. The party who maintains the affirmative of an issue carries the burden of proof through the whole case, although he may be aided by such a rebuttable presumption of law, or such facts, as would prima facie support his contention. His opponent need do no more than counterbalance the presumption or prima facie case. Nor does it make any difference that the instrument contains the words 'value received.'" In my opinion the rule just stated is the correct one.

The majority members, however, invoke § 5882, Comp. Laws 1913, which provides that a party who seeks to invalidate or avoid a written instrument has the burden of showing want of consideration. This, and the preceding section, do not relate to negotiable instruments, but to other written contracts. Under the common law an adequate consideration was necessary to give validity to contracts not under seal. In case of suits upon simple contracts it was necessary to allege and prove a consideration. Peasley v. McFadden, 68 Cal. 611, 10 Pac. 179. This rule, however, did not apply to negotiable instruments; in suing upon them it was not necessary either to allege or, in the first instance, to prove consideration. 3 R. C. L. pp. 836, 837; 8 C. J. 867. The purpose of §§ 5881, 5882, Comp. Laws 1913, was to change the common-law rule in this state with respect to simple contracts (Peasley v. Mc-

Fadden, supra), and to extend to all simple contracts in writing the presumption which originally attached only to negotiable instruments. 13 C. J. 760; 6 Am. & Eng. Enc. Law 762.

The Negotiable Instruments Law provides: "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value." Comp. Laws 1913, § 6909. "Absence or failure of consideration is matter of defense as against any person not a holder in due course." Comp. Laws 1913, § 6913. "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some other person under whom he claims acquired the title as a holder in due course." Comp. Laws 1913, § 6944.

These provisions are applicable in this case. They are in harmony with the rule announced in Ruling Case Law quoted above, and in conflict with the rule announced by the majority members in this case. Under the rule adopted by the majority the ultimate burden of proof is cast upon the defendant to disprove the consideration, but the statutes referred to only cast upon him the burden of overcoming the presumption or prima facie case. In case the testimony is equally balanced, defendant succeeds; not the plaintiff, as held by the majority.

BIRDZELL, J. I concur in the dissenting opinion of Mr. Chief Justice CHRISTIANSON.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, a Corporation, Respondent, v. PETER W. THOMAS and Erma Z. Thomas and Ruby H. Tallmadge, Appellants.

(176 N. W. 523.)

Sales — warranty — failure of consideration — recovery of payments made.

1. The plaintiff sold to defendants the Thomases, a certain gas engine accompanied by a written warranty, and took the defendants' notes and mortgages for the same before the delivery of the engine. Defendants made certain

payments thereon and were to much expense in buying repairs for the engine. According to the preponderance and weight of the testimony, the engine was wholly worthless; *held* that the notes were without consideration or if there were any consideration it had failed; that the mortgages, both chattel and real, securing the notes, were of no force nor effect and were or had become wholly invalid and unenforceable; that the defendants are not liable on the notes nor mortgages; that the defendants are entitled to recover any payments made and the amount expended by them for repairs thereon.

Sales — effect of giving renewal note — availability of defenses against payment of new note.

2. Where a renewal note is given instead of another which represented part of the indebtedness of a certain transaction, whatever defense might have been available as against original note is equally available as against the renewal note so long as the transaction remains one between the original parties.

Sales — effect of giving renewal note — effect of waiver in renewal note — agreement of waiver in note held void.

3. Where one had given a renewal note for another note which represented part of the purchase price of certain machinery, and in addition to the ordinary terms of a promissory note there was inserted in the renewal note a waiver of the maker's remedies if any against the payee, and said note is signed without the defendants expressing any intention to waive their right to such remedies or without their attention being particularly called to the waiver in the note, even though they could read and write, it is *held* that such waiver in such circumstances is of no force nor effect and is wholly invalid and constitutes constructive fraud, it being a contract in itself separate and distinct from the promissory note and there being no testimony showing that defendants intended to sign anything except a promissory note.

Sales — obtaining of waivers by agents or sellers — waivers obtained by misrepresentation constitute constructive fraud.

4. Plaintiff by its experts procured other waivers of defendants' remedies against the plaintiff upon various pretexts, such as procuring defendants to sign a waiver while representing it simply to be a paper to show delivery of the engine, etc. *Held* that waivers procured in this manner were procured by misrepresentation and constituted constructive fraud; that by reason thereof they were of no force, effect, nor validity; that the signing of the same by

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NOTE.—Authorities discussing the question of failure of consideration as a defense to action on a purchase price note are collated in notes in 39 L.R.A.(N.S.) 938, and L.R.A.1918A, 1055, where it will be seen by an examination of the cases, that a want of consideration for a note arising where the note at its inception was given for the payment of property the title to which has entirely failed owing to defects therein, may be relied upon as a defense.

the defendants in the circumstances in which they were signed in no manner defeats their rights or remedies against the plaintiff.

Opinion filed June 30, 1919. Rehearing denied September 8, 1919.

Appeal from District Court of Hettinger County, *W. C. Crawford,* J. Reversed.

Jacobsen & Murray, for appellants.

Miller & Zuger & Tillotson, for respondent.

A buyer who keeps personal property, continues to use it until the trial of the collector's action for the price, is estopped to claim a rescission of the contract as a defense. Linderman Mach. Co. v. Shaw-Walker Co. (Mich.) 153 N. W. 34; Wetter Bros. v. Otto (Iowa) 162 N. W. 12; John D. Cruber Co. v. Smith (Mich.) 162 N. W. 124.

Our court has settled the law on the reciprocal duties of a warrantor and warrantee in the sale of machinery. See Fahy v. Easterley Mach. Co. 3 N. D. 220, 55 N. W. 580; Reeves & Co. v. Corrigan, 3 N. D. 415, 57 N. W. 80.

GRACE, J. Appeal from the judgment of the district court of Hettinger county, W. C. Crawford, Judge.

This is an action brought to recover upon two certain promissory notes, one for $1,100 and one for $1,175, each bearing interest at the rate of 8 per cent, and to foreclose certain chattel and real estate mortgages given to secure such notes. The notes and mortgages are signed by the Thomases. The defendant Ruby H. Tallmadge has no interest in this case on appeal. The complaint is in the usual form. The separate answer of the Thomases admits the execution of the notes and mortgages, and that plaintiff is the owner and holder of them. The defendants further plead that the notes and mortgages were wholly without consideration, or that if there ever was any consideration the same has wholly failed. The defendants plead a breach of warranty. They aver that the engine delivered to the defendant by the plaintiff was not the engine bargained for. They plead a counterclaim for the sum of $3,500 based upon the loss of crop for four different years.

The material facts, so far as ascertained from this record, which is in an exceedingly poor condition on account of the loss of the exhibit

in the case, which became lost before the case reached this court, are substantially as follows:

The Thomases purchased from plaintiff certain machinery consisting of tractor engine and certain attachments thereto. Exhibit "D" appears to be an order for such machinery. A copy of the same is as follows:

Order for Gas and Gasolene Engine.

To International Harvester Company, Town Bismarck, N. D.

The undersigned of R. R. No. N.W.¼, Sec. 22–133–97, P. O. county of Hettinger, state of North Dakota, hereby orders, subject to your approval and to all conditions of agreement and warranty printed on back of this order and made a part hereof, to be shipped on or about the (at once) to Tallmadge & Myers at New England engine one 30–60 h. p. International gas or gasolene engine, regular size of pulley, complete, including necessary fixtures, at price of three thousand two hundred seventy-five dollars, to be paid in cash in three years and balance of purchase price to be paid in 7 horses. Attachments. One each of the following, at the following prices: One P. & O. engine gang plow with both bottoms. One 15 bbl. A. & T. tank. One set 12" extensions. One 1 h. p. starter engine. One steering device. In consideration whereof the undersigned will receive same on arrival, will pay freight and charges thereon from Chicago, Ill., and upon delivery or tender thereof will pay to your order, and execute approved notes payable to your order as follows: $1,000 due November 1, 1913; $1,100 due November 1, 1914; $1,175, due November 1, 1915. Said notes to draw interest at the rate of 8 per cent per annum from date until maturity, and 10 per cent per annum from maturity until paid. It is expressly agreed that this order shall not be countermanded, and that the title to said property shall remain vested in you and your assigns, until the entire purchase price has been paid in money. It is expressly agreed that the property herein ordered shall be and remain personal property in whatsoever manner it may be annexed to realty. The undersigned hereby acknowledge having received a true copy of this order, agreement, and warranty as indorsed on the back thereof.

Security: W.½ of N.W.¼ and S.E.¼ and N.W.¼ and S.W.¼ of N.E.¼

of Sec. 22, Twp. 133, R. 97, Hettinger county; and N.E.¼ of Sec. 21, Twp. 133, Rge. 97, Hettinger county.

Order Dated the 26th day of April, 1913. Taken by W. E. Behrons. Signatures: Peter W. Thomas and Erma Z. Thomas.

The back of agreement is as follows:

Warranty and Agreement: International Harvester Company of America (Incorporated) warrants the within described engine to do good work, to be well made, of good materials, and durable if used with proper care. If upon one day's trial, with proper care, the engine fails to work well, the purchaser shall immediately give written notice to International Harvester Company of America, at Chicago, Illinois, and to the dealer from whom it was received, stating wherein the engine fails, shall allow a reasonable time for a competent man to be sent to put it in good order, and render necessary and friendly assistance to operate it. If the engine cannot then be made to work well, the purchaser shall immediately return it to the said dealer, and the price paid shall be refunded, which shall constitute a settlement in full of the transaction. Use of the engine after three days, or failure to give written notice to said company and said dealer, or failure to return the engine as above specified, shall operate as an acceptance of it and a fulfilment of this warranty. No agent has power to change the contract of warranty in any respect. This express warranty excludes all implied warranties, and said company and said dealer shall in no event be liable for breach of warranty in an amount exceeding the purchase price of the engine. If within ninety days' time any part proves defective, a new part will be furnished on receipt of part showing defect.

The engine was received by the Thomases, for which they gave their three notes, two of which are above described and another of $1,000 was paid in November, 1913. Thomas gave a renewal note of the $1,100 note which was due in November, 1914. This note became lost. Upon said note is the following: "This is renewal and extension of time of payment of my note number 72 the year 1913, given (with one other note) in full payment of the purchase price of engine—eight bottoms, plow, oil tank machine, and in consideration of such renewal and extension I hereby expressly waive all claims arising out of the purchase of said property and all defenses, statutory or otherwise, to the payment

hereof. The indorsers, sureties and guarantors severally waived presentment for payment, protest, and notice of nonpayment and diligence."

It is claimed by the defendants that at the time they made the renewal note that the plaintiff agreed to make good its warranty, and that such renewal note and mortgages to secure the same were made only upon these conditions. The notes in question were executed and delivered to the plaintiff prior to the delivery of the engine in question. The engine was delivered to the defendants. It was brought out by Mr. Vedders, who was acting for the company. He operated it about half a day, had more or less trouble with it. He plowed about three or four hours the first day. Within two days after that the plaintiff called for an expert through Tallmadge & Meyers of New England, then agents of the plaintiff. The next morning Mr. Bankston, an expert of the company, went out and worked on the engine. The defendants claim there is no consideration for the note, by reason of breach of the warranty hereinbefore set forth. That the engine was absolutely worthless for the use and purpose for which it was intended seems clear from the testimony.

Mr. Meyers at the time of the sale of the engine was agent of the plaintiff. He was a witness in this case and gave the following testimony:

Q. Now, after the engine was delivered, did you observe how it worked, go out there or anything?

A. Yes, sir.

Q. How did it work?

A. Very spasmodically.

Q. What do you mean by that?

A. Sometimes it did and sometimes it didn't.

Q. Do you know what was the matter with it?

A. It had too many ailments for me to describe it.

Q. Name some of the ailments.

A. Continual breaking of the gears; continual wearing out of the gears; continual trouble with carburetion and ignition and lubrication. As a matter of fact I do not believe there was a part of the engine that didn't give us trouble.

Q. Well, from your experience in handling engines, please state whether or not that engine was good workmanship.

A. I naturally made up my mind as to that.

Q. What did you say?

A. I think it was ready for the junk heap the day it was made.

Q. Please state about the material that was in it.

A. The material, as I observed it, such as the gears and parts which I helped replace, were very defective; the cast seemed to be very inferior, full of blow holes and sand holes, and if I was any judge of material I would say the material in it was very poor.

Q. Did you notice where the breaks would be in the sand holes or out of the sand holes?

A. Yes, I noticed from the breaks right in the sand holes.

Q. Shortly after the engine had been delivered to Thomas, did he indicate to you that it wasn't satisfactory, that he wanted an expert?

A. Yes.

Q. How many days after he got the engine was that?

A. I can't state the exact number of days, but I am certain it was not over two days.

Q. Did you indicate this to the company?

A. Yes, sir.

Q. And indicated to them what Thomas indicated to you was the matter with the engine?

A. Yes, sir.

Q. What was that indication as to what was the matter with the the engine?

A. That he couldn't make it work and that he wanted them to send an expert.

Q. In response to that request by you, did the company send an expert?

A. Yes, sir.

Q. How long afterwards?

A. I think it was the following day.

Q. What was his name?

A. Bankston.

Mr. Tallmadge, who was associated in business with Mr. Meyers, they at the time of the sale being the agents of the plaintiff, testified

that the amount of repairs for the engine gotten by Thomas either gratis or for which he paid cost in the neighborhood of $1,500. Thomas's testimony shows conclusively that the engine was practically worthless. The record as we read it is conclusive that the engine was worthless for the use for which it was intended. The record also conclusively shows that the plaintiff received notice within the three-day period of the failure of the engine to work, and that it sent its experts out from time to time in an effort to remedy the defects in the engine and to cause it to do its work. In all the company sent out four different experts at different times. They have failed utterly to make the engine comply with the warranty. So far as the engine is concerned, it afforded no consideration for the notes.

The plaintiff has produced no testimony to controvert the testimony of the worthlessness of the engine. It thus in effect admits that the engine was worthless. It relies, however, on defendants' alleged waivers of the defects in the engine and the damages sustained by him by reason thereof. One of the alleged waivers is contained in the renewal note. The other alleged waivers were procured from the defendants by some of the experts making certain representations to the defendants; for instance, one waiver was procured by representing to the defendants that the paper which they were signing was simply to show that the engine had been delivered. Another was procured under the representation that it was to show that the experts were out there at that time. This appears to have been the method pursued to procure the signing of the waivers. According to defendant's testimony, he did not know nor understand that any of such statements signed by him contained the waiver, nor that he was waiving the rights of defense against the collection of the notes, nor is there any testimony that he intended to do so, nor that he ever expressed any such intention at any time.

We will more particularly discuss the waiver in the renewal note. That waiver is above set out in full. This alleged waiver, from the length of it, if it were on the face of the renewal note, must have been in very fine print. It must be conceded that when the note was presented to defendants, it was the main subject before his mind. His mind must have been centered upon the giving of that note, upon the amount and terms thereof. He in all probability was considering the question of the note, and that only. There is nothing in the testimony to show

that at the time the note was signed his attention was called to the waiver thereon. There is no evidence to show that he expressed any intention to waive his rights or defense against the note or notes which they had given plaintiff. It must be kept in mind that the promissory note is one contract, that the waiver is a separate and entirely different contract; if the defendants were engaged in giving the note, and that matter alone was upon their minds, they would have no reason to examine anything, only the amount and terms of the note. That was the contract they were considering; that was the business they had gotten together to transact, and though defendants might be able to read and write, unless there is competent proof that the defendants knew, understood, and intended to waive their right of defense against the notes by reason of the worthlessness of the engine, such waiver is of no effect; it is a contract to which the defendants did not consent as a matter of law, nor is there any evidence to show that there was any mutual agreement between plaintiff and defendants that defendants should waive their cause of action, if any, nor any of their rights or claims against plaintiff. It was of no force nor effect, and does not operate to prevent the defendants from enforcing any remedies they may have against plaintiff. The same reasoning which we have applied to the waiver contained in the note applies with equal force to every waiver signed by the defendants. In the preparation of such waiver and the note, and the procuring of it to be signed by the defendants without calling their attention to the waiver, and without the defendants expressing any intention to waive their right of defense against collection of the notes or to enforce any remedies which they had against plaintiffs, coupled with the further proposition that the purpose of inserting the waiver in the note could be only to prevent defendants from exercising their remedies against plaintiff by enforcing their rights and remedies and defenses against him, would have a strong tendency to show that the whole proceedings of procuring such waiver amounted to constructive fraud. The procuring of other waivers by the experts under the representations and conditions under which they were procured amounted to constructive fraud. All of said waivers, including that in the note in this case, were of no force nor effect. The engine was worthless, the plaintiffs never did put it in shape to do its work though they had four different experts working on it in different years. It was clearly a hopeless failure as an engine;

this is conclusively shown by the undisputed testimony. The procuring of waivers under these circumstances and conditions cannot be regarded in any other light than that of constructive fraud. The writing or waiver signed upon the consideration of defendants' getting some new drive wheels and lugs was of no effect so far as defeating defendants' right to defend against the collection of any of the notes, nor did it in the circumstances of this case abridge any rights or remedies which he had against plaintiff. Drive wheels are not the only part of a gasolene engine. The drive wheels might be perfectly good and the rest of the engine worth nothing. The fact still remains that the engine as a whole is worthless for the purposes for which it was intended to be used. There is some testimony that, after the wheels were on, the engine would be worth from 30 to 50 per cent of the original purchase price. This testimony is, however, by Mr. Meyer, whose testimony we have quoted at length. There is no showing that after the wheels were put on that the engine would do any better work than before. There is no showing in the record that the engine in question has by the plaintiff been put in condition so that it would do the work for which it was intended. It did not do so at the time it was sold nor any time thereafter, except under great difficulty a few hundred acres were plowed with it. It was an expensive piece of machinery. It is useful if it will do its work properly. It is of practically no use nor value if it will not do its work.

The evidence clearly shows this engine to be practically a complete failure. Certainly under these circumstances it would be a travesty on justice to require the defendants to pay for an article so hopelessly unfitted to do the work for which it was constructed and intended, and they should not be required to do so simply because the plaintiff, through its experts or others, procured the defendants to sign waivers in the circumstances and conditions we have set forth. The giving of the renewal note amounted to nothing so far as cutting off any defense which defendants had to the collection of renewal note nor any other note given for the engine. Whatever rights, remedies, or defenses the defendants had against collection of the original note or notes, will be equally available against the renewal or other notes so long as the transaction remained one between the original parties. It is to be remembered also, that at the time defendants gave the renewal note, it was

upon the promise that the engine would be made to work, etc. If the engine did not work, the note still remained without consideration. Conroy v. Logue, 87 Minn. 289, 91 N. W. 1105.

The consideration relied upon for these notes involved in this lawsuit would seem to be limited to the value of the engine in question. It is true the order described some other property, such as plows and a starter engine, etc. There is no testimony so far as we are able to discover showing that the plows were delivered. If they were, they would be useless to defendants unless his engine was made to work and thus cause them to become of value and service to him. According to the order, the plows and engines were all part of one transaction, and in the circumstances of this case, if the engine was worthless to the defendant, the plows were equally so, for it is plain that defendant could not use them unless he could use the engine. In the circumstances of this case in all the conditions we have heretofore noticed, the plows or other attachments if they were delivered, constituted no consideration for the notes. It is also to be remembered there is considerable testimony showing that if the engine did not work properly that the defendants were to have their notes returned to them. Defendants notified the plaintiff within the three-day period, but did not return the machinery to it. He was not required to do so, for the plaintiff immediately upon the notice undertook to make the machinery work and comply with the warranty and continued to do so for the different years. The plaintiff by its conduct waived any right to have the machinery returned as a condition precedent to the assertion of rights by the defendants upon the breach of warranty. In all the circumstances of this case and keeping in mind all the testimony with regard to return of notes if the engine was not satisfactory and did not work, we think, as a matter of law, it is clear there was no actual delivery of the notes, and for this additional reason they are of no force nor effect and at law unenforceable.

From what has been said, we are clear there was no consideration for the notes, or, if there ever was any, it has wholly failed. This being true, the mortgages, both chattel and real, are of no force nor effect, and cannot be enforced. The plaintiff is not entitled to recover upon the notes, and is not entitled to foreclose the mortgages. The notes should be canceled and surrendered to the defendants, and the mortgage canceled and satisfied of record. It is also clear that the de-

fendant, under proper pleadings or in a proper action, is entitled to recover any payments he has made upon the engine or the machinery and all money which he has actually paid out for expense for repairs for the same.

The judgment of the trial court is reversed. The case is remanded to it for further proceedings not inconsistent with this opinion. The appellant is entitled to statutory costs on appeal.

BIRDZELL, J. I dissent.

CHRISTIANSON, Ch. J. (dissenting). I am unable to agree with the majority members either as to the law or the facts. It is stated, and reiterated, that the tractor was entirely worthless. Yet the defendant Thomas testified that in the years 1913, 1914, and 1915 he plowed hundreds of acres of land with the tractor. In 1914, in addition to plowing for himself, he also plowed 290 acres for one Davis, and gave an order upon Davis for $500, which was applied upon the purchase price of the tractor. And the majority members say that the defendant may recover from the plaintiff this money, which was earned with the machinery which plaintiff sold. Not only is it undisputed that the defendant was able to read and write, but his testimony shows that he entered into an agreement with the agent of the plaintiff that he would waive his claims against the company in consideration of the company furnishing a new set of drive wheels and lugs.

I quote from Thomas's testimony as contained in the record on this appeal:

Q. So that at that time in the fall of 1914, Mr. Thomas, when Mr. Harrison was out there, in substance then and there you agreed with him, after talking the matter over, that if you would get these new wheels and lugs you would pay the freight on them and that you would take the old wheels in and return them to the company and never make any more demand or claim on them, didn't you?

A. That was the agreement because we had come to the conclusion that the wheels was the cause of the gear breaking. We thought we had eliminated one of our main troubles by replacing the wheels.

Q. Well, you got the wheels didn't you?

A. No, sir.

Q. Why?

A. Because the first wheels that was shipped to me wasn't what we agreed upon.

Q. Was there some more shipped?

A. Yes, sir.

Q. Didn't you get them?

A. No, sir.

Q. Why?

A. Because, before I got enough money to get up there and pay the freight on them they had them shipped back. . . .

Q. Do you know when they were shipped back?

A. I don't know when they were shipped back. I know they were there quite a while.

Q. And during that time all you had to do was to pay the freight on them?

A. Yes, sir, something that I didn't have enough money.

Q. It was agreed upon, wasn't it, between you and the company through Mr. Harrison at that time that you were to pay the freight on them?

A. Yes, sir.

Q. And you were to go there and pay the freight and take the wheels and put them on and return the old ones, and the question of your contract was closed then and there forever, wasn't it?

A. If I had got the wheels, yes, probably would have.

The majority members say that the waiver contained in the renewal note must have been in fine print. The note is not in the record on this appeal. No member of this court has seen it or knows what its appearance was. The trial judge, however, saw it. He also saw the witnesses and parties who testified, and heard their stories. Tallmadge & Meyers, the agents who sold the machinery to Thomas, afterwards lost their agency. Their animus towards the plaintiff is apparent even from the printed page. The decision of the trial court should not be disturbed.

L. R. JUNGKUNZ, Appellant, v. SARAH COMONOW, Aaron Comonow, Henry Comonow, Dora Levitt, Percy D. Godfrey, and All Other Persons Unknown Claiming Any Estate or Interest in or Lien or Encumbrance upon the Property Described in the Complaint, Respondents.

(174 N. W. 68.)

Redemption from mortgage must be commenced within the time prescribed by statute.

1. The right to maintain an equitable action to redeem by the mortgagor or his successors is prescribed by § 7381, Comp. Laws 1913, and must be commenced within ten years from the time the cause of action accrued.

Mortgages — right of redemption barred by Statute of Limitations.

2. In an action to determine adverse claims where a trust deed to secure an indebtedness of $575 was made in November, 1886, and thereafter a void foreclosure of such trust deed was had by the owner of the indebtedness, and possession of the land taken in 1902, pursuant to a sheriff's deed issued, and where such possession continued up to the time of the commencement of the action in 1917, hostile and adverse to the claim and title of the mortgagor and his successors in interest, accompanied by continuous exercise of possessory rights and acts of cultivation upon the land, including payment of taxes, and where further the mortgagor or his successors have made no attempt to maintain a suit in equity to redeem, for a period of time exceeding twenty-five years, it is *held* that the rights of the mortgagor and his successors in interest are barred under § 7381, Comp. Laws 1913.

Mortgages — redemption — right of mortgagor and successor.

3. In such action to determine adverse claims, where the mortgagor and his successors in interest have not been in possession for a period of time exceeding twenty-five years, and have not exercised any acts of dominion or proprie-

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NOTE.—That the Statute of Limitations does not run against a mortgagee in possession is supported by all the decisions which have directly involved the question, as will be seen by an examination of the cases in 34 L.R.A.(N.S.) 356, on the question as to whether limitation runs against a mortgagee in possession.

On effect of debt becoming barred by Statute of Limitations upon right and remedies under conveyance absolute on its face but intended as a mortgage, see notes in 11 L.R.A.(N.S.) 825, and 24 L.R.A.(N.S.) 840.

On effect of the bar of Statute of Limitations on mortgage or trust deed and debt secured thereby, see note in 95 Am. St. Rep. 664.

On limitation of actions in equity cases, see note in 6 L. ed. U. S. 143.

tary rights, in fact, upon the premises concerned, nor paid nor offered to pay taxes through such period of time, nor offered to redeem or maintain a suit in equity to redeem; and where, further, the successive owners of the indebtedness and the security therefor have taken possession of the land either as equitable assignees of the debt and the security therefor, or under the void foreclosure, hostile and adverse to the title of the mortgagor or his successors, have improved and cultivated the land for over fifteen years, and have paid the taxes thereupon, all with the acquiescence, in law and in fact, of the mortgagor, or his successors,—it is *held* that the rights of the mortgagor and his successors in interest are barred by laches.

Opinion filed July 3, 1919. Rehearing denied September 8, 1919.

Action to determine adverse claims in District Court, Ramsey County, *Buttz,* J.

From a judgment in favor of the defendants the plaintiff has appealed and demands a trial *de novo.*

Judgment reversed with directions to quiet title in plaintiff.

Henry G. Middaugh and *Albert E. Coger,* for appellant.

Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when, in the case of personal property, it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Civ. Code 1883, § 1724; Bradley v. Helgerson, 14 S. D. 593, 86 N. W. 634; Comp. Laws 1913, § 4348; Langmaak v. Keith, 19 S. D. 351, 103 N. W. 210.

The deeds from the Biddle next of kin to Walker, and from Walker to Brown, operated as assignments of all interest that Biddle and Walker had in the mortgage. This is the law of this state. Nach v. Northwest Land Co. 15 N. D. 566, 105 N. W. 792; Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261; Cooke v. Cooper, 18 Or. 142, 7 L.R.A. 273, 17 Am. St. Rep. 709, 22 Pac. 945; Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889.

The rights of the mortgagee, as known to the law, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law impairing the rights thus acquired impairs the obligations which the contract imposed. Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 73.

Defendant's right to relief is barred by the Statute of Limitations. Nash v. N. W. Land Co. 15 N. D. 566, 108 N. W. 792; Mears v. Summers Land Co. 18 N. D. 384, 121 N. W. 916; West v. Middlesex, 33 S. D. 465, 146 N. W. 598; Jackson v. Rohrberg, 94 Neb. 85, 142 N. W. 290.

One of the watchwords of equity is diligence. Unless a suitor is diligent he cannot obtain relief, nor does the Statute of Limitations always control. Pom. Eq. Jur. §§ 817, 818; Calhoun v. Diehl & M. R. R. Co. 8 L.R.A. 248; Kessler v. Ensley Co. 123 Fed. 561; Brown v. Buena Vista County, 95 U. S. 157, 24 L. ed. 422; Farr v. Sennler, 123 N. W. 838.

John C. Adamson, for respondents.

Bronson, J. This is an action to determine adverse claims to some 175 acres of land in Ramsey county. From a judgment quieting title in the defendants the plaintiff has appealed and demands a trial *de novo.* The facts substantially are as follows:

On November 9, 1886, a final receiver's receipt of the United States was issued to one Louis Comonow. On November 10, 1886, said Comonow and his wife executed a trust deed to William G. Nixon, as trustee, and in case of death, absence, or inability of said Nixon to act, to Frank Davis, as trustee, and to William F. Baird, as beneficiary, to secure the sum of $575 evidenced by a real estate bond executed by said Comonow on said date, due five years from date. On October 22, 1889, a United States patent was issued to said Louis Comonow. Said Comonow, while resident on this land, died, at or about this time. He left surviving him his wife, Sarah Comonow, and his children, Aaron Comonow, Henry Comonow, and Dora Levitt, the defendants.

The original bond and trust deed were introduced in the record and produced by one Wm. H. Brown, a witness for the plaintiff. On the back of the bond there is the following indorsement:

For value received, I hereby assign and transfer the within bond, together with all my interest in, and all my rights under the trust deed securing the same to ——— without recourse.

W. L. Baird.

Also on the back of such bond there is a guaranty of the collection

of the principal and the payment of the interest signed by the Security Mortgage & Investment Company through W. L. Baird, President, and W. G. Nixon, Treasurer.

Said Brown testified that he was acquainted with this title since the year 1890; that the bond and deed were turned over to him for collection or foreclosure by Henry D. Biddle through the Security & Mortgage Investment Company, his agent; that at that time, he (Brown) was in the employ of such investment company; that he was unable to collect any part of the interest or principal, and foreclosure was ordered; that he examined the property in the fall of 1891, found no one living there, and could not ascertain the whereabouts of the mortgagor; that he was at Devils Lake from 1891 to 1901, saw this land often, looked after it as agent of such company.

On March 5, 1892, the land was sold by advertisement upon foreclosure sale, of the bond and trust deed, by Henry D. Biddle, who was the purchaser at the sale for $791.02. Pursuant thereto, in May, 1893, a sheriff's deed was issued to said Biddle. It is conceded that this foreclosure was invalid. In October, 1898, said Biddle died leaving two sisters and four children of a deceased sister, as his heirs. In May, 1898, the children of the deceased sister quitclaimed the land to the surviving sisters of the deceased Biddle. In June, 1899, the two surviving sisters deeded the land to one I. Walker, who in June, 1902, deeded the land to said William H. Brown. On January 4, 1892, said Baird, the beneficiary, pursuant to a written assignment in the record, assigned the same to said William H. Brown. The trial court found that this assignment was a forgery; that it was in fact issued to said Biddle, and his name thereafter erased and the name of said Brown inserted. In June, 1899, a foreclosure by advertisement of such trust deed was made by said Brown, and pursuant thereto a sheriff's deed was issued to him on July 29, 1901. In the case of Brown v. Comonow, 17 N. D. 84, 114 N. W. 728, decided January 9, 1908, an action was instituted by said Brown against the defendants herein and others to determine adverse claims.

In that action this court determined that the foreclosure by Brown was invalid for the principal reason that the trust deed granted no power of sale to anyone excepting the trustee or his successor in trust, and hence there existed no right for Baird, the beneficiary, or said

Brown, his assignee, to exercise such power of sale (a statutory requisite) in a foreclosure by advertisement. The court did not determine whether the deed was a trust deed in fact, or a mortgage. The action was ordered dismissed without prejudice to a proper proceeding by the plaintiff, in the event that he was still the owner of the indebtedness secured by such instrument, to subject such security to the payment thereof subject to any legal defense which may be urged.

The widow, Sarah Comonow, died in St. Paul in 1909, leaving three children surviving her, who are all of age and are the defendants herein. In January, 1902, said William Brown conveyed the land to one Ardery. Said Ardery, in March, 1911, conveyed the land to the plaintiff. During the period of ownership by Ardery the premises were worked by a tenant under the usual croppers' lease, and he paid the taxes. Since the plaintiff went into possession in 1911 he has leased the land up to and including the year 1916, to a tenant and during that time has paid taxes. It is stipulated in the record that the Comonows left the land about 1890, and that the same was abandoned, unoccupied, and unimproved until the year 1902. In their answer to the complaint of the plaintiff the children set up title and a counterclaim for $320 for the use and occupation of the land during each year they have been deprived thereof.

The plaintiff, in his reply, alleges the indebtedness and the trust deed therefor, the foreclosure thereof, possession had thereunder for twenty years, failure of the defendants to make any offer of redemption or payment of the indebtedness, their laches in that regard, and further asserts the application of both statutes of limitations covering the ten years' period and the twenty years' period.

The action came to trial in April, 1917, and thereafter the trial court in January, 1918, made its findings and conclusions, that the trust deed in question was not a mortgage; that the plaintiff or plaintiff's grantors had not been mortgagees in possession; that the plaintiff had no right or interest in the premises, and that the defendants were entitled to judgment for the immediate possession of the premises and to a money judgment against the plaintiff for $1,820.78, the difference between the total rents and profits received and the taxes paid by the plaintiff. Pursuant to such findings, judgment was entered in February, 1918.

Upon this record it is clear that, for a period of time exceeding twenty-five years, the Comonows have exercised, in fact, no proprietary or possessory interest in this land. They have neither paid nor offered to pay any taxes to the state during this period or at all. They have neither paid nor offered to pay the amount of the indebtedness justly and properly chargeable upon this land. Manifestly they have received the benefits of the loan made to them in 1886, the money and the use of the same ever since, and yet they now seek and assert the right to a title in themselves free from any claim or lien on account of such moneys loaned. For over nine years after this court rendered its opinion in the Brown v. Comonow Case, the defendants have neither sought to maintain or secure their possessory rights nor to redeem or to offer to redeem the premises.

Upon this record it is further clear that Baird, the beneficiary in the trust deed, was the owner of the bond for $575. It requires no citations of authority to establish that the actual transfer and the written transfer in blank of the bond and trust deed operated to assign to Biddle, Baird's interest therein. It matters not whether the foreclosure had by Biddle was invalid and that no possession was taken thereunder. It likewise is immaterial what effect be given to the assignment purporting to be from Baird to Brown. The fact is that Brown became the owner of the bond and trust deed through actual transfer and an assignment in blank, assisted by deeds proceeding from the heirs of Biddle. The foreclosure had by Brown was invalid. Nevertheless possession in fact was taken by Brown thereunder. He had and possessed the indebtedness and a lien upon the land therefor. For years he and his grantees, including the plaintiff, have exercised acts of dominion over the premises, hostile and adverse to the title of the defendants. Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792. For years they have paid the taxes, made improvements, and brought the land into a state of cultivation and received rents and profits through their energies in that direction. Again, it is immaterial whether the deed be deemed a trust deed in fact, or a mortgage. It is clear that the title evidenced, whatever it be termed, is a title that stands as security for the unpaid indebtedness. Properly Brown and his grantees should be termed and are equitable assignees of this indebtedness and this title, in possession. Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W.

792; Mears v. Somers Land Co. 18 N. D. 384, 121 N. W. 916; Boschker v. Van Beek, 19 N. D. 104, 122 N. W. 338.

In this state where agricultural production needs every possible stimulus, where the prompt payment of taxes is recognized as a prime need for the maintenance of the sovereignty, equity should not highly favor a bad-faith ownership that wills neither to produce nor pay its proportionate share for the protection it received. The defendants seek equity. They must do equity. The defendants come into court with a stale demand based upon an ownership ancient as to the dominion or the duties exercised thereunder. It was their duty in equity to offer to redeem and to pay what justly had been paid to the state and to others in their behalf. This they have neglected to do. Grossly they have been guilty of laches, and equity should and must refuse their claim. Nash v. Northwest Land Co. supra; Mahaffy v. Faris, 114 Iowa, 220, 24 L.R.A.(N.S.) 840, 122 N. W. 934. See Pettit v. Louis, 88 Neb. 496, 34 L.R.A.(N.S.) 356, 129 N. W. 1005.

Whether the possession of the plaintiff and his grantors be deemed to be under the terms of the trust deed or under the void foreclosure, the defendants' remedy was a suit in equity to redeem. The right to maintain such action is prescribed by § 7381, Comp. Laws 1913, which requires such action to be brought within ten years from the time the cause of action accrued. The defendants' cause of action arose in 1902, about fifteen years prior to the commencement of this action. It is plainly barred under the statute. The maintenance of a defense in the former action of Brown v. Comonow, 17 N. D. 84, 114 N. W. 728, seeking to have title quieted in the defendants with no offer to redeem did not interrupt the running of the statute. See Nash v. Northwest Land Co. supra; Steinwand v. Brown, 38 N. D. 602, 610, 166 N. W. 129. See note in 24 L.R.A.(N.S.) 840. The rights of the defendants and their cause of action are barred both by laches and the statute.

It is ordered that the judgment be reversed, with directions to enter judgment quieting title in fee in the plaintiff, with costs to the appellant.

GRACE, J. I concur in the result.

ANGUS MACPHERSON, Respondent, v. TAYLOR CRUM, Appellant.

(174 N. W. 751.)

Mechanic's lien — description of property required in.

1. Any description in a mechanic's lien statement which will enable a party familiar with the locality to identify the property with reasonable certainty is sufficient as between the parties. Howe v. Smith, 6 N. D. 432, followed.

Mechanic's lien — description of premises — description sufficient that identifies the premises with reasonable certainty.

2. The defendant was the owner of lot one (1) block twenty (20), Roberts' second addition to Fargo. The lot was 140 feet by 50 feet. There was a dwelling situated on the east 80 feet of the lot occupied by defendant and his wife. The lot had not been subdivided. In 1916 the plaintiff constructed for the defendant another dwelling on the west 60 feet of the lot. The plaintiff filed a mechanic's lien statement wherein he stated that between July 15, 1916, and December 15, 1916, he had performed labor in the construction of a dwelling on lot one (1) block twenty (20) Roberts' second addition to Fargo, and claimed a mechanic's lien for the amount due for such labor upon such dwelling and the land upon which it was situated. It is *held* that the description was sufficient, and that the lien was valid and enforceable against the owner, at whose request and for whose benefit the labor was performed.

Opinion filed July 7, 1919. Rehearing denied September 8, 1919.

Appeal by defendant from a judgment of the District Court of Cass County, *Allen,* Special Judge, awarding a foreclosure of a mechanic's lien.

Affirmed.

J. E. Hendrickson and *Taylor Crum, pro se,* for appellant.

The memorandum contract, plaintiff's said exhibit 3, and the specifications, plaintiff's exhibit 5, are by the express terms of plaintiff's said exhibit 3 consolidated into one instrument. These papers must be interpreted together in construing the contract, as if they were both embodied in one paper. N. D. Comp. Laws 1913, §§ 5901, 5902; Byers v. Farmers Ins. Co. 35 Am. Rep. 625; First Nat. Bank v. Flath, 10 N. D. 287.

Where the plans and specifications are by express terms made a part

of the contract, the terms of the plans and specifications will control with the same force as though incorporated in the very contract itself. 6 R. C. L. pp. 857, 867, §§ 245, 253.

Oral testimony as to this feature of the contract (the date when the house would be completed) which was not mentioned in the writings, is competent and material. Kupfer v. McConville, 35 N. D. 635; 17 Cyc. 741, § 39 et seq. and note; Schmidt v. Musson, 107 N. W. 362 et seq.; Erie Cattle Co. v. Guthrie, 44 Pac. 984; Manufacturers' Furnishing Co. v. Kremer, 6 N. W. 528; Wolthers v. King, 51 Pac. 35; Sievers v. Sievers, 32 Pac. 571; Guidery v. Green, 30 Pac. 786; Patek v. Waples, 72 N. W. 995; 4 Wigmore, Ev. pp. 3443, 3444, and note under § 2442.

No recovery can be had upon a mechanic's lien based upon this contract, as the plaintiff admittedly failed to show a compliance therewith. Kuper v. McConville, 35 N. D. 635; Stoltze v. Hurd, 20 N. D. 417.

It is elementary that the grammatical and ordinary sense of the words in a contract is to be adhered to, unless that would lead to some manifest absurdity or some repugnance. 6 R. C. L. p. 842, § 232.

It was error for the court to consider any oral or extrinsic testimony concerning "changes" or "extras," as that whole matter was covered by the written contract, to the effect that "changes" or "extras" should entail no extra expense without a written agreement to that effect. Johnson v. Bank, 12 N. D. 336; Alsterberg v. Bennett, 14 N. D. 596; 17 Cyc. 714 (b); Northern Light Lodge v. Kennedy, 7 N. D. 154, supra; Abbott v. Gatch, 71 Am. Dec. 635.

It was also an error for the trial court to consider any testimony on a *quantum meruit* as to "changes" or "extras." McLean v. News Pub. Co. 21 N. D. 95.

The lien is void for the reason that it does not contain "a just and true account of the demand due." Comp. Laws 1913, § 7820; Brennen v. White (Mich.) 56 N. W. 354; Stubbs v. College Springs & S. W. R. Co. (Iowa) 22 N. W. 654; Nicolai Brothers Co. v. Van Fridagh (Or.) 31 Pac. 288; Gibbs v. Hanchette (Mich.) 51 N. W. 691; Lynch v. Cronan, 6 Gray (Mass.) 531; McPherson v. Walton (N. J.) 11 Atl. 21.

The lien is void—not containing a correct description of the property to be charged, and the court erred in creating a new lien. Houglum

v. Browkowski, 33 N. D. 628; Comp. Laws 1913, § 6820; Engstad v. Grand Forks Co. 10 N. D. 58.

To be valid, all statutory liens, being unknown to the common law, must comply with the act of the legislature which authorizes the lien; and that when once filed the courts are powerless to amend an entirely new lien for the plaintiff. N. D. Comp. Laws 1913, §§ 6820, 6823; Lavin v. Bradley, 1 N. D. 296; Lyon v. Logan (Tex.) 17 S. W. 264; Ely v. Wren, 90 Pa. 148; Wilkerson v. Rust, 57 Ind. 179; Cowie v. Abrenstedt (Wash.) 25 Pac. 458; Whittier v. Mill Co. (Wash.) 33 Pac. 393; Maynard v. East (Ind.) 41 N. E. 839; Bowen v. Wickersham (Ind.) 24 N. E. 983; Howell v. Zerbee, 26 Ind. 214; Williams v. Porter, 51 Mo. 441; Munger v. Green, 20 Ind. 38; Atlas Lumber Co. v. Canadian Amer. Mfg. Co. 36 N. D. 43; Houglund v. Browkowski, 33 N. D. 628; Chafee v. Edinger, 29 N. D. 541; Stultz v. Hurd, 20 N. D. 418; Lumber Co. v. Boulger, 19 N. D. 518; Moher v. Rasmussen, 12 N. D. 74; Lumber Co. v. Children of Israel, 7 N. D. 49; Howe v. Smith, 6 N. D. 432; Martin v. Hawthorne, 5 N. D. 68; Parker v. Bank, 3 N. D. 88; Goss v. Strelitz, 54 Cal. 644; Lindley v. Cross (Ind.) 99 Am. Dec. 613; Fernande v. Burleson (Cal.) 42 Pac. 566; Meyer Lumber Co. v. Trygstad, 22 N. D. 562; Gates v. Brown (Wash.) 25 Pac. 914; Statson v. Mill Co. (Wash.) 32 Pac. 108; Rugg v. Hoovar (Minn.) 10 N. W. 473; Meyer v. Berland (Minn.) 40 N. W. 518; McDonald v. Rosengarten (Ill.) 25 N. E. 429; Minor v. Marshall (N. M.) 27 Pac. 483; Drake v. Green (Kan.) 29 Pac. 584; Griffin v. Booth (Ill.) 38 N. E. 552; Greely v. Harris (Col.) 20 Pac. 766; Morris v. Wilson (Cal.) 32 Pac. 801; Wiltsie v. Harvy (Mich.) 72 N. W. 134; Knox v. Starks, 4 Minn. 20, Gil. 7; Rose v. Perse & B. Paper Works, 29 Conn. 256; Wright v. Beardsley, 69 Mo. 548; Goodrich Lumber Co. v. Davie (Mont.) 32 Pac. 282; Iron Works v. Dorman, 78 Ala. 218.

The rule is that where lienable and nonlienable items are made the basis of a lumping charge, so that it cannot be perceived what proportion is chargeable to each, the benefit of the mechanic's lien is lost. Adler v. Pastime Co. 18 N. E. 811; Allen v. Elwart, 44 Pac. 827; Getty v. Ames, 48 Pac. 356; McClaim v. Hutton, 61 Pac. 274; Wagner v. Hanson, 37 Pac. 195; Williams v. Coal Co. 36 Pac. 159.

Lovell & Horner, for respondent.

The plaintiff is clearly entitled to a judgment for the balance due under his contract and for the extras furnished by him in accordance with the statement annexed to the lien, and is further entitled to a decree foreclosing the lien upon the west sixty (60) feet of said lot one (1). Cary Hardware Co. v. McCarty, 50 Pac. 745; Western etc. v. Montana etc. 77 Pac. 413; Fernandez v. Burlington, 42 Pac. 566; note in 26 L.R.A.(N.S.) 831; Bloom, Mechanic's Liens, p. 356, ¶ 405; Phillips, Mechanic's Liens, ¶¶ 379, 387.

PER CURIAM. This is an action to foreclose a mechanic's lien. From the judgment of the district court awarding a foreclosure, the defendant appeals and demands a trial *de novo* in this court.

The facts are substantially as follows: The plaintiff made a contract with the defendant whereby he agreed to do the carpenter work and superintend the construction of a dwelling for the defendant in the city of Fargo. Pursuant thereto plaintiff performed certain labor between July 15, 1916, and December 15, 1916, and, claiming an unpaid balance due amounting to $516.40, he filed a mechanic's lien therefor on January 2, 1917. In the lien the plaintiff stated that "under a contract with Taylor Crum, the owner of the premises hereinafter described, he performed labor upon the construction of a residence for the said Taylor Crum, said labor commencing on or about July 15, 1916, and continuing to on or about the 15th day of December, 1916, as specified in the annexed account, at the respective dates and at and for the respective prices specified in said account; for a certain residence and dwelling situated upon the following described land of which the said Taylor Crum was then and is now the owner thereof, to wit: Lot one in block twenty of Roberts' second addition to the city of Fargo, in Cass county, North Dakota." The lien statement sets forth the amount due the plaintiff for his labor, and asserts that a mechanic's lien is claimed in favor of said plaintiff upon said residence and dwelling, including the land hereinbefore described upon which the same is situated. The evidence shows that the said lot was 140 feet by 50 feet. This action involves a new two-story duplex house situated on and occupying the west 60 feet of said lot. Prior to this contract and construction there was a dwelling on, and occupying a portion of, the east 80 feet of said lot. Said dwelling was then, and for a long time prior

thereto had been, occupied by the defendant and his wife as their home. Said dwelling was entirely separate and distinct from the duplex constructed by the plaintiff. The trial court found that the west 60 feet of said lot were appurtenant to the building constructed, and the judgment rendered decreed a foreclosure upon the west 60 feet of said lot only; that is, the trial court restricted the lien to the land actually covered by the building constructed by the plaintiff.

In the trial court the defendant challenged, and before this court he challenges, the validity of the lien, upon the ground of incorrect and indefinite description of the property to be charged with the lien. He also asserted that the plaintiff had failed to comply with the terms of his contract, and hence was not entitled to a lien; and that under the terms of the written contract he was not entitled to recover for certain alleged extras. These claims were asserted by defendants by way of defense and counterclaims, and affirmative judgment was asked against the defendant for $799.77. No defense was made or right predicated upon the homestead character of the premises. The case was tried to the court without a jury. The trial court made findings in favor of the plaintiff as prayed for in his complaint, and disallowed the counterclaims. On this appeal defendant contends that the judgment is erroneous, and he presses the same contentions which were advanced in the court below. The evidence is quite extended. No good purpose would be subserved by reciting it in detail. Upon many points there is a direct conflict. The members of this court have individually considered the contentions advanced by the defendant, and they are all agreed that in so far as the trial court found that the defendant was indebted to the plaintiff for the amount claimed in the lien, and that defendant was not entitled to recover upon his counterclaims, the decision of the trial court is right, and should not be disturbed. The members are also all agreed that there is no merit in the contention that plaintiff has forfeited his right to claim a mechanic's lien. The only question upon which the members of this court have had any difference of opinion is with respect to the sufficiency of the description of the property in the lien statement. A majority of the court are of the opinion, however, that the description is sufficient.

Our statute provides that a person who desires to avail himself of the provisions of the mechanic's lien law shall file with the clerk of the

district court of the county where the property sought to be charged is situated, within ninety days after furnishing labor or materials, a just and true account of his demand, duly verified, containing a correct description of the property to be charged with such lien; "but a failure to file the same within the time aforesaid shall not defeat the lien, except as against purchasers or encumbrancers in good faith and for value whose rights accrue after the ninety days and before any claim for the lien is filed, or as against the owner, except the amount paid to the contractor after the expiration of the ninety days and before the filing of the same." Comp. Laws 1913, § 6820.

"The entire land upon which any such building, erection, or other improvement is situated, or to improve which the labor was done or things furnished, including that portion of the same not covered therewith, shall be subject to all liens created by this chapter to the extent of all the right, title, and interest owned therein by the owner thereof for whose immediate use or benefit such labor was done or things furnished. . . ." Comp. Laws 1913, § 6823.

Section 6818, Comp. Laws 1913, provides that if labor is done or materials furnished under a single contract for several buildings, erections, or improvements situated "upon a single farm, tract, or *lot*," the person furnishing such labor and materials shall be entitled to a lien therefor "upon all such buildings, erections, and improvements and the farm, tract, or *lot* upon which the same are situated."

The important means of identifying urban realty is the description according to the plat. Northwestern Cement & Concrete Pav. Co. v. Norwegian-Danish E. L. A. Seminary, 43 Minn. 452, 45 N. W. 868; 27 Cyc. 162. In this state express provision has been made for the filing and preserving of such plats, and penalties are imposed for placing city or village lots on sale until a plat has been made and filed. Comp. Laws 1913, §§ 3942–3958. It is undisputed that the description given in the lien statement in this case was the smallest legal subdivision that could be given. The lot was 140 feet long and 50 feet wide. It had not been subdivided. Under some of the authorities the plaintiff would be entitled to claim a lien upon the entire lot. See 18 R. C. L. p. 949. But in this case we are not concerned with that question, for the trial court limited the lien to that portion of the lot immediately appurtenant to the building on which the lien was claimed. The

lien is not defeated because the claim or statement describes more land than is subject to the lien; where there is no fraudulent intent and no one is injured thereby. 27 Cyc. 159. Nor is its validity affected by the fact that it does not cover as much land as might properly be included therein. 27 Cyc. 160.

It is true there were two houses on the lot at the time the lien was filed. But the lien statement expressly stated that the lien claimed was upon a house, in the construction of which plaintiff performed labor between July 15, 1916, and December 15, 1916. It would seem that, as between the parties at least, this description was entirely adequate. "It is only necessary that the statement or notice of lien should so describe the property that it can be reasonably recognized. In other words, a description is sufficient if it contains enough to enable a person who is familiar with the locality to identify the land intended to be described with reasonable certainty." Jones, Liens, 3d ed. § 1421. "The claimant is not required, before filing his claim of lien, to make an accurate survey of the lot upon which the building stands, at the risk of losing his lien if he makes a slight mistake in giving its boundaries, nor is he even required to give the boundaries of the lot." "The best rule," says Phillips (Phillips, Mechanics' Liens, § 379), "to be adopted, is that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is great reluctance to set aside a mechanics' claim merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise. It is enough that the description points out and indicates the premises, so that, by applying it to the land, it can be found and identified." This rule was approved by this court in Howe v. Smith, 6 N. D. 432, 434, 71 N. W. 552, and in effect has been reaffirmed in later decisions. It has also received the support of the courts and legal writers generally. See Bloom, Mechanics' Liens, § 402; Jones, Liens, 3d ed. § 1421; and authorities cited in Howe v. Smith, supra.

In Howe v. Smith, this court said: "Tested by the doctrine of these cases,—a doctrine universally recognized,—it is evident that the property was described with sufficient accuracy to make such description a

'correct description,' within the meaning of the statute. No one familiar with the locality and with all the facts—as the owner must be deemed to be—could possibly misunderstand what property was meant." 6 N. D. 435, 436. This language is applicable to this case.

Judgment affirmed.

GRACE, J. I concur in the result.

BRONSON, J. I dissent. This is an action to foreclose a mechanic's lien. From the judgment of the trial court awarding a foreclosure the defendant appeals and demands a trial *de novo* in this court. The substantial facts are as follows: The plaintiff made a contract with the defendant for certain carpenter work and superintending in the construction of a dwelling for the defendant in the city of Fargo. Pursuant thereto he performed certain labor in such work between July 15, 1916, and December 15, 1916, and, claiming an unpaid balance due for such work amounting to $516.40, he subsequently filed a mechanic's lien therefor. The lien describes the property as follows: "A certain residence and dwelling situated upon the following described land, of which the said Taylor Crum was then and is now the owner thereof, to wit: lot one (1) in block twenty (20) of Roberts' second addition to the city of Fargo in Cass county, North Dakota," and further asserts a lien upon such residence and dwelling including the land described for the amount due and unpaid. The contract concerned, and the work in question was performed in the construction of, a new frame two-story double house or duplex situated in the west 60 feet of said lot one. Prior to this contract and construction, there was a dwelling house on the east 80 feet of said lot one, occupied by the defendant and his wife as their home. The east 80 feet, the home of the defendant, was and is isolated from the west 60 feet by the house itself and by fences, and this fact the plaintiff knew during the period of the construction. In the trial court the defendant challenged, and before this court he challenges, the validity of the lien, upon grounds of incorrect and indefinite descriptions of the property to be charged with such lien. The trial court found that the west 60 feet of said lot were appurtenant to the new building so constructed, and the judgment rendered decrees a foreclosure of said lien upon the west 60 feet.

It is clear that, first, there is an indefinite description of the building itself in the lien statement; and, second, the land described includes a separate building with a separate curtilage, upon which the plaintiff did not do, and does not claim to have done, any work.

Section 6814, Comp. Laws 1913, grants to a person for labor done on a building a lien upon such building and upon the land belonging to the owner upon which the same is situated. Section 6820, Comp. Laws 1913, requires the lien claimant to file a correct description of the property to be charged with the lien. Section 6823, Comp. Laws 1913, provides that the entire land upon which any building is situated, including that portion not covered therewith, shall be subject to the lien so created.

There is no question that the defendant owned all of said lot one. The plaintiff has no lien upon the new building in question independent from the land, and no claim is so made. Comp. Laws 1913, §§ 6823, 6824; Gull River Lumber Co. v. Briggs, 9 N. D. 485, 84 N. W. 349; Green v. Tenold, 14 N. D. 46, 116 Am. St. Rep. 638, 103 N. W. 398; Powers Elevator Co. v. Pottner, 16 N. D. 359, 113 N. W. 703.

In other words, where there is a unity of title in the land and in the building thereon, the building is a fixture annexed to the realty, and the lien applies to such as realty and is not severable in the absence of an express statute so providing. Gull River Lumber Co. v. Briggs, 9 N. D. 485, 84 N. W. 349. See note in 62 L.R.A. 382.

The lien of the plaintiff herein must therefore stand or fall as lien upon realty pursuant to the statutory requirements.

Although in Salzer Lumber Co. v. Claflin, 16 N. D. 605, 113 N. W. 1036, this court said that the Lien Law, designed to protect materialmen and laborers, should be liberally construed to effectuate that purpose, nevertheless, in North Dakota Lumber Co. v. Bulger, 19 N. D. 516, 125 N. W. 883, the general principle is recognized and adopted that "a mechanic's lien is a creature of the statute, and every step prescribed by the statute must be shown to have been substantially followed, or it does not exist," and, further, that "the doctrine is well settled that, where one seeks to avail himself of the benefits of a purely statutory right, he must bring himself within its provisions, by complying with its terms." The lien in question is a realty lien; it is required to be filed to give notice to the owner and all persons concerned

in the realty of the property sought to be charged; there were two separate and distinct buildings and curtilages upon the property described; no person could know from the lien statement which building was claimed under the lien; the description was erroneous, and so the trial court recognized by carving out a curtilage appurtenant to the real building intended, to wit, the west 60 feet of said lot 1. In this case there is both an indefinite description of the building and an incorrect description of the land properly subject to any such lien.

Evidently, the trial court proceeded upon the theory that a proper description could be carved out of the description given, and that this could be done without any reformation of the lien.

In Minnesota it is held that the including in the description of a larger tract than is permitted by the Lien Law does not invalidate the lien, but the court may so carve out of such description the proper description applicable to the building in question. North Star Iron Works Co. v. Strong, 33 Minn. 1, 21 N. W. 740; Boyd v. Blake, 42 Minn. 1, 43 N. W. 485; Evans v. Sanford, 65 Minn. 271, 68 N. W. 21.

In the last case, Evans v. Sanford, supra, the description was east half of lot 7 and west half of lot 6, whereas the house in question claimed to be the basis of the lien was situated on the west half of lot 7 and the east half of lot 6. Here the court rejected the descriptions east half and west half as erroneous and surplusage under a statutory provision that provided any inaccuracy in the statement relating to the property should not invalidate the lien if such property can be reasonably recognized from the description. See also Ewing v. Allen, 99 Iowa, 379, 68 N. W. 702, which holds that under the Iowa statute the lien applied only to the house and the appurtenant grounds, and the court gave decree for one half of the lot where the lien was claimed for the whole lot.

The rule of construction herein must be applied in accordance with the statutory provisions existing in this state.

There exists no right to reform a statutory mechanic's lien in this state; the description must be such as to enable a party to identify the property with reasonable certainty. Lavin v. Bradley, 1 N. D. 291, 47 N. W. 384; Howe v. Smith, 6 N. D. 432, 71 N. W. 552, citing with approval Goodrich Lumber Co. v. Davie, 13 Mont. 76, 32 Pac. 282; Chaffee v. Edinger, 29 N. D. 537, 151 N. W. 223.

In Howe v. Smith, 6 N. D. 435, 71 N. W. 552, the general rule was stated to be "that, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. . . . It is enough that the description points out and indicates the premises so that, by applying it to the land, it can be found and identified."

It is unnecessary for us to determine whether the mere inclusion in a statutory mechanic's lien of a greater amount of land than that properly appurtenant to the building or subject to such lien will vitiate the lien or whether the court may reject the erroneous surplus area in determining the lien.

In the case at bar, the lien statement describes land which contains two separate buildings with two separate curtilages. There is no attempt to describe the building sought to be charged with the lien, as a "new" building, a "duplex or double house," or by any description which would serve to designate which of the two distinct and separate buildings on such described land was intended. The description contained in the lien will fit equally the home dwelling of the defendant and the land appurtenant, and the new double house and land appurtenant thereto. The description is double and uncertain. The plaintiff had no right to any lien on the home dwelling of the defendant and the land appurtenant, and the trial court so found by its determination. Plaintiff's lien must be confined to the land and its fixtures properly appurtenant to the building upon which the work was done. See note in 65 Am. St. Rep. 166, 578; Wilcox v. Woodruff, 61 Conn. 578, 17 L.R.A. 314, 29 Am. St. Rep. 222, 24 Atl. 521, 1056. In Smith v. Bowder, 31 S. D. 607, 141 N. W. 786, an affidavit for a mechanic's lien was filed, setting up a contract to furnish lumber and building material for a certain house used for a dwelling house upon lot 6 in Kellar Acres. The lien claimed was based upon a contract made to furnish building material to be used and that was used in the erection of two dwelling houses upon such lot, and upon which there was then existing another dwelling house occupied by the owner as his homestead. It was held that the claim for a lien was void for uncertainty, not only because the wording might indicate that it referred to the house already standing upon the premises, but also because, if it re-

ferred to one of the dwellings in the construction of which the material was, in fact, used, it in no manner pointed out or located upon which one of such dwellings it was intended to claim a lien.

Even though the plaintiff had made improvements on the home dwelling of the defendant under a separate contract, he could not have included the premises in this lien, so as to claim a lien upon both. Meyer Lumber Co. v. Trygstad, 22 N. D. 558, 134 N. W. 714; Stoltze v. Hurd, 20 N. D. 412, 30 L.R.A.(N.S.) 1219, 128 N. W. 115, Ann. Cas. 1912C, 871.

The uncertainty of the description is apparent; subsequent encumbrancers or purchasers cannot ascertain from the lien statement which of the properties was intended to be charged; property not chargeable with such is clouded by this apparent lien of record. At least the purpose of the statutory requirement is to designate with reasonable certainty to those who may be interested and concerned, the building and property sought to be charged.

There is no room for the application of the maxim, "That is certain which can be made certain." Neither can the insufficient description be aided by applying the test that no other property exists which answers, in any manner, the description given; the alleged lien, therefore, is void for uncertainty. Lavin v. Bradley, 1 N. D. 291, 47 N. W. 384; Howe v. Smith, 6 N. D. 432, 71 N. W. 552; Chaffee v. Edinger, 29 N. D. 537, 151 N. W. 223; Phillips, Mechanics' Liens, §§ 385, 386; Boisot, Mechanics' Liens, § 433; Bloom, Mechanics' Liens, § 402.

In applying the rule of construction concerning a mechanic's lien, an interpretation should not be placed upon a description given which will permit to be placed of record lien claims upon land not subject to lien, thereby clouding the title to such land, and thereby jeopardizing the security of titles, and thereby inferentially holding that the court may reform an improper lien statement which covers two separate curtilages by carving out of the description a particular description to fit the premises which are properly subject to a lien.

The trial court therefore erred in adjudging the existence of a lien and in awarding the foreclosure thereof. Accordingly the judgment of the trial court should be modified. The money judgment against the defendant for $666.46 should be approved and affirmed. McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39; Moher v. Rasmussen, 12 N. D.

71, 74, 95 N. W. 152; Smith v. Gill, 37 Minn. 455, 35 N. W. 178; 27 Cyc. 433.

D. F. McLAUGHLIN, Plaintiff and Respondent, v. DODGE ELEVATOR COMPANY, a Corporation, Defendant and Appellant, and FRANK RETTINGER, as Sheriff of Pierce County, North Dakota, Intervener.

(174 N. W. 871.)

Conversion — damage claims by third parties — notice — effect of deposit of the value in court after action is brought.

In an action to recover damages for the conversion of grain stored with the defendant, the defense was based upon claims by third parties, of which the bailee had notice, and the bailee relied upon a deposit in court of the value of the grain, less storage, fixed as of the date of the bringing of the action. It is *held:*

(1) Section 7594, Compiled Laws of 1913, concerning deposits in court where adverse claims are made to property, does not authorize a deposit of the money value of the property, after action brought, in discharge of a liability for conversion as of a prior date.

Opinion filed July 7, 1919. Rehearing denied September 16, 1919.

Appeal from the District Court, Towner County, *C. W. Buttz,* J. Affirmed.

F. B. Lambert, for appellant.

"A tender of changes must be made before suit in trover where a lien exists, unless the goods have been parted with." Salters v. Everett, 20 Wend. 267, 32 Am. Dec. 511; Picquit v. McKay (Ill.) 2 Blackf. 465.

"It is obvious that the court take judicial notice of the market price of wheat at any particular date, and especially at a date more than three weeks prior to the retrial of the case in this court."

"Nor does evidence of the price in the middle of September, 1895, suffice to inform this court at the end of said month of September." Towne v. St. Anthony & D. Elevator Co. 8 N. D. 208.

The respondent, having neglected to show the value of the grain as of the date of conversion, and only the date of delivery, and sale, some weeks prior to the demand, had not made a prima facie case when it rested and the appellant submitted its motion for a directed verdict, *hence, it was error to deny such motion.* Citizens Nat. Bank v. Osborne-McMillan Elev. Co. 21 N. D. 339.

Where the grain was delivered to an elevator company, storage tickets were issued, the grain was sold, and the actual cash value thereof was turned into court, the elevator company was absolved from all liability by the making of such deposit. State Bank v. Hurley Farmers Elevator Co. 33 N. D. 272.

"Any judgment which plaintiff may obtain can be satisfied only by a payment of the amount thereof in money, it cannot be satisfied by the delivery of the grain." More v. Western Grain Co. 31 N. D. 381; Minneapolis Drug Co. v. Kiernes, 167 N. W. 326.

The defendant was not guilty of conversion and the defendant was entitled to a directed verdict in his favor, even though there was no statute on the question at all, and in support of this we cite some unquestioned authorities. Zachary v. Pace, 9 Ark. 212, 47 Am. Dec. 744.

"A creditor of an estate who has possession of stocks payable to deceased as executrix commits no conversion in holding them for her executor as against her successor in the administration of her husband's estate, pending the decision of said successor's suit against her estate for her conversion of said stocks." Mills v. Britton, 64 Conn. 4, 24 L.R.A. 536, 29 Atl. 231.

"A refusal to deliver property will not be considered an unlawful detention, where the authority of the person making the demand is rightfully questioned." Ingalls v. Bulkley, 15 Ill. 224; Wood v. Pierron, 45 Mich. 313; Carroll v. Mix, 51 Barb. 212; Blankenship v. Berry, 28 Tex. 448.

"A bona fide reasonable detention of goods by one who has assumed some duty respecting them, for the purpose of ascertaining their true ownership, or determining the right of the defendant to receive them, will not sustain an action for conversion." 38 Cyc. 2029, and long note citing numerous cases. See 47 Century Dig. under Trover and Conversion, § 52.

"The levy of an attachment on property is a legal excuse for refus-

ing to deliver it to the owner." Fletcher v. Fletcher, 7 N. D. 452, 28 Am. Dec. 359.

Kehoe & Moseley, for respondent.

"If a bailee, upon a demand for possession, refuses to deliver, placing his refusal on other grounds than his right to detain the chattels under the possessory lien, he thereby waives such lien, and the refusal constitutes a conversion." 28 Am. & Eng. Enc. Law, 2d ed. 706.

"It was not incumbent on the persons holding the storage ticket to make a tender. The court will take a judicial notice of the usual practice prevailing throughout the state for the warehouseman to make such deductions for storage and insurance upon settlement with the ticket holder." State ex rel. Ertelt v. Daniels, 35 N. D. 10.

"Exhibit 4 is a duplicate of the letter written on behalf of the plaintiff to the defendant on September 15, 1915. It was therefore admissible in the evidence without notice to produce the duplicate thereof mailed to the defendant." International Harvester Co. v. Elfstrom (Minn.) 112 N. W. 252, 12 L.R.A.(N.S.) 343, and note, 11 Ann. Cas. 107, and note.

BIRDZELL, J. This is an appeal from a judgment and from an order denying the defendant's motion for a judgment notwithstanding the verdict or for a new trial. The action is one to recover damages for alleged conversion of 898 bushels of rye which were raised in 1915 and delivered to the defendant elevator company at Wolford, North Dakota. The rye in question was grown upon land owned by Mrs. F. E. Kerr. The grain was delivered to the defendant as Mrs. Kerr's grain, and storage ticket No. 6356, running in her favor, was made under date of August 28, 1915. On September 1st, Mrs. Kerr gave a written assignment of the ticket to the plaintiff, and he received the ticket direct from the defendant's agent. On September 15th, the plaintiff made a written demand for the rye, but it was not delivered, and on the following January 27th the demand was repeated, the defendant being requested on this occasion to deliver the rye at Minneapolis. It seems, from exhibits attached to the motion papers, that soon after the grain was first delivered for storage, the agent of the defendant advised it that there was a dispute as to who was entitled to the money, and that defendant should hold the grain in case the ticket

was presented. And when the demand was made in January the defendant at first refused to make delivery unless an indemnity bond were given, claiming that liens had been filed against the grain. This action was begun in March, 1916, summons being served March 13th, and it was not tried until March, 1918. One of the adverse claims which caused the defendant to hesitate to make delivery was that of Albert Solberg & Company, a judgment creditor of Mrs. Kerr, in whose behalf a warrant of attachment had been levied by the sheriff of Pierce county. The facts in connection with this levy and of an attempt to amerce the sheriff for the failure to return, during the statutory time, an execution subsequently levied, are stated in the case of Solberg v. Rettinger, 40 N. D. 1, 168 N. W. 572. The sheriff intervened in the action now before us on November 24, 1916, but was not represented at the trial. Another lien of which defendant had notice was a thresher's lien by one Yoder. It seems that the defendant had notice of these liens in September, 1915. After this action was brought he deposited in court the sum of $615.13, this sum being the market value of the grain at Wolford on March 13th, the day the summons was served, less storage charges, at the same time notifying the adverse claimants of the deposit.

The appellant's principal argument in support of the claim that there was error in the judgment is that the deposit in court exonerated the defendant from the liability sought to be enforced in the action. Section 7594, Compiled Laws of 1913, is relied upon in this connection. The section is as follows: "Whenever two or more persons make claim for the whole or any part of the same money, personal property or effects in the possession or control of any other person as bailee or otherwise and the right of any such claimant is adverse to the right of any other claimant, or is disputed or doubtful, and the bailee, custodian or person in control of any part of such property, money or effects is unable to determine to whom the same rightfully belongs, or who is rightfully entitled to the possession thereof; or whenever such bailee, custodian or person in control has notice or knowledge or any right or claim of right of any person in or to any part of such property, money or effects adverse to the right of any other claimant therefor; or whenever any debt, money, property or effects owing by or in the possession or under the control of any person may be attached by garnishment or

other process, and there is any dispute as to who is entitled to the same or any part thereof; in any such case the person in the possession or control of any such property, money or effects, when an action in any form has been commenced for an account of or growing out of the same or in which the same has been attached as aforesaid, may pay such money or deliver such property or effects to the clerk of the court in which any such action having reference to said money, property or effects, or the value thereof, may be pending, or out of which any garnishment or other process may issue with reference thereto; or if no such suit is commenced, he may apply to the district court of the district where such property, money or effects may be situated, and upon showing to the satisfaction of the court the existence of facts bringing him within the operation of this section, said court shall make an order designating a depositary with whom said property, money or effects may be deposited by the applicant for such order. In either case such person in the possession or control of such property, money or effects shall at once notify personally or by registered mail all persons of whose claims he may have notice or knowledge, having or claiming any interest, property, lien or right in, to or upon such property, money or effects, of such deposit; and upon giving such notice the person so depositing the same shall thereupon be relieved from further liability to any person on account of such property, money or effects; provided, that such depositor may be required upon the application of any party interested therein to appear and make disclosure before the court, in which any such action may be pending or by which any order designating a depositor may be made, concerning the said property, money, debts or effects held, controlled or owned by him. If the address of any persons having or making any claim as aforesaid cannot be ascertained, an affidavit to that effect shall be filed with the depositary, and the giving of such notice shall not be required in such case."

From the statement of facts preceding, it is apparent that the property or a duplicate storage ticket representing it was not deposited with the clerk of the court, but that the deposit consisted of an amount of money which is the equivalent of the value of the grain, less storage charges, on the day the summons was served on the defendant. Appellant's counsel contends that the action is one involving personal property *or its value,* and that in such case the statute expressly authorizes

the deposit of the property "or the value thereof." We cannot so read the statute. Where the action involves either specific property or its value, the statute authorizes *its* deposit in court. It does not authorize the deposit in court of the present value of property alleged to have been converted at some prior time. If the appellant's contention in this respect were correct, it would follow that if a conversion should take place while the price of grain was $1.50 per bushel and an action were brought after the price had fallen to $1 per bushel, the liability for the conversion would be decreased 33⅓ per cent. In other words, the wrongdoer would be permitted to obtain the benefit of a fall in the market. The statute does not so provide, nor is such a meaning within its spirit. The statute is merely intended to relieve a person who is in a position analogous to that of a stakeholder. He is relieved by delivering up the stakes.

If the defendant in the instant case was justified in its prior refusal, as would be the case if its refusal to deliver were the result of a reasonable effort, in good faith, to ascertain the validity of adverse claims, it would follow that no conversion took place. But it cannot, by the delivery in court of a value fixed as of a subsequent time, purge itself of liability for a previous conversion. A number of appellant's specifications of error are hinged upon the construction of the statute which we find to be erroneous, and it will serve no good purpose to take up the assignments *seriatim*.

It is argued that error was committed in admitting secondary evidence as to the contents of a letter, without first having made a demand for the production of the original. The argument on this point is confusing. It relates to two exhibits. Exhibit 4 is a duplicate of a letter written by the witness to the defendant, and the other secondary evidence to which objection was made was the witness's statement as to the contents of a letter received from the defendant in reply to exhibit 4. The witness first accounted for the absence of the original reply, and as he was about to state the contents of the reply as he remembered it, objection was made to the statement as "not the best evidence, no demand being made for the original." It is obvious that the defendant would not have the original, it being a letter which the witness had received from it. Consequently this objection is without merit and was properly overruled. When exhibit 4 was introduced (the duplicate of

a letter written by the witness to the defendant) it was objected to upon the ground, among others, that it was not the best evidence. Counsel admits that the exhibit was a correct carbon copy, and the pleadings in the case served to apprise the defendant that it was charged with the conversion of the grain. It was reasonable, therefore, to anticipate that the defendant would have for use at the trial any correspondence passing between it and plaintiff's attorney concerning the transaction. The error, if any, in the admission of secondary evidence, was clearly not prejudicial.

The record discloses that there is ample evidence to go to the jury on the question of the defendant's conversion of the grain. We have examined the instructions, and find that the jury was fairly instructed upon the issues presented by the pleadings and the evidence. It also appears that the pleadings were sufficient to apprise the defendant of the character of the plaintiff's demand and to impress upon it the necessity of meeting the issue of conversion. The defendant has had a fair trial and a fair opportunity to present its defense. The judgment being amply supported in the evidence, and no error having been committed in denying the defendant's motion, the judgment and order appealed from are affirmed.

BRONSON and GRACE, JJ., concur in result.

FRANK J. LANGER and William Langer, Appellants, v. FARGO MERCANTILE COMPANY, a Corporation Dissolved, T. A. Quirk, C. O. Follett, and Croil Hunter, Directors and Trustees of Fargo Mercantile Company, a Corporation Dissolved, Fargo Mercantile Company, a Corporation, T. A. Quirk, C. O. Follett, and Croil Hunter, Directors of Said Fargo Mercantile Company, a Corporation, Respondents.

(174 N. W. 90.)

Corporations — receivership — grounds for denial of receivership.

In this case the judge is commended for refusing to appoint a receiver, be-

cause it would have done the plaintiffs no possible good, and it would have done the defendants a great and manifest injury.

Opinion filed July 16, 1919. Rehearing denied September 8, 1919.

Appeal from an order of the District Court of Cass County, Honorable *A. T. Cole,* Judge.

Affirmed.

W. S. Lauder, for appellants.

Under § 4567 the directors of a dissolved corporation become trustees of its assets only in case other persons are not appointed by the court. Besides the subject of trusts is, and always has been, one peculiarly of equitable cognizance. Perry, Trusts, § 240; Fatjo v. Swasey (Cal.) 44 Pac. 225.

"Corporations whose charters expire by limitation may continue to act for the purpose of winding up their affairs, but this does not preclude a court of equity from winding up the affairs of such corporation when necessitated by internal dissensions in the corporation." Stewart v. Pierce (Iowa) 89 N. W. 240.

A court of equity can wind up the affairs of a dissolved corporation only through receivers or trustees appointed by itself. Stewart v. Pierce (Iowa) 89 N. W. 240; Vila v. Grand Island Electric Co. 94 N. W. 136; Vila v. Grand Island Electric etc. Co. (Neb.) 97 N. W. 613; French Bank Case, 63 Cal. 495; People v. Judge of St. Clair Circuit Ct. 31 Mich. 456; Republican Mountain Silver Mines v. Brown (U. S. Circuit) 24 L.R.A. 776; Dodge v. Woolsey, 15 L. ed. U. S. 401; Robinson v. Smith (N. Y.) 24 Am. Dec. 732; Ellwood v. First Nat. Bank (Kan.) 21 Pac. 673; Cameron v. Groveland (Wash.) 54 Pac. 1128; Columbus etc. Dredging Co. v. Washed Bar etc. Co. 136 Fed. 710.

Trustees cannot lawfully sell the trust property to themselves nor to a corporation in which they are interested. Comp. Laws 1913, § 6282.

That a trustee may not lawfully deal with the trust property for his own advantage, or for the advantage of a company or corporation in which he had a personal interest, see the following authorities: Clendenning v. Bank (N. D.) 86 N. W. 116; Anderson v. First Nat. Bank (N. D.) 64 N. W. 114; McKay v. Williams (Mich.) 35 N. W. 159; Kimball v. Ranney (Mich.) 80 N. W. 992; King v. Remington

(Minn.) 29 N. W. 352; Stettnische v. Lamb (Neb.) 26 N. W. 374; Veeder v. McKinley, L. Loan & T. Co. (Neb.) 86 N. W. 982; Frazier v. Jeakins (Kan.) 57 L.R.A. 575; Ferguson v. Gooch (Va.) 40 L.R.A. 234; Kindman v. O'Connor (Ark.) 13 L.R.A. 490; Moore v. Mandlebaum (Mich.) 8 Mich. 432; Wormley v. Wormley (U. S.) 5 L. ed. 651; Harding v. Handy (U. S.) 6 L. ed. 429 (Chief Justice Marshall); Michaud v. Girod (U. S.) 11 L. ed. 1076. See particularly column 2, p. 1098, one of the three leading cases of this country; Richardson v. Jones (Md.) 22 Am. Dec. 293; Cumberland Coal & I. Co. v. Sherman (N. Y.) 30 Barb. 553; Gardner v. Odgen, 22 N. Y. 327, 78 Am. Dec. 192; Barnes v. Lynch (Okla.) 59 Pac. 995; Bruner v. Finley (Tenn.) 41 Atl. 334; Sage v. Culver (N. Y.) 41 Atl. 513; Wayne Pike Co. v. Hammons (Ind.) 27 N. E. 487; Francis v. Cline (Va.) 31 S. E. 17; Ferguson v. Gooch (Va.) 26 S. E. 397; Loud v. Winchester (Mich.) 17 N. W. 784.

"The good will of a business is property transferable like any other property." Comp. Laws, § 5466; Mapes v. Metcalf, 10 N. D. 601.

"The good will of a business is an asset and cannot be appropriated by majority stockholders." 2 Cook, Corp. § 641, p. 1835; Trentman v. Wahrenburg (Ind.) 65 N. E. 1060.

"The good will of a business is the expectation of continued public patronage. It is property transferable like any other property." Merchant's Ad. Sign Co. v. Sterling, 57 Pac. 468, 71 Am. St. Rep. 94; Knoedler v. Bossuod, 46 Fed. 465.

Watson, Young, & Commy, for respondents.

The old corporation, the Fargo Mercantile Company, ceased to exist as a legal entity upon the expiration of its charter on April 1, 1915. Under our statute it had no further corporate existence. See MacRae v. Kansas City Piano Co. (Kan.) 77 Pac. 94; Kurtz v. Paoli Town Co. 20 Kan. 397; Paoli Town Co. v. Kurtz, 22 Kan. 726; Eagle Chair Co. v. Kelsey, 23 Kan. 631; McCulloch v. Norwood, 58 N. Y. 562; Sturges v. Vanderbilt, 73 N. Y. 384; Venable Bros. v. Southern Granite Co. (Ga.) 69 S. E. 822; Crossman v. Vivienda Water Co. (Cal.) 89 Pac. 335; Newhall v. Western Zinc Min. Co. (Cal.) 128 Pac. 1040; Lowe v. Superior Ct. (Cal.) 134 Pac. 190; Root v. Sweeney, 12 S. D. 43; Miami Exporting Co. v. Gano, 13 Ohio, 271; United States v. Spokane Mill Co. 206 Fed. 999; National Bank v. Colby, 21 Wall. 609; Marion

Phosphate Co. v. Perry (C. C. A.) 74 Fed. 425; Harris-Woodbury Lumber Co. v. Coffin (C. C. A.) 179 Fed. 257; Robinson v. Mutual Reserve L. Ins. Co. (C. C. A.) 182 Fed. 850; Olds v. City Trust Co. (Mass.) 70 N. E. 1022; Merrill v. President, etc. 31 Me. 57, 50 Am. Dec. 649; Combes v. Milwaukee & M. R. Co. (Wis.) 62 N. W. 89; May v. State Bank, 2 Rob. 56, 40 Am. Dec. 726; Thornton v. Marginal Freight R. Co. 123 Mass. 32 (syllabus); Gulledge Bros. Libr. Co. v. Wenatchee Land Co. (Minn.) 132 N. W. 992; Sinnott v. Hanna, 141 N. Y. Supp. 505.

The Kansas statute and our own were before our court in Murphy v. Missouri & K. L. Co. 28 N. D. 519, 149 N. W. 957, same case, second appeal, Murphy v. Wilson, 163 N. W. 820. See also: 2 Beach, Corp. § 780; 17 Enc. Pl. & Pr. p. 722, as follows: "Notice must be served upon the debtor and other parties to the suit who are interested in the property adversely to the applicant." People v. O'Brien, 111 N. Y. 1.

We know of no authority for a court to appoint a receiver of property vested in trustees, without cause and without notice to them, or opportunity afforded to defend their title and possession. Stuart v. Palmer, 74 N. Y. 184; Ferguson v. Crawford, 70 N. Y. 256. See also Bank v. Walker, 66 N. Y. 428.

"In a suit by a stockholder, a receiver will not be appointed to take the property out of the hands of the managers, except as a last resort and when it is considered absolutely necessary for the preservation of the trust fund." 1 Pom. Eq. Rem. § 121.

In State Invest. & Inc. Co. v. Superior Ct. (Cal.) 35 Pac. 549, the supreme court of that state granted an application for an original writ of prohibition against the appointment of a receiver by the lower court.

"While it is true that the defendant, as a director of the corporation, was bound by all those rules of the conscientious fairness which courts of equity have imposed as the guides in dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed and the transaction is open and otherwise free from blame." Buell v. Buckingham, 16 Iowa, 284; Hallam v. Hotel Co. 56 Iowa, 178, 9 N. W. 111; Garrett v. Plow Co. 70 Iowa, 697, 29 N. W. 395; Smith v. Lansing, 22 N. Y. 520; Duncomb v. Railroad Co. 84 N. Y. 190; Welch v. Bank,

122 N. Y. 177, 25 N. E. 260; Hotel Co. v. Wade, 97 U. S. 13; Stratton v. Allen, 16 N. J. Eq. 229; Sims v. Railroad Co. 37 Ohio St. 556; Busby v. Finn, 1 Ohio St. 409; Stark v. Coffin, 105 Mass. 328; Holt v. Bennett, 146 Mass. 439, 16 N. E. 5; Saltmarch v. Spaulding, 147 Mass. 245. For other cases in applying the same rule, see: Savage v. Madelia Farmer's Warehouse Co. (Minn.) 108 N. W. 296; Troy Min. Co. v. White (S. D.) 74 N. W. 236; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Barr v. Pittsburg Glass Co. 57 Fed. 86; Louisa Co. Nat. Bank v. Traer (Iowa) 16 N. W. 120; Stratton v. Allen, 16 N. J. Eq. 229; Smith v. Ferries & C. H. R. Co. (Cal.) 51 Pac. 710; Copsey v. Sacramento Bank (Cal.) 66 Pac. 7; Singer v. Salt Lake City Copper Mfg. Co. (Utah) 53 Pac. 1024; Oil Co. v. Marbury, 91 U. S. 587; Sims v. Petaluma Gaslight Co. (Cal.) 62 Pac. 300; International Wrecking & Transp. Co. v. McMorran (Minn.) 41 N. W. 510; Barr v. New York, L. E. & W. R. Co. (N. Y.) 26 N. E. 145; San Diego, O. R. & P. B. R. Co. v. Pacific Beach Co. (Cal.) 44 Pac. 333; Cannon v. Brush Electric Co. (Md.) 54 Atl. 121; Robotham v. Prudential Ins. Co. (N. J.) 53 Atl. 842; Manufacturers Sav. Bank v. O'Reilly, 10 S. W. 865; Kelly v. Newburyport & A. H. R. Co. (Mass.) 6 N. E. 745; Roy & Co. v. Scott Hartley & Co. (Wash.) 39 Pac. 679; Hill v. Nisbet, 100 Ind. 341; Brewer v. Michigan Salt Asso. (Mich.) 25 N. W. 374; Fudickar v. East Riverside Irr. Dist. (Cal.) 41 Pac. 1024.

"We have found no case, and plaintiff's counsel have not cited any case, in which it has been held, under a statute like ours, that good will survived the death of the corporation." Greene v. Bennett (Tex.) 110 S. W. 108.

The act of liquidation destroys the value of such good will, as a value separate and apart from the value of the tangible assets. Centralia Nat. Bank v. Marshall, 26 Ill. App. 440.

ROBINSON, J. In this case there is no question concerning either the facts or the law. It is an appeal from an order of the district court denying a motion to remove the defendants as trustees of the Fargo Mercantile Company and to appoint a receiver for the company. Its corporate stock was 2,500 shares or $250,000. F. J. Langer owns 25 shares; William Langer, 100 shares. The affairs of the company had been so well managed for many years that its stock paid a dividend of

25 per cent. Its life term of twenty years expired on April 1, 1915, and without noticing the lapse of time the company continued and did business as a *de facto* corporation until August 13, 1918. Then all the stockholders, excepting the Langers, formed a new corporation by the name of "Fargo Mercantile Co." The business of the company was a valuable asset, and the new company took over and conducted the same as the heir or legal successor of the old company. In the reorganization the new company left out the plaintiffs and tendered them only the par value of their stock in the old company, though it was apparently worth much more than its par value. Then the trustees proceeded to sell to the new corporation of which they were officers all the property of the old corporation, and to conduct the business in just the same manner as if the new corporation were the legal successor of the old corporation. Now, of course, it goes without saying that the new corporation cannot in that way freeze out the Langers. They are entitled to receive either the full value of their stock or to share in the new corporation according to their stock the same as all the other members. The old corporation has always been perfectly solvent, and it has paid large dividends, commonly 25 per cent a year, and in truth the new corporation is merely the old corporation under the same name only that the letters "Co." are used for company. However, as the new company is perfectly solvent and as it has given a good bond in the sum of $35,000 to pay any judgment that the plaintiff may recover, there is no reason for appointing a receiver. Such an appointment would have done the plaintiffs no good and it would have done the new company a great and manifest wrong. Hence the court denied the motion, and of course that was perfectly right, and of course there was not the least reason or excuse for this appeal, nor was there any reason for counsel referring to the trustees and managers of the old corporation as crooks, thieves, and pirates. Crooks do not commonly manage a corporation so as to make its stock pay 25 per cent dividend.

Order affirmed and case remanded forthwith.

GRACE, J. I concur in the result.

Justice BRONSON, being disqualified, did not participate, Honorable J. M. HANLEY, of the Twelfth Judicial District, sitting in his stead.

BIRDZELL, J. (concurring). The main facts in this case have been briefly stated in the opinion prepared by Mr. Justice Robinson. The writer concurs in that opinion, but in order that the contentions of appellants' counsel upon this appeal may be more fully stated and considered, a supplemental statement is thought necessary.

In the complaint, relief is prayed for as follows: (1) That defendants Quirk and Follett be adjudged trustees of the property of the old corporation; (2) that they be required to account, as trustees, for the property of the old corporation; (3) that the pretended sale of the property to the new corporation be adjudged null and void; (4) that the assets of the old corporation, including the good will of the business, be sold and the proceeds applied to the payment of debts and the residue distributed among the stockholders; (5) that a receiver be appointed to take possession of the property, effects, and assets of the old corporation for the purpose of preserving them for the benefit of those entitled to share in the distribution, and to the end that the same may be so handled as to yield the largest returns for the stockholders of the old corporation; and (6) for such further relief as may be found to be equitable.

While the record does not seem to disclose a demand on the part of the plaintiffs for the furnishing of security by the defendants Quirk and Follett to guarantee the performance of their duty as trustees, the order appealed from states that at the plaintiffs' request the defendants Quirk and Follett are required to give bond to secure the performance of their duty as trustees, and to secure such judgment as the plaintiffs may obtain in the action. The order requires a bond in the sum of $35,000 to be given within ten days, which order was complied with.

It appears that after the order had been made denying the appointment of a receiver and requiring the defendants to furnish a bond as above, plaintiffs' attorney requested the court to prepare findings of fact and conclusions of law, and that, in conformity with such request, findings and conclusions were made, the substance of which are: that the old corporation ceased to exist on April 1, 1915, and through a mistake of fact the business was conducted as formerly until about August 9, 1918, when three of the directors, Quirk, Follett, and Croil Hunter, together with an employee, organized the new corporation; that thereafter the three directors named, without consulting plaintiffs, made a

pretended sale of the assets of the old corporation to the new; and that preliminary to the sale they caused a valuation to be made which was without careful inquiry or consideration. The conclusions of law are that Quirk, Follett, and Croil Hunter have at all times been and now are trustees in charge of the assets of the old corporation and accountable as such; that the transfer to the new corporation is void and of no effect; that the assets, including the good will of the business, is still the property of the stockholders of the old corporation; that the valuation is fraudulent in law as to the plaintiffs; that the new corporation is conducting and controlling the business in trust for the stockholders of the old; that the appointment of a receiver, pending final determination of the action, would injure the business and depreciate its value; and that no receiver should be appointed pending the determination of the value of the interests of the plaintiffs, but that one should later be appointed after the determination of the issues in the action, for the purpose of making a sale of the assets of the old corporation, including its good will.

The only question presented on the record upon this appeal involves the correctness of the order denying the appointment of a receiver before the trial of the action. The main arguments advanced by the appellant are: (1) That on account of the unlawful attempt to transfer the effects of the old corporation to the new, the defendants should not be continued as trustees; and (2) that the court should have availed itself of the statutory power which it is alleged it possessed to appoint a receiver *pendente lite*. The first argument largely involves considerations of expediency, and must be weighed in the light of the practical consequences which would follow the appointment of a receiver or a new trustee. It has been answered in the opinion of Mr. Justice Robinson, and, while nothing more need be said at this stage of the litigation, it might be added that, in view of the long period of successful management of the business by the directors of the old corporation who are continued in the new, there is only a very remote probability, especially in view of the bond, that the plaintiffs will ultimately sustain any loss by reason of continuing the directors of the old corporation as trustees. No necessity whatever appears to exist for disturbing the continuity of the management under which the business has been successful in the past, and upon which its future success so largely depends.

Our attention is called to the various sections of the statute controlling the conduct of trustees, and the extent to which the trustees in question have violated their obligations as expressed in the statutes is elaborated. For every breach of such an obligation, the plaintiffs, of course, have their remedy; in fact, it is available in this action, for the principal prayer of relief is for the declaration of a trusteeship and for an accounting. The defendants, in their answer, acknowledge the trust relationship and join in the prayer for an accounting. It is difficult, indeed, to see how the plaintiffs can gain any advantage in protecting their rights through a change of trustees at this time. The trust is obviously a trust for the purpose of winding up the affairs of the old corporation, and they have already been largely wound up unwittingly by the continuous conduct of the business in ignorance of the fact that the old corporate charter had expired. Whatever remains to be done in this direction, however, can readily be done without the intervention of new trustees and without sacrificing in any way the rights or interests of the plaintiffs. In these circumstances, the same practical considerations that weigh against the appointment of a receiver likewise suggest the inadvisability of appointing new trustees. A different situation might be presented if beneficiaries of an active trust requiring a long period of future administration were seeking a change of trustees on account of past violations of duty. Here it is conceded in the answers that the trustees are accountable for their failure to fulfil their duties in the respects contended for, and those violations will become material in considering the account, but they cannot be mended or recompensed at this time by changing the trustees. Breach of trust does not, in all circumstances, necessitate the removal of a trustee. See 1 Perry, Trusts & Trustees, 6th ed. § 276a; 2 Story, Eq. Jur. 13th ed. § 1289; Lathrop v. Smalley, 23 N. J. Eq. 192; Re O'Hara, 62 Hun, 531, 17 N. Y. Supp. 91. In considering the appellants' desire for a change of trustees, at this time, we are compelled to be mindful of the fact that there are other beneficiaries than the plaintiffs. Some authorities even go to the extent of holding that where a majority of the beneficiaries may desire a change of trustees, application for removal will not necessarily be granted. In all cases, the primary consideration is the welfare of the beneficiaries as a whole, and the trustees will or will not be removed depending upon the necessity for such

action in order to protect the trust estate. See Letterstedt v. Broers (1884) L. R. 9 App. Cas. 371, 53 L. J. P. C. N. S. 44, 51 L. T. N. S. 169; Re Wrightson [1908] 1 Ch. 789, 77 L. J. Ch. N. S. 422, 98 L. T. N. S. 799.

But the counsel for the appellants contends that a receiver should have been appointed under one of three subdivisions of § 7588, Compiled Laws of 1913. This section authorizes the appointment of a receiver on application of a plaintiff seeking to subject property or a fund to his claim when it is shown that the same is in danger of being lost, removed, or materially injured; also, in the cases provided in the Code of Civil Procedure, when a corporation has been dissolved or has forfeited its corporate rights, and in other cases where receivers have been appointed by the usages of courts of equity. It is quite apparent that the trial court has not abused any discretion it may have had to appoint a receiver under any of the subdivisions referred to. From the facts already stated, it is clear that the plaintiffs are not attempting to charge any fund in which they are interested that is in danger of being lost, removed, or materially injured, and there is consequently no occasion for a receivership on this ground.

Section 4565 of the Civil Code states that a corporation may be dissolved in any one of three different ways,—(1) by the expiration of the time limited by its articles of incorporation; (2) by involuntary dissolution provided for in chapter 27 of the Code of Civil Procedure; and (3) upon voluntary application. The dissolution in the instant case was effected by the expiration of the time limited in the charter, and the trusteeship results by operation of law, as provided in § 4567 of the Civil Code. This, therefore, is not an instance in which the court is authorized to appoint a receiver under subdivision 5 of § 7588, Code of Civil Procedure. That subdivision clearly relates to cases in which a receivership may be necessary where an action is brought to dissolve a corporation or to secure a forfeiture of its franchise under chapter 27 of the Code of Civil Procedure. By the express language of the subdivision, it is so limited; for it states that a receiver may be appointed by the court "in the cases provided in this Code," etc., clearly referring to the Code of which the section is a part; namely, the Code of Civil Procedure.

Nor is this a case for the appointment of a receiver under subdivi-

sion 6 of § 7588. This subdivision merely authorizes the appointment of a receiver according to the usages of courts of equity, and certainly there is no occasion for a receiver to be appointed when trustees authorized by law to administer the trust estate have already been designated by operation of law and when they are fully subject to the control of the court in executing the trust. The parties are all before the court in this action, and the court has ample supervisory power, capable of being exercised over the acts of the defendants in the administration of the trust, to prevent any sacrifice of the plaintiff's interests. Consequently the receivership is wholly unnecessary. A receivership ordinarily terminates an existing possession where its continuation is likely to prove hazardous. The facts presented here do not, in our opinion, warrant taking this step.

HANLEY, District Judge, concurs.

CHRISTIANSON, Ch. J. (concurring). I concur in an affirmance of the order appealed from, for the reasons stated in the opinion prepared by Mr. Justice BIRDZELL.

BOVEY-SHUTE LUMBER COMPANY, a Corporation, Appellant, v. GERTRUDE M. DONAHUE and J. E. Donahue, Respondents.

(175 N. W. 205.)

Appeal and error — trial — action is terminated when time for appeal has expired.

1. Following Gohl v. Bechtold, 37 N. D. 141, and prior decisions, it is *held:* Under § 7966, Comp. Laws 1913, an action is terminated when the time for an appeal from the judgment has expired, and the trial court has no authority thereafter to entertain a motion for a new trial, over the objection of the adverse party, unless the final character of the judgment had been suspended by proceedings commenced prior to the time for appeal has expired.

Appeal and error — judgment not suspended by *ex parte* application for extension.

2. The final character of the judgment is not suspended by an *ex parte* application for an extension of the time in which to move for a new trial, and an *ex parte* order entered thereon.

Opinion filed July 18, 1919. Rehearing denied September 8, 1919.

Appeal from the District Court of Eddy County, *Buttz, J.*

Plaintiff appeals from an order denying a new trial.

Order summarily affirmed.

Rinker & Duell and *Cuthbert & Smythe,* for appellant.

Whatever an agent does in the lawful exercise of his authority is imputable to the principal, and where the acts of the agent will bind the principal, his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the transaction are often classed in the decisions as *res gestæ.* Jones, Ev. § 356, pp. 444, 445; Tennessee Teleph. Co. v. Simms, 35 S. W. 173; B. & M. R. R. Co. v. Ordway (Mass.) 5 N. E. 627; Robinson v. Fitchburg & W. R. R. Co. 7 Gray, 92; Pratt v. Ogdensburg & L. C. R. R. Co. 102 Mass. 565; Grinnell v. W. U. Tel. Co. 113 Mass. 299; Hulbeur v. Erie R. Co. 55 Atl. 273; King v. Atlantic City Gas & Water Co. (N. J.) 58 Atl. 345; Goddard v. Crefield Mills, 75 Fed. 821.

"Relevant declarations of an agent, provided they are within the scope of his authority, and in the course of the negotiations to which it refers, but not otherwise, are admissible in evidence against the principal." 16 Cyc. 1005; Plymouth County Bank v. Gilman (S. D.) 52 N. W. 871; Balding v. Andrews, 96 N. W. 305; Short v. N. P. Elevator Co. 45 N. W. 706.

"An expert may be said to be a skilled witness who testifies upon the basis of assumed facts in a hypothetical question." 3 Chamberlayne, Ev. § 2374; 12 Hun, 276.

"The opinion of a witness possessing peculiar qualifications is admissible, whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, without such assistance." Greenl. Ev. 12th ed. § 440, note 3; 1 Smith, Lead. Cas. 286; 36 Iowa, 473.

"Inaccessible, warranted sound, and merchantable. One who sells or agrees to sell merchandise inaccessible to the examination of the buyer thereby warrants that it is sound and merchantable." Rev. Codes 1905, § 5425; Comp. Laws 1913, § 5981; Civ. Code 1877, § 1011; Rev. Code 1899, § 3978.

This implied warranty is limited to manufacturing. See cases discussed in note to McQuaid v. Ross, 22 L.R.A. 189; Leavitt v. Fiber-

loid Co. 15 L.R.A.(N.S.) 855; Oil Well Supply Co. v. Watson, 15 L.R.A.(N.S.) 868; Farrell v. Manhattan Market Co. 15 L.R.A.(N.S.) 884; Miller v. Raymond, 31 L.R.A.(N.S.) 783. And also note to Nettrograph Co. v. Brown (Okla.) 34 L.R.A.(N.S.) 737, 114 Pac. 1102; Elevator Safety Device Co. v. Brown-K. Iron Works, 153 Ill. App. 313; Stanford v. National Drill & Mfg. Co. (Okla.) 114 Pac. 734; Obenshain v. Roff (Okla.) 116 Pac. 782; John Roebling Sons Co. v. Am. Amusement & Constr. Co. 231 Pa. 261, 80 Atl. 647.

N. J. Bothne, for respondents.

Admissions of an agent made while he is acting within the scope of his agency and relating to the subject with reference to which he is empowered to act for this principal are competent and admissible in evidence even as to past transactions. Bartlett v. Ins. Co. (Iowa) 41 N. W. 601; Prew v. Ry. Co. (S. D.) 156 N. W. 582; Ayres v. Hubbard (Mich.) 40 N. W. 10; Cumbey v. Lovett (Minn.) 79 N. W. 99; Needham v. Halverson, 22 N. D. 594; Paulson v. Seever, 8 N. D. 215.

"Admissions not based on personal knowledge are admissible in evidence, and it is for the jury to determine their weight." Chapman v. R. Co. 26 Wis. 303; Shadduck v. Town, 22 Wis. 118; Kitchen v. Robins, 29 Ga. 713; Sparr v. Wellman, 11 Mo. 230; Reed v. McCord, 46 N. Y. Supp. 407.

"One who sells or agrees to sell merchandise inaccessible to the examination of the buyer thereby warrants that it is sound and merchantable." Comp. Laws, § 5981; Hoover & Allison v. Witz Bros. 15 N. D. 477; Blackwood v. Co. 18 Pac. 249; 35 Cyc. 397, and citations.

"An implied warranty of fitness will arise if goods are purchased for a particular purpose of which the buyer informs the seller, and the rule applies especially if the seller is a dealer in the article." 35 Cyc. 399, 400, and citations; Shaw v. Smith, 11 L.R.A. 681. See also notes in 31 L.R.A.(N.S.) 783, and 34 L.R.A.(N.S.) 737; Loxtercamp v. Implement Co. 125 N. W. 830.

"Special damages naturally and proximately resulting from the breach of warranty may be recovered." Larson v. Calder, 16 N. D. 248; Needham v. Halverson, 22 N. D. 248; Joy v. Blitzer, 41 N. W. 575; Mitchell v. Pinckney, 104 N. W. 286; Plow Works v. Niles & S. Co. 63 N. W. 1013; Shaw v. Smith, 11 L.R.A. 681; Swain v. Schieffelin, 18 L.R.A. 385; Tyler v. Moody & Offut, 54 L.R.A. 417; Rock-

port v. Granite Co. 51 L.R.A. 781; Leavitt v. Fiberloid Co. 15 L.R.A. (N.S.) 864.

It is well settled that a new trial will not be granted on the ground of newly discovered evidence which could have been discovered before the trial by the exercise of reasonable diligence. McKirahan v. Mining Co. 165 N. W. 542; 29 Cyc. 886 and citations.

Newly discovered evidence which is not material, but merely impeaching, and which would not change the result, is not sufficient ground for granting a new trial. Braithwaite v. Aiken, 2 N. D. 57; Libby v. Barry, 15 N. D. 286; State v. Albertson, 20 N. D. 512.

The court was without jurisdiction to hear and determine such motion for new trial after six months had passed since entry of judgment. Grove v. Morris, 31 N. D. 8; Higgins v. Rued, 30 N. D. 551; Garbush v. Firey, 33 N. D. 154; Gohl v. Bechtold, 37 N. D. 141.

When the time for appeal has expired the action is no longer pending, but is terminated, *and the trial court has then no power, authority, or jurisdiction to hear or consider a motion for a new trial.* Grove v. Morris, 31 N. D. 8; Higgins v. Rued, 30 N. D. 551; Garbush v. Firey, 33 N. D. 154; Gohl v. Bechtold, 37 N. D. 141; Comp. Laws 1913, § 7966; Bright v. Juhl (S. D.) 93 N. W. 648; Deering v. Johnson (Minn.) 22 N. W. 174.

Per Curiam. In this case defendants recovered judgment. Notice of entry thereof was served upon plaintiff's attorney on March 7, 1918. No appeal was taken from the judgment. The plaintiff prepared and served a proposed statement of case, and noticed the same for settlement on August 10, 1918. It also noticed a motion for judgment notwithstanding the verdict or for a new trial for hearing at the same time. Defendants' counsel asserted that such motion could not be noticed or heard until after the statement had been settled. Plaintiff thereupon withdrew such motion. The proposed settlement of the statement of the case came on for hearing pursuant to the notice, and the same was settled on August 12, 1918. On the same day, after the statement had been settled, plaintiff's counsel was informed that the trial judge would be absent from the district for some time and unable to hear the motion for a new trial until some time in September. Thereafter on August 12, 1918, plaintiff's attorney presented to the trial court an affidavit

setting forth these facts, and asked that the time in which to move for a new trial be extended until October 1, 1918. The trial court entered an *ex parte* order extending the time accordingly. The plaintiff's attorney thereafter, on September 11, 1918, served notice of a motion for new trial, such motion to be heard September 20, 1918. When the motion came on for hearing defendants' counsel made special appearance and objected to the said consideration thereof on the ground that the action had been terminated, that it was no longer pending, and that the trial court had no power to entertain the motion. The trial court made no ruling on the objections. In his memorandum decision the trial judge intimated that he believed the objections to be well taken, but did not base his decision on that ground. The decision was based upon the ground that plaintiff had received a fair trial, and that, wholly aside from the objections, the motion for a new trial should be denied. In this court respondents have urged the same objections which they made in the court below, *viz.*, that the trial court was without authority to entertain the motion for a new trial. Questions similar, or analogous, to the one now under consideration have been considered by this court in the following cases: Grove v. Morris, 31 N. D. 8, 151 N. W. 779; Higgins v. Rued, 30 N. D. 551, 153 N. W. 389; Garbush v. Firey, 33 N. D. 154, 156 N. W. 537; Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707; Gohl v. Bechtold, 37 N. D. 141, 163 N. W. 725. The rule announced in these cases is to the effect that when the time for appeal for judgment has expired the trial court has no authority thereafter to entertain a motion for a new trial under the objection of the adverse party, unless the final character of the judgment has been suspended by proceedings commenced prior to the time for appeal has expired. In applying this rule this court held in Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707, that where a motion for a new trial is duly noticed to be heard at a date prior to the expiration of the time for appeal for a judgment, but continued by consent of the parties and finally submitted and determined after the time for appeal for judgment has expired, the final character of the judgment is suspended by such proceedings, and the court has jurisdiction to determine a motion for a new trial even though the time for appeal for judgment has expired. But in Gohl v. Bechtold, supra, this court held that the final character of the judgment is not suspended so as to authorize the court

to entertain the motion by the mere fact that notice of motion was served prior to the time in which an appeal from the judgment has expired.

We have again reviewed these decisions and the statutory provisions involved, and are satisfied that the rulings are correct, and that the interpretations placed upon the statutes give effect to the intention of the lawmakers. The question in this case, therefore, is whether the final character of the judgment might be, and was, suspended by the *ex parte* order entered by the court on August 12, 1918, extending the time in which to move for a new trial until October 1, 1918. If it was suspended, then the court has authority to entertain the motion; if it was not, it had no such power. We are of the opinion that the trial court had no power to extend the time in which to move for a new trial beyond the date when the action ceased to be pending under the express terms of § 7966, Comp. Laws 1913. A wholly different situation is presented where a motion is made while the action remains pending, but not decided until later. As we said in Gohl v. Bechtold, supra: "In our opinion, a party aggrieved must move for a new trial before the time in which an appeal may be taken from the judgment has expired. After that time no proceedings can be instituted for a reversal of the judgment over the objections of the adverse party. If a motion is made within that time, and continued by the consent of the parties or by action of the court until a later date, then the final character of the judgment is suspended. The motion is not made until it is submitted to or brought within the breast of the trial court and some affirmative action taken thereon either by the court or the adverse party. The unsuccessful party cannot, by his own act, and by the mere service of a notice of hearing of a proposed motion for a new trial at such future time as he may see fit to designate, suspend and keep in abeyance the final and conclusive character of the judgment." 37 N. D. 146, 147. This language is applicable to and is decisive of this case. Manifestly this court can review no errors assigned by the appellant. The order must be affirmed.

GRACE, J. I dissent.

CARL BARTELSON, Respondent, v. INTERNATIONAL SCHOOL DISTRICT NO. 5, PORTAL TOWNSHIP, Appellant.

(174 N. W. 78.)

Schools and school districts — debt contracted in excess of constitutional debt limit — where debt is *ultra vires* and exceeds constitutional debt limit equity will not aid in recovery.

1. Where one seeks to recover for benefits received by a school district the amount due and unpaid in excess of the constitutional debt limit pursuant to a contract of construction, *ultra vires* as to such excess, and where neither the property representing such excess can be segregated or returned without destruction or damage to the property of the municipality, nor can a burden of indebtedness therefor be imposed upon such municipality without exceeding the constitutional debt limit imposed, equity will not afford relief.

Municipal corporations — schools and school districts — school district not a trustee for the amount in excess of legal limit — where part in excess of contract cannot be segregated no recovery can be had.

2. In an action where it is sought to recover the amount due a contractor for the construction of a school building, in excess of the constitutional debt limit, by requiring the school district to return the property received or be declared a trustee for the use or rental value thereof, and where it appears that the building cannot be returned or any part thereof segregated without destruction or loss of property of the municipality, and that no burden can be imposed upon the municipality without exceeding the debt limit, it is *held* that no recovery can be had.

Opinion filed July 18, 1919. Rehearing denied September 8, 1919.

Action to recover in equity moneys due and unpaid in the construction of a school building in excess of the constitutional debt limit.

From a judgment in favor of the plaintiff in District Court, Burke County, *Leighton,* J., defendant has appealed.

Reversed and action ordered dismissed.

C. H. Marshall (*John C. Lowe,* of counsel), for appellant.

The claim of plaintiff as to the amount of $4,295.90 being in excess of the constitutional debt limit, is *void,* and the plaintiff cannot recover. N. D. Const. § 183; N. D. Comp. Laws, § 2218.

One who makes an agreement with another in contravention of an express statute or constitutional provision is a *particeps criminis;* and one who contracts with another in violation of the debt limit provision of the Constitution is a *particeps criminis.* It is fundamental law that *particeps criminis* cannot come into court with clean hands. Litchfield v. Ballou, 114 U. S. 190, 29 L. ed. 132.

A contract or indebtedness in excess of the debt limit is void, and beyond the aid of a court of equity. McQuillin, Mun. Corp. § 2239.

"Where the contract is executed and the money paid *in pari delicto,* this rule certainly holds, and the party who has paid it cannot recover it back." Browning v. Morris, 2 Cow. 791; Holman v. Johnson, 1 Cow. 342; Martin v. Hodge, 58 Am. Rep. 763; Nellis v. Clark, 4 Hill, 424; Merienthal v. Shafer, 6 Iowa, 226; Smith v. Bean, 15 N. H. 577; 10 R. C. L. 353, 389.

"Whoever deals with a municipality does so with notice of the limitation of its powers, and with notice, also, that he can receive compensation for his labor and materials only from the revenues and incomes previously provided for the fiscal year during which his labor and materials are furnished." San Francisco Gas Co. v. Brickwedel, 62 Cal. 641; Helena Waterworks Co. v. Helena, 81 Am. St. Rep. 453; Black v. Detroit, 78 N. W. 660; 28 Cyc. 649.

"One contracting with a municipality does so at his peril, so far as the chance of being unable to recover where the debt limit has been exceeded." McQuillin, Mun. Corp. § 2239; Gamewell Fire Alarm Co. v. Laporte, 102 Fed. 417.

"The purpose of the constitutional prohibition is to serve as a limit to taxation, and as a protection to taxpayers; to effectually protect persons residing in municipalities from the abuse of their credit and the consequent operation of burdensome if not ruinous taxation." McQuillin, Mun. Corp. 87 Ill. 396; Balch v. Beach, 95 N. W. 132; Anderson v. School Dist. 32 N. D. 413; Engstad v. Dinnie, 8 N. D. 1.

The plaintiff is not only *not entitled* to enforce payment of his claim, but on the contrary, if the officers of the defendant school district had voluntarily paid his claim, an action would lie to recover it back. Chaska v. Hedman, 55 N. W. 737; 28 Cyc. 1561.

Fisk & Murphy, for respondent.

No person, not even a municipal corporation, shall be permitted un-

justly to enrich itself at the loss of another. Thompson v. Elton (Wis.) 85 N. W. 425; McGillivan v. Joint School Dist. 112 Wis. 354, 88 Am. St. Rep. 969, 88 N. W. 310; Lefebre v. Board, 81 Wis. 66, 51 N. W. 952; Bordwell v. Southern E. & B. Works (Ky.) 20 L.R.A.(N.S.) 110, 113 S. W. 97; Salt Lake City v. Hollister, 118 U. S. 256, 30 L. ed. 176; State v. Dickerman (Mont.) 40 Pac. 698; Livingston v. School Dist. (S. D.) 76 N. W. 301; Allen v. Lafayette (Ala.) 9 L.R.A. 497; Chapman v. Douglas Co. 107 U. S. 348, 27 L. ed. 378; Read v. Plattsmouth, 107 U. S. 568, 27 L. ed. 414; Parkersbury v. Brown, 106 U. S. 432, 27 L. ed. 238; Central T. Co. v. Pullman Parlor Car Co. 139 U. S. 24, 35 L. ed. 238; Snoffer v. City, 161 Iowa, 223, 142 N. W. 97, L.R.A.1915B, 173 (Bridge Case); Turner v. Cruzen, 70 Iowa, 202, 30 N. W. 483. See also notes in 4 Columbia L. Rev. 67, and 17 Harvard L. Rev. 343; Paul v. Kenosha, 22 Wis. 266; Lefebre v. Board, 81 Wis. 660, 51 N. W. 952; Salt Lake City v. Hollister, 118 U. S. 256, 30 L. ed. 176; Pimental v. San Francisco, 21 Cal. 362; Louisiana v. Wood, 102 U. S. 294, 26 L. ed. 153; Read v. Plattsmouth, 107 U. S. 568, 27 L. ed. 414; Allen v. Lafayette (Ala.) 9 L.R.A. 497; Scofield v. Council Bluffs, 68 Iowa, 695, 28 N. W. 20.

BRONSON, J. This is an action to recover the amount due a contractor for the construction of a high school building in a school district in Burke county, North Dakota. The facts are stipulated. In May, 1913, pursuant to an election theretofore held so authorizing, the board of education made a contract with the plaintiff to erect a high school building for the contract price of $24,000. Accordingly, the building was constructed and its value, as stipulated since completion, is $30,000. The plaintiff has received $19,769.10. There is a balance due and unpaid of $4,295.90, with interest. In 1914 an action to enjoin the school district, its officers, and the plaintiff herein, was instituted by a resident taxpayer of the district to enjoin further issuance or reception of warrants in payment of outstanding warrants for the contracts of constructing such building. In that case (Anderson v. International School Dist. 32 N. D. 413, L.R.A.1917E, 428, 156 N. W. 54, Ann. Cas. 1918A, 506), this court in November, 1915, held that the contract created a present debt against the district, greatly in excess of the constitutional debt limit, and that to the extent of such excess, the

contracts were void, and enjoined further payments thereupon. This action, accordingly, has been instituted not to enforce the contract, but upon the equitable doctrine that no person, not even a school district, shall be permitted unjustly to enrich itself at the loss of another. It is stipulated in this record that the school district is and was indebted, at the time of the commencement of this action, for an amount equal to 5 per cent of the assessed valuation of the taxed property of such district, and that the plaintiff herein has no remedy excepting such as the court in equity may grant to him. The theory of plaintiff's action therefore is to disaffirm the contract and to place the parties *in statu quo* by requiring the school district to restore the property which it has received without cost, or be declared a trustee for the use of it and liable for the reasonable rent or the value of the use of the same, or for its return. The trial court, upon findings made, determined that the plaintiff was entitled to be reimbursed for the unpaid balance due him, and that it was impractical to restore to the plaintiff the material and labor furnished. That therefore the school district should remunerate the plaintiff for the value thereof. Accordingly, in July, 1918, judgment was rendered for the plaintiff for $5,528.82, from which this appeal has been taken. The sole question involved, therefore, is the right of the plaintiff in equity, upon the facts to obtain relief for the amount unpaid and due him in the construction of such high school building.

The respondent frankly concedes that the consideration is involved whether, under the facts, any form of relief may properly be awarded to him. He further concedes a different rule to apply to municipal corporations in seeking to enforce restitution for benefits received under contracts than that which applies to natural persons or private corporations. He further asserts that where restitution will impose no additional burden upon the taxpayers it may be enforced according to the ordinary principles of quasi contracts.

Equity properly recognizes that a municipal corporation should not be permitted to take the property of another, and receive the benefits thereof, and thus be enriched through the loss of another, without compensation.

On the other hand, constitutional limitations upon the creation of indebtedness of municipalities are mandatory restrictions, enacted for the purpose of curbing the taxing power and of restraining excessive

expenditures that entail tax burdens. It is well settled that those who deal with municipalities are bound to take notice and be bound by these constitutional restrictions. Accordingly, it must be recognized that, in applying equitable relief in the present form of action, equity must not accomplish by indirection what the law has prescribed must not be done directly.

In accordance with the stipulated facts it is impossible to restore to the plaintiff the building erected without destroying property of the municipality. It is likewise impractical to segregate or detach that portion of the building which represents the excess moneys therein owing to the plaintiff. It is likewise clear that the imposition of a judgment to pay such amount, or the requirement that a rental be paid for that portion of the building represented by plaintiff's moneys unpaid, would impose a burden upon the school district in excess of the constitutional restrictions. It is stipulated that the school district has been compelled to and does levy, the maximum rate prescribed by law in order to maintain its schools. Although, in equity recovery may be permitted in such cases, where no additional burden is thereby placed upon the municipality in excess of the constitutional debt limit, or where the property itself can be identified, segregated, and restored to the parties without injuring the municipality or its property by so doing, nevertheless, in upholding the constitutional restrictions absolutely imposed, relief upon equity principles cannot be granted where this cannot be accomplished. Litchfield v. Ballou, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; Grady v. Pruit, 111 Ky. 100, 63 S. W. 283; Grady v. Landram, 23 Ky. L. Rep. 506, 63 S. W. 284; McGillivray v. Joint School Dist. 112 Wis. 354, 58 L.R.A. 100, 88 Am. St. Rep. 969, 88 N. W. 310. See Goose River Bank v. Willow Lake School Twp. 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; Engstad v. Dinnie, 8 N. D. 1, 12, 76 N. W. 292.

It therefore follows that the trial court erred in entering judgment for the plaintiff. The judgment is reversed, with directions to enter judgment for the defendant, dismissing the action. The appellant will recover costs of this appeal.

GRACE, J. I concur in the result.

ROBINSON, J. (dissenting). No opinion of the court should ever be written with the appearance of cynical indifference to the cause of right and justice. If we must sustain plunder and theft it should be done with tears of regret. Hence, from the majority opinion I do most strenuously dissent, and hope that on a proper petition for rehearing a better opinion may prevail.

The case presents an appeal by Portal City School District from a judgment against it for $5,000, the balance due on a just and honest contract for the erection of a schoolhouse. In 1913 the schoolhouse was erected and accepted by the district, and though the contract price was $24,000 it appears and is conceded that the schoolhouse is worth $30,000. It is just the building that the city needed and demanded. The defense is on the constitutional provision which limits the debt of a school district to 5 per cent of the assessed valuation of its taxable property. § 183. The purpose of the Constitution was to fix the debt limit at 5 per cent of the true and full value of all taxable property, because under the Constitution and the law it is provided that all property must be assessed at its true and full value. But in the year 1913 there was no such assessment in the city of Portal, nor in Burke county, nor in any other county of the state. All the taxable property was assessed at about 20 per cent of its true and full value. Hence, by sticking to the letter of the Constitution and disregarding its spirit and purpose the court does hold, in effect, that by assessing property at 20 per cent of its true value the debt limit was reduced to 1 per cent of the real value, that under such assessment the debt limit did not permit a contract to pay for a schoolhouse any sum in excess of $19,000. Such was the decision of the court in a suit against the district by one Anderson. 32 N. D. 413, L.R.A.1917E, 428, 156 N. W. 54, Ann. Cas. 1918A, 506. The decision was grossly erroneous and inequitable and unjust. The cause of it was that both the court and counsel wholly overlooked two cardinal points: (1) That a court of equity should never exercise its equitable jurisdiction or grant an injunction for the purpose of doing wrong and iniquity; (2) that, in truth, the contract to pay $24,000 did not exceed the debt limit. It did not exceed 2 per cent on the real value of the taxable property of the district. In the Anderson suit both the court and counsel overlooked the patent fact that the property had been assessed at only a small part of its full and true

value, and that the real purpose of the Constitution was to limit the debt of a school district to 5 per cent of the true and full value of its taxable property. The Constitution is not a mockery, and it did not anticipate a mock assessment.

In this case, under a proper complaint, it should have been proven, if not conceded, that in 1913 the total of all debts contracted by Portal City School District did not exceed 1 or 2 per cent of the true and full value of its taxable property, or the court should have taken notice of that fact though it is not alleged in the complaint.

Portal City is a place of no small importance. It is on the Soo Railway and on the northern boundary line of Burke county and on the international boundary line. In 1913 it was incorporated with a population of 568. Its assessed valuation was $165,000. Its real valuation was over $600,000. In 1913 the average assessed valuation of land was as follows: In Burke county, per acre, $3.50; Cass county, $7.50; Grand Forks county, $6.50; Golden Valley county, $3.25; Ransom county, $5; Richland county, $6. In the cities and villages all property was assessed at no more than 20 per cent of its value. As the complaint does not show the character of the assessment and the true value of the property it is radically defective. But under the statute a pleading may be amended at any time before the trial, or during the trial, or on an appeal. A defective pleading does not justify any court in trampling on justice or in aiding or abetting a robbery. It is the business and the duty of this court to correct its own blunders and the blunders of counsel, and to vindicate the cause of justice. And it is time for the court to cease building error upon error by following erroneous and blundering decisions. It is time to teach the city of Portal that its children should not be educated in a $30,000 schoolhouse secured in whole or in part by legal theft. The city is old enough and rich enough to be honest and to give unto Cæsar that which is Cæsar's. The plaintiff is honestly and justly entitled to recover the balance due for the erection of the schoolhouse, and the judgment for the same should be affirmed. If not, then the case should be remanded, with directions to amend the pleadings and to submit evidence and findings on the true and full value of all the taxable property of the Portal City School District in the year 1913. And as the facts above stated are confessedly true, on such an amendment and such additional evidence

the judgment should of necessity be the same as that from which the appeal has been taken. Hence, there is no cause for reversing the judgment in order to go through the formal matter of reinstating it on correct pleadings and evidence.

ANTON LIEN, Respondent, v. THE SAVINGS, LOAN, & TRUST COMPANY, a Domestic Corporation; G. S. Youmans, President of the Savings, Loan, & Trust Company, a Domestic Corporation; and Anthony Walton, Secretary of the Savings, Loan, & Trust Company, a Domestic Corporation, Appellants.

(174 N. W. 621.)

Mandamus — equitable discretion of court.

1. In an action for mandamus the court may exercise equitable discretion and refuse the writ where the purposes for its issuance are not shown clearly to be proper.

Mandamus — nature of action — not triable *de novo* before the supreme court.

2. Although an action for mandamus in this state is a special proceeding and upon appeal is not triable *de novo* before the supreme court, nevertheless the court, in the exercise of its equitable discretion, will search the conscience of the transaction and if improper motives are shown deny the issuance of the writ.

Mandamus — equitable discretion of supreme court — weight accorded to findings of trial court.

3. In a special proceeding for a writ of mandamus, where the court exercises its equitable discretion, the same conclusiveness is not accorded to the findings of the trial court as are accorded to such findings in a law action tried to the court, a jury being waived.

Mandamus — examination of records of corporations — effect of improper motives, or purposes in asking examination.

4. In a special proceeding seeking the writ of mandamus to compel the right of a stockholder to examine the records and transactions of a corporation

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NOTE.—On right of stockholders to inspect books of the corporation, see notes in 45 L.R.A. 446; 20 L.R.A.(N.S.) 185; 30 L.R.A.(N.S.) 290; and 42 L.R.A.(N.S.) 332.

On right of stockholder to inspect the books of his corporation and the remedies for its enforcement, see note in 107 Am. St. Rep. 674.

pursuant to § 4560, Comp. Laws 1913, the court will not presume that such statute was enacted with the legislative intent to permit one, by its use, to perpetrate a wrong upon another, or to act as a license to a stockholder to use his right for the purpose of injuring or destroying his own corporation and to benefit or promote a rival corporation; and, in the exercise of its equitable discretion, it will refuse such writ where such or analogous improper motives or purposes are shown, expressly overruling to such extent Schmidt v. Anderson, 29 N. D. 262.

Mandamus — inspection of books by attorney for stockholder.

5. In an action for mandamus to enforce the right of a stockholder to inspect the records, books, and assets of a corporation, it is *held* that the court, in the exercise of its equitable discretion, will refuse to permit an attorney for the stockholder to examine and make such investigation, where improper conduct and improper motives on his part are shown.

Mandamus — inspection of books by attorney for stockholder.

6. In such action where the attorney for the stockholder upon a previous occasion had effected a sale of stock in the defendant corporation through means of a threat that he would occasion worry and expense to the corporation by an examination of its assets, and where in the instant case he sought again to sell the stock of his client to such corporation, and if it was not purchased to make a complete and full investigation of all its assets, it is *held* that this court, in exercising its equitable discretion and in searching the conscience of the transaction, will refuse the writ so far as it permits or directs the examination of the records, books, and assets of such corporation by such attorney.

Opinion filed July 19, 1919. Rehearing denied September 8, 1919.

Action to compel the inspection of books, records, and assets of the defendant corporation by the plaintiff and his attorney.

From a judgment awarding peremptory writ of mandamus in favor of the plaintiff, in the District Court of Ward County, *Leighton*, J., defendants have appealed.

Judgment modified, with directions to the trial court to refuse permission to make such examination by such attorney.

Fisk & Murphy, for appellants.

While some courts appear to go so far as to hold that the motive or purpose of a stockholder in seeking inspection is immaterial under the statute, still the courts are quite unanimous in agreeing that the right

to the writ is discretionary. White v. Manter, 109 Me. 408, 42 L.R.A. 332, 84 Atl. 890.

We believe that the proper rule would be to qualify the so-called right of inspection and make it subject to the discretion of the court to refuse inspection when desired for some evil, improper, or unlawful purpose. Weihenmayer v. Bitner, 88 Md. 325, 45 L.R.A. 446, 42 Atl. 245; Eton v. Manter, 114 Me. 259, 95 Atl. 948; State v. Mondia & Y. Stage Co. 110 Minn. 193, 124 N. W. 971, 125 N. W. 676.

There is an implied limitation upon the statutory right, that the same shall not be exercised from idle curiosity nor for improper or unlawful motives. Weihenmayer v. Bitner, supra, 45 L.R.A. 446, and note; Kuhback v. Irving Cut Glass Co. 20 L.R.A.(N.S.) 185; White v. Manter, 42 L.R.A.(N.S.) 332, and note; State ex rel. Brumley v. Jessup & M. Paper Co. 30 L.R.A.(N.S.) 290.

Lewis & Bach, for the respondent.

In the United States the prevailing doctrine appears to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company's books, although they have no power to interfere with the company's management. Guthrie v. Harkness, 50 L. ed. 130, 132.

The right of a stockholder to examine the books for any motive whatever, so long as the purpose of the examination is not to aid a crime, is thus fully established in this state, by statute and the decision of this court construing it. The overwhelming weight of authority elsewhere is in favor of such a construction of the statute. 7 R. C. L. pp. 322, 323; Schmidt v. Anderson, 29 N. D. 262; Weihenmayer v. Bitner (Md.) 45 L.R.A. 446; Werner v. Chicago City R. Co. (Ill.) 92 N. E. 643; Kimball v. Dern (Utah) 35 L.R.A.(N.S.) 134; Johnson v. Langdon (Cal.) 87 Am. St. Rep. 156; State v. St. Louis & S. F. R. Co. (Mo.) 29 Mo. App. 301; Cincinnati & V. Co. v. Hoffmeister (Ohio) 48 L.R.A. 732; People v. Keesville A. C. & L. R. Co. 106 App. Div. 349.

Judicial discretion is reversed only for abuse, not for exercise in a manner in which the reviewing court might not itself have exercised it. State v. Fabrick, 16 N. D. 94.

A stockholder may have assistance in the examination, and may make copies. It is unnecessary that the statute shall specifically so provide.

See notes in 45 L.R.A. 446, 449, 450, and 20 L.R.A.(N.S.) 185, 197, where numerous cases are quoted; also 7 R. C. L. 324, § 301.

People v. Consolidated Nat. Bank, 105 App. Div. 409. The right of inspection carries with it the right to make such extracts from the books as would enable the shareholder to retain the information disclosed by the inspection.

Clawson v. Clayton (Utah) 93 Pac. 729. The right is not a personal one in the sense that the examination must be personally conducted, but the right thus conferred may be exercised by the agent.

Ellsworth v. Dorwart (Iowa) supra. "Plaintiff had the right to have his attorney with him, and the attorney had the right to an amanuensis." Mutter v. Eastern & M. R. Co. L. R. 38 Ch. Div. 92, quoted in 35 L.R.A.(N.S.) 138.

"The president and directors of every corporation shall keep full, fair, and correct accounts of their transactions, which shall be open at all times to the inspection of the stockholders or members." Weihenmayer v. Bitner, supra.

BRONSON, J. This is an action for mandamus by a stockholder to compel the inspection of corporate records and books. The defendants have appealed from the judgment of the trial court awarding a peremptory writ. The facts are substantially as follows:

The plaintiff is fifty-six years old. He is a Norwegian, neither understanding nor reading English. He is a single man, and for the last ten years has worked out, earning on an average of $100 to $125 per year. In September, 1916, he bought thirteen shares of stock in the defendant company of the par value of $100 per share, paying $120 per share. Later he bought thirteen shares more. Ever since he owned the stock he has received 12 per cent dividends January 1st of each year. His own attorney in the record terms his client to be a subnormal specimen. The plaintiff went to the annual stockholders' meeting in January, 1917 and 1918, and to a special stockholders' meeting in October, 1917. He testifies that at one of these meetings when they were voting to change the name he got the impression that the stock was not very good. He does not remember clearly. He became afraid that he was going to lose his money. In March or April, 1918, he went to see Attorney Nestos. He told his attorney that he wanted $3,120 for his stock. Nestos saw the president of the company and inquired

concerning the circumstances under which the stock was sold to the plaintiff. This was explained, and the president in addition offered to loan the plaintiff up to the par value of the stock. Nestos afterwards advised the president that the plaintiff went home satisfied. Since February 10, 1918, the plaintiff has worked for one Peter Hall. Plaintiff had Peter Hall write a letter to the president about the stock. Later when the plaintiff wanted to see someone in Minot about the stock, Hall sent him to one Rasmussen. He saw Rasmussen. He went with Hall to see an attorney, his present counsel. Mr. Hall prepared a power of attorney in English, translated it to the plaintiff, and plaintiff signed it. This power of attorney authorized his attorneys, his present counsel, to handle for him his certificates of stock, and to examine the books of the company if they deemed it advisable, and to bring such action as they deemed proper to protect his interests. One of such counsel testifies that on June 29, 1918, he went to defendants' offices, saw the president, Mr. Youmans, and advised him that he had been employed by plaintiff to sell to the president the stock if he desired to buy, or otherwise, to examine the books of the company. He further testifies that Youmans used rough language towards him, refused to either buy the stock or permit examination of the books or records of the corporation. Thereafter he made a written demand to examine, with a stenographer and accountant, all the records, books, and assets of the corporation, and upon refusal of the corporation this action was instituted by the issuance of an alternative writ of mandamus. There is testimony by the plaintiff that he desires to have the books investigated. There is also testimony by his attorney that he has no improper motive in desiring to make such investigation. However, it appears in the evidence that plaintiff's attorney suggested the idea of investigating the books to the plaintiff; that his attorney first talked about the matter with Rasmussen; that said Rasmussen is president of the First National Bank of Carpio; that the president of the defendant bank had litigation with Rasmussen in reference to Savings Deposit Bank of Minot, in which Youmans was formerly interested; that Youmans is also in a new bank at Carpio, a competitor of the Bank of Rasmussen; that the relation between such parties is far from friendly. Upon cross-examination the plaintiff admits that he wants to sell his stock; that he wants $3,120 for it; that he never tried to sell it to anyone except

to Youmans; that he never made any complaint to Youmans that the stock was not worth the money he paid for it; that he never tried to borrow any money from the company or Youmans on it, and that he himself never went to Youmans and demanded that he buy the stock. The record discloses, pursuant to the testimony of Youmans, that at a previous time the attorney for the plaintiff handled some other stock against the company in a similar way; that he came to Youmans with the threat that if Youmans did not buy that stock he would examine the assets to the last and make all kinds of trouble and unnecessary expense and trouble, that he would bring his stenographers there; that such attorney made threats every time he came to the office that he was going to come in with his attorneys and put the defendants' company to much expense. On rebuttal this attorney states that he made no threats that he knew of, although he admits that, on such previous occasion, he offered to sell such stock to Youmans, which Youmans said he could not take. That then he made a demand to examine the books, which request was granted and arrangements made therefor. That after Youmans concluded to buy the stock, he, Youmans, inquired of him why he wanted to examine the books, and he replied that he figured that Youmans did not want his books examined.

The president of the defendant company testifies that he is willing to permit the plaintiff in any manner to examine the books or papers and also any attorney for the plaintiff, if his attitude and behavior were satisfactory to him. That it was the threats and intimidation that occasioned the action taken.

This action came to trial in November, 1918, and, in January, 1919, the trial court made findings in favor of the plaintiff, pursuant to which a peremptory writ of mandamus was entered requiring the appellants to submit to an examination of all their records, books, and assets by the plaintiff, his counsel herein, or such other attorney as plaintiff may hereafter select, together with the assistance of a stenographer and accountant.

The appellants have assigned some ten specifications of error. These are deemed to be without merit excepting as they concern the statutory right of a stockholder to examine the books and records of a corporation, and the right of the court in a mandamus action to exercise an equitable discretion where improper motives are disclosed in the record.

This appeal is not triable *de novo*. State ex rel. Bickford v. Fabrick, 16 N. D. 94, 112 N. W. 74. The usual presumption is accorded that the findings of the trial court are correct. Nevertheless, proceedings to secure a writ of mandamus in this state are special proceedings. Chap. 42 (Comp. Laws 1913, §§ 8457–8469). Although, historically and generally, mandamus is deemed to be a law action, yet, it is to be exercised upon equitable principles. 26 Cyc. 145. Every mandamus, in a manner seeks the aid of equity. It ordinarily will issue where there exists no adequate remedy at law. As a special proceeding it is tried to the court, and not to a jury. There is manifest reason why the court in the exercise of this writ should search the entire conscience of the transaction. It is evident, therefore, that the same conclusiveness should not attach to the findings of the trial court in such special proceeding that do attach to such findings, where a law action is tried to the court, a jury being waived.

The trial court, in its findings, determined that no improper motives for the inspection of the books and records were shown or established, and, in a memorandum opinion, stated that it is immaterial what the motive may be where the stockholder seeks to use the right granted to him by the statute.

The respondent cites some authorities to the effect that the right to the writ is not discretionary. Likewise, Schmidt v. Anderson, 29 N. D. 262, 150 N. W. 871, is cited, wherein it is directly stated that it is immaterial if the stockholder desires to inspect the books in the interest of a rival corporation, or to aid him in securing business which might otherwise go to a corporation whose books he seeks to inspect, upon the ground that the statute (Comp. Laws 1913, § 4560) is mandatory, and where the right is shown it is absolute. As far as the language in such case seeks to assert or imply that in a special proceeding of mandamus, no equitable discretion exists, and that the court must issue the writ like a mere adding machine, upon the showing that a person is a stockholder and desires to make inspection, no matter what his motives may be, the case should be and is hereby expressly overruled. See Eaton v. Manter, 114 Me. 259, 95 Atl. 948; State ex rel. Humphrey v. Monida & Y. Stage Co. 110 Minn. 193, 124 N. W. 971, 125 N. W. 676; notes in 45 L.R.A. 446; 20 L.R.A.(N.S.) 185; 42 L.R.A.(N.S.) 332; and 107 Am. St. Rep. 674. It is shocking to the American sense

of law and justice that a statutory right, through the protecting and directing arm of the law, may be made an instrumentality of perpetrating a wrong. Section 4560, Comp. Laws 1913, grants to a stockholder full right to inspect the records, books, and all the business transactions of his corporation. By such inspection he may learn, or even compile and preserve (Comp. Laws 1913, § 1016), all of its business and trade secrets. It is a wholly beneficial law serving to protect and apprise stockholders concerning their property rights and guarding against wrongdoing, when properly administered and interpreted. No court should presume that this law was enacted with the legislative intent to permit one, by its use, to perpetrate a wrong upon another or to act as a license to a stockholder to use this right for the purpose of injuring and destroying his own corporation and to benefit or promote a rival corporation. Laws are presumed to be enacted for the protection of society and persons in their personal and property rights. There is no presumption that such laws can or may be used for purposes of accomplishing or perpetrating a wrong.

A consideration of the evidence in this record reveals this outstanding feature permeating the entire case of the plaintiff; namely, that the plaintiff desires to sell his stock to the defendant corporation or its president, and that if he cannot so sell, he is disposed to occasion expense and trouble by a vast, laborious examination of all of the assets of the defendant corporation. The defendants are willing, and so assert, in the record, to permit the plaintiff himself to examine the books in any manner, or to permit any attorney that is satisfactory to so do. It is further apparent in this record that this action and this method of procedure has been suggested, initiated, and maintained by the attorney for the plaintiff. He states that his client is subnormal. He is desirous himself to investigate these books. Furthermore, it appears that this very attorney, on a previous occasion, used this statutory right as a means, at least indirectly, of compelling the defendant corporation to buy the stock of his client in order to avoid a laborious investigation. There is no claim in the record that the defendant company is insolvent; that its officers have been guilty of fraud, deception, or improper acts. There is, further, nothing in the record that discloses any refusal whatsoever to give to the plaintiff himself full information concerning the corporation; that shows any dissatisfaction concerning

the plaintiff's stock excepting his mere suspicion. The attorney for the plaintiff states his purpose by testimony proceeding from himself that he sought to sell the stock of his client to this company, and upon their refusal to buy he intended to make a complete investigation and to bring a stenographer and an accountant so to do. The attorney justifies this conduct; he asserts that it is wholly proper for him so to do. It is now necessary for this court to criticize this conduct in no unmeasured terms. The law profession has a code of ethics not excelled by any other profession. It is the duty of the court, as well as the attorneys, who are officers of the courts, to exemplify, by practice, as well as by precept, the high ethics of the profession. It should be unnecessary to state that it is improper for an officer of this court, an attorney, to seek to compel the sale of the stock of his client to a corporation for the benefit of himself or his client, upon the threat, express or implied, to use himself the statutory right of his client to force such sale and to occasion embarrassment or expense to the corporation. Such conduct is not only repugnant to the high sense of a lawyer's duty in enforcing the rights of his client upon the ethical grounds, but is repugnant to the sense of fair dealings between man and man. See A. B. A. Canons Ethics, §§ 19–30, 794, 2 C. L. 1913. Upon this record, such attorney for the plaintiff is not entitled to the aid of the court through a writ of mandamus permitting him and his assistants to examine and inspect completely all of the records, books, and assets of the defendant corporation. The trial court erred accordingly in so directing. The appellants have conceded in the record their willingness to have the plaintiff or any suitable party that he may desire to assist, to examine in any manner the books and records. The law grants this right to the plaintiff; it is conceded by the appellants. The court will enforce that right. This appeal therefore practically concerns such attorney, his conduct, and his insistence that he personally is entitled to make such inspection. It would seem that this appeal might well have been avoided, after the appellants made the concession in the record, by eliminating the personal desire of the attorney to make such examination.

It is accordingly ordered that the peremptory writ of mandamus herein be vacated, with directions to issue a new peremptory writ, without costs, permitting the plaintiff, and any person or persons necessary to assist him, suitable to the parties, to make inspection of any and all

records, books, and business transactions of the defendant company; and in the event that the parties are unable to agree upon a person or persons necessary to assist such plaintiff, the court shall appoint some disinterested person or persons, who will be obligated by the court not to divulge or give any information secured by such examination except to the plaintiff; such inspection to be reasonably conducted within business hours as the court may designate. The appellants will recover the costs of this appeal.

GRACE, J., concurs.

ROBINSON, J. I concur in the result and in the censure of the proceedings by counsel.

BIRDZELL, J. (concurring in part and dissenting in part). Not being in accord with the majority of the court in all the reasoning leading to the conclusion arrived at, and believing that the conclusion is in part erroneous, I find it necessary to state the facts as I see them in order that my views of the case may be better understood.

This is an appeal from a judgment awarding to the plaintiff a peremptory writ of mandamus. The writ directs the defendants to forthwith allow the plaintiff, by and through his attorney, John H. Lewis, together with such accountant and stenographer as the plaintiff or his attorney may bring with him for such purpose, to examine all of the books, papers, records, and assets of the defendant corporation; to make copies thereof, such examination and inspection to be made at any time during the business hours of the corporation or from 9 A. M. to 3 P. M. of every day except Sunday and legal holidays. An alternative writ of mandamus was issued by the district judge, based on the petition and affidavit of John H. Lewis, and the affidavit of one William Bakeman. Upon the hearing on the return day of the alternative writ, the following facts were established by the testimony of witnesses: Anton Lien, the plaintiff, some time prior to the commencement of this proceeding, became the owner of fifty-two shares of stock of the par value of $2,600 in the Savings, Loan, & Trust Company, having purchased the stock at 120 or for the price of $3,120. So far as it appears from the record, he purchased the stock voluntarily and without any special solicitation

on behalf of anyone representing any of the defendants. During the time the plaintiff was a stockholder, he had received annual dividends of 12 per cent upon his stock. Early in the spring of 1918 the plaintiff consulted R. A. Nestos, an attorney in Minot, with reference to his investment in the defendant company, whereupon Nestos made inquiries of the defendant Youmans, president of the company, the results of which were evidently communicated to the plaintiff and served to satisfy him, at least for the time being. In the month of June, 1918, the plaintiff consulted John H. Lewis, another attorney, and on the same day gave to his firm a power of attorney to handle his certificates of stock, to examine the books of the company, and to bring any action necessary to protect his interests. Prior to the time he consulted Lewis, the plaintiff was unacquainted with him, and it appears that he was directed to Lewis by S. J. Rasmussen, president of the First National Bank of Carpio, North Dakota, or by P. O. Hall. Lien had done business with Rasmussen's bank in Carpio, and it seems that there was some business rivalry between Rasmussen and the defendant Youmans. Hall had been acquainted with Lien for some thirteen years, Lien having worked for him at different times during that period. On the occasion of Lien's first visit to Lewis's office, Hall accompanied him and acted as interpreter. On or about June 29th, Lewis went to the office of the defendant corporation and interviewed the defendant Youmans, its president, informing him that he had been employed by Lien to sell Youmans his stock, or, if the latter did not desire to buy the same, to examine the books of the defendant corporation; and Youmans indicated that he did not want to buy the stock, and that he would not allow Lewis to examine the books of the defendant corporation without an order of the district court. On October 18, 1918, Lewis, accompanied by William Bakeman, went again to the office of the defendant corporation and served upon the defendant Walton, the secretary of the corporation, a written demand that he be permitted to examine the books, papers, records, and assets of the corporation; whereupon Walton referred Lewis to Youmans, upon whom he also served a duplicate of the demand. After reading the demand, Youmans refused to comply with it. It appears that Youmans manifested some anger on this occasion, and, judging from the record, the provocation consisted of recollections of a prior unpleasant experience with the same attorney when he had

made a similar demand on behalf of a client whose stock was ultimately purchased by Youmans personally. On that occasion, as well as this, the demand was in the alternative, that Youmans purchase the stock or permit an examination of the books on behalf of the client desiring to sell.

Youmans testified that he would have been glad to have let Mr. Lien, personally, look over the books if he wished to do so, and that any stockholder could get anything he wanted by coming like a gentleman and asking for it; also that he would be willing to let a stockholder's attorney look at them except when he comes "in a threatening attitude and tries to force his way," but that he was not willing to allow him to bring a stenographer and an accountant without an order of the district court. He also gave as a reason for the refusal, to use his own words, that he "figured that Lewis was after—that he was in a conspiracy with those other fellows and my competitors, especially with Rasmussen at Carpio; that what he wanted to do and they wanted to do was to get possession of the list of stockholders and their postoffice addresses, so that they could prejudice them and get them to start similar actions."

It appears that the investment of the plaintiff in the stock of the defendant corporation comprises the major portion of his property, and represents the accumulation of his earnings extending over a number of years.

The question for decision upon this record is the right of the stockholder Anton Lien to inspect the books and records of the defendant corporation with a view to ascertaining the value of his stock, so that he might intelligently deal with the same. We cannot, with propriety, dispose of this right by considering it as secondary to any personal quarrel there may be between Youmans, the president of the defendant company, and Lewis, the plaintiff's attorney.

Section 4560, Compiled Laws of 1913, requires all corporations for profit "to keep a record of all their business transactions; a journal of all meetings of their directors, members, or stockholders, with the time and place of holding the same, whether regular or special . . ." and that "the record must embrace every act done or ordered to be done; who were present and who were absent;" etc. It also requires that "all such records *shall be open* to the inspection of any director, member, or stockholder or creditor of the corporation." The same section provides

for the keeping of a record "to be known as the 'stock and transfer book,' in which are required to be entered alphabetically the names of the stockholders." This book is required to be *kept open* to the inspection of any stockholder, member, or creditor.

This statute treats of two sets of records,—(1) a record of business transactions and a journal of meetings; and (2) a stock and transfer record. The first is required *to be open* to inspection and the second *to be kept open* to inspection. If there is any distinction between these two requirements, it is in favor of a more ready access on the part of the stockholders to the stock and transfer book than to the records of business transactions and journal of meetings. The distinction between the right of inspection of the two classes of records designated in our statutes is one that has received both legislative and judicial recognition in at least one state (New York). See People ex rel. Clason v. Nassau Ferry Co. 86 Hun, 128, 33 N. Y. Supp. 244; People ex rel. Gunst v. Goldstein, 37 App. Div. 550, 56 N. Y. Supp. 306; People ex rel. Harriman v. Paton, 20 Abb. N. C. 195; People ex rel. Callanan v. Keeseville, A. C. & L. C. R. Co. 106 App. Div. 349, 94 N. Y. Supp. 555. The right to inspect the stock record is there held to be broader than the right to inspect the record of business transactions. It seems clear that our statute gives to every stockholder the right to ascertain who are co-owners of the stock of the corporation, and this right is not at all limited by the fact that there may be a large number of stockholders in the enterprise. We do not find in the statutes anywhere evidence of a legislative intention to protect as confidential the list of stockholders in banking corporations. On the contrary, § 2116, Compiled Laws of 1913, requires that a duplicate copy of a statement showing the full and correct list of stockholders, with names and residences, be filed with the county auditor, and no provision is made that will protect the list so filed from inspection by anyone who may be interested therein. Thus, so far as the principal objection made by Youmans is concerned (that he feared his competitors desired to obtain a list of the stockholders), it is groundless, as the list could presumably be obtained from another source; at any rate it is not a confidential list.

No showing is made in this record to the effect that this particular examination would subject the defendant to any more inconvenience than would be necessarily incident to any examination at any time. It

goes without saying that any examination had under the provisions of § 4560 must be so ordered as to be reasonable from a practical viewpoint, but since there is nothing in the record from which it can be assumed that the inspection ordered is unreasonable, there is no occasion to modify the writ in this particular. The principal objection to the inspection being groundless, and the inspection permitted being reasonable from the standpoint of inconvenience to the defendant, it remains to be seen whether it should be denied on account of the motives of the plaintiff or his attorney.

Counsel for the appellant, in their argument, request the court to reexamine the question of law decided in the case of Schmidt v. Anderson, 29 N. D. 262, 150 N. W. 871, wherein it was held that the provisions of § 4560, Compiled Laws of 1913, were mandatory, and that the right of inspection would not be denied on account of the fact that the stockholder desired to make use of the information obtained to aid a rival in business. In the opinion of the writer, it is unnecessary to reexamine the holding in the case referred to; for, upon a careful examination of the record presented, he is convinced that there is no evidence to warrant a finding that the plaintiff was actuated by any improper motive. While there is some evidence from which it might be inferred that the attitude of the plaintiff's attorney was threatening; that he was likely to make improper use of the legal right of the stockholder to know the condition of the corporation; and that he threatened to subject the corporation to the inconvenience of an inspection as a means of coercing the president of the corporation to buy his client's stock,—the writer is satisfied from the record that the client was not acting from any improper motives in exercising his right. In fact, there is no evidence whatever that he was acting from bad motives. It is his right to safeguard his own hard-earned savings that is involved, and this, as above indicated, must not be subordinated to any personal quarrel between an attorney and an officer of the corporation.

Since there is nothing in this record which can, in any event, abridge the stockholder's right, the principle involved in Schmidt v. Anderson, *supra*, is clearly not controlling here.

On account of the facts, however, which go to show that business rivals of the defendants may be more or less interested in this proceeding, it is thought proper to remark that, in case any misuse of the informa-

tion is made or threatened, the defendants have their remedy to prevent it.

Since it appears that the objections raised by the defendants are based upon an apparent connection between the plaintiff's attorney and parties whose interests conflict with those of the defendants, the question of examination through agents is involved. The propriety of allowing the examination to be made by the attorney designated is not, however, urged by counsel. It would seem to be clear that if the stockholder be a mere tool of the designing competitors, and that fact appears to the reasonable satisfaction of the court, the court would be amply justified in refusing to permit the agents or attorneys so asking to avail themselves of the stockholder's right to have access to the records of the corporation. The statute does not throw the records of the corporation open to competitors to make any use thereof that they may see fit. It only gives the right to the stockholder, director, or creditor; and while the free exercise of the right thus defined in the statute might readily result in giving information to those not fairly entitled thereto, and while it may be difficult to protect the corporation from such consequences, nevertheless, where the likelihood of abuse through designing agents fairly appears to the court, it should not actively aid those who are not stockholders in carrying out such illegal designs. If, therefore, it should appear that there is reasonable ground to suspect the presence of improper motives on the part of those who are active in arousing the interest of the stockholder, the court should require the right of inspection to be so exercised as not to aid in the unlawful design. This it might do by suggesting the appointment of another agent. Manifestly, it is not particularly the function of an attorney at law to act as an expert accountant or appraiser of securities. He performs his full duty when he sees that the rights of his client are protected. Neither is it any part of the duties of an attorney, as such, to act as a selling agent for stock a client may own in a corporation, though he may render valuable advice in that connection. The attorney, then, cannot complain of any order designed to prevent the information from being misused.

In the case of State ex rel. Humphrey v. Monida & Y. Stage Co. 110 Minn. 193, 124 N. W. 971, 125 N. W. 676, it was sought by mandamus to compel the defendants to permit a stockholder to examine the books and accounts of the corporation. In answer to the petition, the

defendant alleged that the relator and one of his attorneys had entered into a conspiracy to injure the corporation, and that they desired the information for the purpose of harassing and annoying the corporation and to aid its competitors in business. It appeared upon the hearing that there had been friction between the attorney mentioned and the company for some time prior to the institution of the mandamus proceedings, and from this fact the court found as a legal conclusion that the petitioner was entitled to the peremptory writ, but that the writ should provide that the petitioner or such attorney or agent as he may select, other than the one already designated, should be allowed to inspect the books and records. It was held on appeal that, on account of these facts, the portion of the order of the court excluding the particular attorney was justified, and the distinction referred to above, and which we deem to be sound, between the right of the stockholder to inspect and the right of a particular agent or attorney to conduct the investigation, was drawn. The supreme court, however, left it to the discretion of the trial court to determine the sufficiency of the facts warranting the exclusion of the particular attorney.

In the *instant case there is a finding that there is no evidence of a motive on the part of the plaintiff in seeking to examine* the records of the corporation to vex, annoy, and harass the corporation, or to aid its competitors or persons hostile to it. But there is no finding with reference to the attitude of the agent or attorney, or as to whether, in view of past relations, it were deemed by the court to be inadvisable that he be permitted to inspect the books; although, as a conclusion of law, it is stated that the "plaintiff is entitled either by himself or by his attorney, J. H. Lewis, or such attorney as he may hereafter select to examine," etc.

As indicated above, counsel for the appellants have not argued that the attorney designated in the power of attorney should be excluded from participation in any examination that might be ordered; and, in the absence of such contention on this appeal, it has seemed to the writer that the cause should be more properly remanded to the trial court for a finding on such matter in the light of the views of this court as expressed concerning it, and that as so modified the judgment should be affirmed.

CHRISTIANSON, Ch. J. (concurring in part and dissenting in part). The plaintiff who is a stockholder in the defendant corporation instituted a mandamus proceeding to compel the defendants to permit plaintiff to examine the books of the corporation. The record shows that the different witnesses, including the plaintiff, his attorney, and the officers of the defendant corporation, appeared personally before the trial court, and were sworn and examined as witnesses. The trial resulted in findings and conclusions in favor of the plaintiff, awarding the plaintiff a peremptory writ of mandamus as prayed for.

It is undisputed that the plaintiff is a stockholder in the defendant corporation, and has invested in its stock the greater portions of the savings of a lifetime. The right of a stockholder to inspect the books of a corporation was recognized at common law; and in this state such right is clearly and unequivocally granted by § 4560, Comp. Laws 1913, which requires all corporations for profit "to keep a record of all their business transactions; a journal of all meetings of their directors, members or stockholders, with the time and place of holding the same, whether regular or special . . . ," and that "the record must embrace every act done or ordered to be done; who were present and who were absent," etc. It also requires that "all such records *shall be open* to the inspection of any director, member, or stockholder or creditor of the corporation." Not only is the language of the statute plain and specific, but it was construed by this court in Schmidt v. Anderson, 29 N. D. 262, 150 N. W. 871. That decision was handed down January 9, 1915, while the fourteenth legislative assembly was in session. If the rule announced in Schmidt v. Anderson was contrary to the intention of the lawmakers, it could readily have been changed by legislative enactment during the 1915, 1917, or 1919 sessions of the legislature. Such change could have been proposed by the people by initiative petition to the legislative assemblies which convened in 1917 and 1919. Yet, although three successive legislative assemblies impliedly assented to the construction placed upon § 4560 in Schmidt v. Anderson, a bare majority of this court by judicial fiat set aside the established law of the state, and mulcted the plaintiff for costs of the appeal because he relied upon the law of the state, and sought to invoke a right granted to him thereby.

If the agents of the stockholders—the officers and directors—may

refuse to permit a stockholder to exercise the right of inspection which the statute grants, on the ground that his motives are improper, and assert such improper motives as a defense in a mandamus proceeding, then the right granted by the statute will oftentimes be entirely defeated. When cause for examination arises there is generally more or less friction. The officers can always raise the question of motive, and impose upon the stockholder the burden of litigating this question. In many instances such burden would of itself be sufficient to deter the stockholder from attempting to enforce his statutory right. The result in this case is a very apt illustration of what is likely to happen to a stockholder who seeks to exercise the right to inspect,—under the rule announced by the majority members in this case. Here we have an old, illiterate man, who has invested the hard-earned savings of a lifetime in the stock of a corporation. For some reason he becomes apprehensive of the soundness or safety of his investment. He consults an attorney. Of course the only way in which anyone could tell whether there was anything wrong with the management of the corporation was by an inspection of its business records. But such inspection would mean expense. Plaintiff has only one interest,—to preserve his savings. So he authorizes his attorney to sell the stock for what he paid for it, and if that cannot be done to make an inspection. The attorney submits the proposition to the officers of the corporation. Now the attorney is censured for his conduct, and the plaintiff is mulcted in costs, and told that if he wants to make such examination he must engage an expert accountant for the purpose. Well may plaintiff ask: Is this a manifestation of "the American sense of law and justice?" What has become of the right granted to me by the laws of this state? Does it really exist, or is it a mere illusion?

The observation made in the majority opinion, "that there is no claim in the record that the defendant company is insolvent; that its officers have been guilty of fraud, deception, or improper acts," was effectively answered by the supreme court of New Jersey in Huylar v. Cragin Cattle Co. 40 N. J. Eq. 392, 2 Atl. 274, as follows: "To say that they [the stockholders] have the right [of examination], but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority

of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders."

Nor do I believe that the distinction which the majority members attempt to draw between the weight to be given to findings of fact in a case like this, and in other actions at law tried by the court without a jury, is sound. If—as the majority members hold—motive is to be a determining factor, then the reasons for the weight usually given to the findings of fact of the trial court are peculiarly applicable. Motive is a mental state or process which induces an act of volition; a determining impulse. Century Dict. Manifestly the trial judge who sees the parties, and hears their story, and observes their demeanor, is in a far better position to determine such mental state or process than are the members of this court, who have only the cold paper record before them. As was well said by this court in Jasper v. Hazen, 4 N. D. 1, 5, 23 L.R.A. 58, 58 N. W. 454: "Every practitioner of extended experience knows how absolutely essential it is, in order to ascertain the truth from parol evidence, that the tribunal who is to pass upon the evidence should see the witness upon the stand. The printed page containing the evidence gives, oftentimes, a radically different impression from that made at the hearing. The opportunity of observing the witnesses and their interest or lack of interest in the case, their prejudices and passions, their mental capacities and powers of observation and memory, and the use they have made of these powers, their entire deportment on the stand, and conduct under cross-examination,—these and many other circumstances that attend personal observation are undoubted auxiliaries in ascertaining truth. Of all these helps this court is deprived, while the trial court possesses them fully. It is obvious that, if these things be disregarded, mistakes will be made, and injustice be done."

It is well to remember that under the Constitution and laws of this state the district court is invested with power to try and determine all questions of law and fact in cases like the one before us, and that this court has appellate jurisdiction only. Const. §§ 86, 103. If the writ of mandamus is discretionary in cases like the one before us (as the majority members say it is), then manifestly the discretion to be exercised is that of the trial court. And under the most elementary prin-

ciples, this court on appeal can only interfere when an abuse of discretion is shown. I do not believe that anyone can say that there was any abuse of discretion in this case. The judgment appealed from should be affirmed without modification.

O. J. BARNES COMPANY, a Corporation, Respondent, v. M. C. SHEGGERUD, Appellant.

(173 N. W. 950.)

Sales — measure of damages — market value — evidence.

1. Defendant entered into a written agreement whereby he agreed to sell to the plaintiff one carload of potatoes at $1.10 per bushel f. o. b. Winnipeg, and guaranteed safe delivery thereof at Grand Forks, North Dakota. In an action by the plaintiff for damages occasioned by defendant's failure to deliver the potatoes, it is *held* that the measure of damages is the value of the potatoes at Grand Forks over the amount which would have been due to the defendant under the contract, if it had been fulfilled.

Sale — proof of market value.

2. For reasons stated in the opinion it is *held* that there was no proper evidence of the market value of the potatoes at Grand Forks.

Opinion filed July 19, 1919. Rehearing denied September 8, 1919.

From a judgment of the District Court of Grand Forks County, *Cooley,* J., defendant appeals.

Reversed and remanded.

W. J. Mayer, for appellant.

"The general rule with reference to the measure of damages for breach of contract of sale, whether the breach was by the vendor or the vendee, is that the injured party is entitled to recover the difference

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NOTE.—The general rule with reference to the measure of damages for breach of a contract of sale, supported by a great number of cases, is that the injured party is entitled to recover the difference between the contract price of the article sold and the market value thereof at the time and place of delivery, as will be seen by an examination of the cases collated in a note in 57 L.R.A. 193, on damages for breach of contract of sale of article that has no market price.

On effect of contract to ship goods f. o. b. in general, see note in 62 L.R.A. 795.

between the contract price of the article sold and the market value thereof at the time and place of delivery." Note in 57 L.R.A. 193.

McIntyre & Burtness, for respondent.

"The circumstances attending the making of a contract are entitled to great weight in arriving at the intention of the parties, and, if the contract is ambiguous or uncertain, may be resorted to in determining the proper construction; and this rule refers not only to the general conditions under which the contract was made, but also to legal and physical conditions." 35 Cyc. 97.

"Though an agreement to sell goods f. o. b. cars at a designated place will ordinarily be regarded as an agreement to deliver the goods at that place, the meaning of the term depends on the connection in which it is used." Barnett & R. Co. v. Fall, 131 S. W. 649.

"The words 'f. o. b.' do not necessarily mean that title is to pass when delivered to a transportation company, but the whole contract must be looked to to determine where delivery is to be made." State v. Patterson (Wis.) 120 N. W. 227; State v. Park, 165 N. W. 289; Niemeyer Lbr. Co. v. Ry. Co. (Neb.) 74 N. W. 692; United States v. Andrews & Co. 207 U. S. 229, 52 L. ed. 185; Herring Co. v. Smith (Or.) 72 Pac. 704.

"If the words 'f. o. b.' are used in connection with the words fixing the price only, they will not be construed as fixing the place of delivery." 35 Cyc. 174.

"Where by the terms of the contract the seller is to select and deliver the goods at any particular place, or in any particular manner, the goods ordinarily remain his property and at his risk until they are delivered in accordance with the agreement." 1 Mechem on Sales, § 733; McNiel v. Brown (N. J.) 26 Am. St. Rep. 445; Hart-Parr Co. v. Finlay, 31 N. D. 130.

"Where the buyer reserves the right of inspection, until inspected at the place where the contract provides therefor, there is no delivery." Will v. Stone (Ind.) 69 N. E. 698; Eaton v. Blackburn (Or.) 96 Pac. 870; 35 Cyc. 288.

The measure of plaintiff's damage is fixed by our statute. Comp. Laws 1913, §§ 7153, 7178, 7179.

Plaintiff can recover the profit which he would have made on these potatoes had they been delivered to him. The right of the plaintiff to

recover these profits has been upheld in a number of cases. Lilly v. Lilly (Wash.) 81 Pac. 852; Shadvolt v. Topliff (Wis.) 55 N. W. 854; Wakeman v. Wheeler & Wilson, 101 N. Y. 205; Trego v. Arave (Idaho) 116 Pac. 119; Sedro Veneer Co. v. Kwopil (Wash.) 113 Pac. 1100; Schwab Safe Co. v. Snow, 140 Pac. 761; Baker v. Shaw, 138 Pac. 888; 35 Cyc. 644.

"Even conceding that this contract of sale provided for delivery f. o. b. Winnipeg, the defendant nevertheless must load the potatoes properly in a car at Winnipeg." 35 Cyc. 160; State v. Peterson, 120 N. W. 227; Culp v. Sandoval, 159 Pac. 956; Safe Co. v. Bank (S. D.) 125 N. W. 572.

CHRISTIANSON, Ch. J. Plaintiff brought this action to recover damages for the breach of a contract whereby defendant agreed to sell to the plaintiff a carload of potatoes. The defendant admits the contract and admits that he breached it, but contends that the plaintiff sustained no damages by reason of such breach. The defendant, also, counterclaimed for damages for the alleged breach by the plaintiff of a second contract of sale. The action was tried to the court without a jury. The court made findings, and ordered judgment, in favor of the plaintiff for $287.33, and interest, and dismissed the counterclaims. Defendant has appealed from the judgment.

The undisputed evidence shows that the plaintiff and defendant are both residents of Grand Forks, North Dakota. On January 13, 1913, at Grand Forks they entered into a written agreement whereby the defendant agreed to sell to the plaintiff "one car of 40,000 pounds or more white potatoes at $1.10 per bushel sacked f. o. b. Winnipeg, we to guarantee safe delivery at Grand Forks, shipped soon as possible—free from culls," and the plaintiff agreed to buy such potatoes on the terms stated.

The evidence shows that the plaintiff has been engaged in the business of buying and shipping potatoes for about eleven years, and that the defendant knew that plaintiff purchased said potatoes for the purpose of reselling them. Barnes testified: "He [Sheggerud] was to get them as far as Grand Forks in a condition free from frost;" and that he (Barnes) "explained to Sheggerud that if he got the potatoes this far that we would take them on from here with other cars."

It appears that the defendant did not have any potatoes at the time he made the agreement with the plaintiff, but that he had had some talk with a dealer in Winnipeg named Davis, in which Davis had asked defendant to find a buyer for a carload of white potatoes. It was this car of potatoes defendant had in mind when he made the agreement with plaintiff. After the agreement was signed, defendant went to Winnipeg and found that Davis had sold the potatoes to another party. On January 19, 1917, the defendant wired plaintiff: "Partner sold the potatoes to Minneapolis. If you can handle two cars at $1.15 let me know." Plaintiff immediately replied: "Our man Warberton is at McNaughton Fruit Auction Company, see him or telephone us how about cabbage. We shall expect the car contracted for, as we do not make one-sided deals, but will take two cars one fifteen our man will help load and pay for them." Upon receiving this telegram the defendant got into communication with Warberton, and some conversation was had between them. The counterclaims are predicated upon the alleged fact that defendant obtained three carloads of potatoes in accordance with the telegrams, and that Warberton failed to come and inspect them in accordance with the arrangement made between defendant and Warberton. There was a square conflict between Warberton and the defendant upon this question, and the trial court believed Warberton's version of the transaction. Under the facts found the trial court properly dismissed the counterclaims, and we see no reason for overturning the findings. Strictly speaking the question is not before us, for defendant has submitted no argument in support of the counterclaims on this appeal.

The principal question in controversy is with respect to the amount of damages plaintiff is entitled to recover, or rather on what basis such damages should be computed. The defendant contends that under the terms of the contract he was not obligated to deliver the potatoes in Grand Forks, but that the same were to be delivered at Winnipeg, and that in computing plaintiff's damages the market price at Winnipeg controls. We are unable to agree with defendant's contention. It is true the price of the potatoes was fixed by the parties f. o. b. Winnipeg, but the obligations of the defendant were not fulfilled by delivery to a carrier at that point. By the express terms of the contract the defendant assumed the risk of transportation, and guaranteed "safe delivery"

of the potatoes to the plaintiff "at Grand Forks." This is the contract which defendant made, and for the breach of which plaintiff asks damages.

Under our laws the measure of damages for the breach of an obligation arising from contract, except when otherwise expressly provided, is the amount which will compensate the party aggrieved for all the detriment approximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. Comp. Laws 1913, § 7146. "The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract, if it had been fulfilled." Comp. Laws 1913, § 7153. And "in estimating damages, except as provided by §§ 7179 and 7180, the value of property to a buyer or owner thereof deprived of its possession is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice with reasonable diligence for him to make such a purchase." Comp. Laws 1913, § 7178.

We are all agreed that in ascertaining the amount of plaintiff's damages the market price at Grand Forks is controlling. The plaintiff introduced evidence showing the freight rates on potatoes from Winnipeg to Grand Forks, and the amount of duty on potatoes imported from Canada. That is, plaintiff showed what the potatoes would have cost him laid down in Grand Forks. The plaintiff, also, introduced some evidence as to the market value of potatoes in Grand Forks, and the writer is inclined to the view that the evidence furnishes substantial support for the findings; but a majority of the court are of the opinion that the evidence, taken as a whole, merely shows what plaintiff could have sold the potatoes for in other markets, and not the market price of potatoes in Grand Forks. And while the members of the court are all agreed that under the evidence in this case plaintiff is entitled to judgment in some amount, a majority are of the opinion that the evidence is in such condition that it is impossible to fairly determine the amount of such damages. It therefore becomes necessary to remand the case

for a new trial in order that proper evidence may be introduced and this issue properly determined. The judgment is therefore reversed, and the cause is remanded for further proceedings in accordance with the views expressed in this opinion. Neither party will recover costs on this appeal.

OLE C. DRIVDAHL, Appellant, v. INTERNATIONAL HARVESTER COMPANY OF AMERICA, a Corporation, Respondent.

(174 N. W. 817.)

Appeal and error — trial *de novo* — new trial ordered where record is too indefinite and unsatisfactory.

Where a trial *de novo* is asked in the supreme court under the provisions of § 7846, Compiled Laws 1913, and the record is in such condition that the court finds it impossible to determine the matters submitted on account of the vague, indefinite, and unsatisfactory condition of the testimony, a new trial will be ordered in the district court.

Opinion filed July 22, 1919. Rehearing denied September 8, 1919.

From a judgment of the District Court of Renville County, *Leighton,* J., plaintiff appeals.

Remanded for a new trial.

H. S. Blood and *J. E. Bryans,* for appellant.

Bradford & Nash, for respondent.

PER CURIAM. A survey of the record and the briefs in this case brings us to the conclusion that the only questions are questions of fact. While somewhat uncertain as to what the facts in the matter actually are, it seems to be a case where a district judge who had an opportunity to see the witnesses and observe the manner in which they gave their testimony is in an infinitely better position to determine the facts than are those who must gain their knowledge from the cold record. That being the case, while somewhat in the dark as to the facts, we are loathe to disagree with the findings of the trial judge. As we

look at the matter, and in so far as we are able to determine it, it stands as follows:

The action is one brought by Drivdahl to cancel and set aside a certain mortgage executed by him to the Harvester Company in September, 1914. The basis of the action, as set forth in the complaint, is a claim that the mortgage was secured by and through duress, to wit, a threat to institute a criminal prosecution on account of the selling of mortgaged personal property.

The answer admits the taking of the mortgage in question, denies that it was obtained by duress, sets out that it was obtained in due course of business to secure the indebtedness owing from plaintiff to defendant, and asks for affirmative relief in the foreclosure of the same.

The reply apparently abandons the theory of the complaint, and, admitting the execution and delivery of the mortgage, it sets out various matters and things in relation thereto. For defenses it alleges that the mortgage was executed by the plaintiff through misapprehension as to what it was and under the belief that it was an altogether different instrument; that the notes which it secures and certain other mortgages executed in connection therewith were made and executed by the plaintiff to the defendant in payment of a certain 40-horse power engine; and that the mortgage in question and certain other mortgages and notes were only executed by reason of, first, a warranty as to the character and quality of the engine, which wholly failed; and, second, that this mortgage in question and certain of the other ones were only executed by reason of the agreement and assurances on the part of the defendant company that the engine in question would be repaired and made fit and suitable for the purposes for which it was sold, and that this was not done.

The undisputed facts are that in the spring of 1911 plaintiff, through one Flem, a machinery dealer at Sherwood, North Dakota, who was selling International Harvester Company machinery, bought of the defendant company a 20-horse power tractor, which he used in 1911 and part of 1912; that in 1912 he was desirous of getting a large engine, and with that idea in view approached Flem and possibly others, relative to securing such an engine; that in the spring of 1912 one Sanderson, through Flem, bought of the defendant company a 45-horse power tractor, the tractor which is at the bottom of this litigation; that San-

derson used this engine in the spring and summer of 1912 for plowing; that in September, 1912, a deal was made by and between Sanderson and the plaintiff, Flem being present and taking part in the transaction, whereby the plaintiff took Sanderson's 45 tractor. Sanderson took the plaintiff's 20 tractor and the plaintiff executed and delivered notes, the notes which are in question in this particular lawsuit, directly to the defendant company.

Plaintiff contends that he made the trade with the defendant company through Flem. Flem contends that he simply acted as a go-between between the plaintiff and Sanderson. Sanderson testified that he made the trade with the plaintiff, but his testimony is very unsatisfactory and indefinite. In any event, the transaction was consummated, the plaintiff taking the 45, Sanderson the 20, with the understanding that if this was not satisfactory and could not be arranged to the satisfaction of the defendant company the deal was off.

Each party used the engine that he thus secured in the fall of 1912. In the spring of 1913 the plaintiff executed to defendant company at the suggestion of one Tice, collector of the defendant company, and in the office of Flem, mortgages covering a great deal of property, both real and personal, securing the note made at the time of the exchange of tractors in the fall of 1912, and at the same time plaintiff made his bill of sale to Sanderson for the 20 engine, and Sanderson made his bill of sale to the plaintiff for the 45 engine, each party taking their respective bills of sale.

Subsequently the plaintiff indorsed over to the defendant that certain chattel mortgage which the plaintiff sought to set aside in his complaint, which is the mortgage covering exactly the same property covered by the chattel mortgage executed in March, 1913, and in addition thereto, the crop to be grown on the land of the plaintiff in the year 1915.

In April, 1913, after the execution of the mortgages which were executed in March of that year, the repairmen of the defendant company made certain repairs to the 45 engine. The engine was used for a time and finally abandoned as being unworkable, and in October, 1913, the repairmen of the defendant company came to the premises of the plaintiff and hauled the 45 engine to the town of Sherwood, some 12 miles, where they claim to have made various repairs upon it. Plaintiff con-

tends that this was done without notice to him or without his knowledge, that no bills have ever been presented to him for any repairs that were so placed upon this engine, and that he was never advised that the same was repaired. When the engine was hauled to Sherwood it was placed in the yard of the man Flem, where it remained up to the time of the trial. There is no testimony in the record showing that any repairs were charged to the account of plaintiff either at the time of the repairing of the engine in the spring of 1913 or in the fall of 1913, nor is there anything in the record to show that he ever ordered or agreed to pay for any repairs, and it does appear that repairs of considerable value were placed upon the engine.

Furthermore, it does not definitely appear from the record where the 45 engine was at the time of the transaction relative to the trading of the engines, but a conclusion that this 45 engine was at that time on the premises of the man Flem, at Sherwood, might be warranted. Sanderson's testimony, as we have stated, is very hazy and indefinite. He has no clear recollection of the transaction involving some $3,000, cannot say who first broached the subject of a trade to him, doesn't know where his engine was at the time the transaction was made, and is a very unsatisfactory witness. We feel justified in concluding that the 45 engine was practically worthless at the time of the exchange of the engines, that it was never subsequently put in such a state of repair as to be of any particular value, and such was its condition at the time of the trial.

On the other hand, we also conclude that the plaintiff, Drivdahl, knew or should have known at the time he executed the mortgage in March, 1913, as to the state of the engine; that he knew or should have known what he was doing when he signed the mortgage in question; that subsequently when he turned over the note received in payment of the separator that he knew or should have known what he was then doing, and that such security was turned over as collateral to his note given to defendant company for the Sanderson engine, and that any payments made on account of it would be applied on such note; and that subsequently in 1914, when he signed the mortgage then executed by him, he did not sign it under duress, but he knew or should have known what he was doing, and the reason for the execution of the same; and that he then had knowledge that the engine was worthless.

Also, we find from the record that at the time the bills of sale were made and acknowledged that each party so signing such bills of sale knew what they were doing and the effect of what he then did.

On the other hand, while there is insufficient testimony to justify a positive finding, it would seem that the man Flem was the instigator of the transaction between Drivdahl and Sanderson, but we are warranted in inferring that various representations were made by him to Drivdahl to induce the latter to make the trade, and that probably these representations included representations as to the quality and character of the engine in question. The International Harvester Company, the defendant, did not authorize such representations, and they were contrary to and beyond any authority that Flem had from the company; nevertheless the defendant company accepted the notes and mortgages executed by Drivdahl on account of them and took the same in their own name. Thus, while the defendant company was not a party to the transaction directly, yet by reason of all the facts and circumstances Drivdahl might reasonably have supposed that it was a party to the transaction.

While it does appear in the record that as a consequence of the trade Sanderson did pay to defendant company a small balance or difference arising by reason of such trade, yet there is nothing to show that Sanderson subsequently executed new notes or new securities to the defendant company, or that the defendant company ever realized anything from Sanderson. We recall that on oral argument it was stated that Sanderson's payments had been sufficient to give him the 20 tractor clear.

Taking the whole matter from the record, as we read it, we cannot satisfactorily form any ultimate conclusions upon which to base a final judgment. Thus, while loathe to disturb the findings of the trial judge who had the advantage of noting the demeanor of the witnesses and of being better able to weigh their testimony and draw proper inferences therefrom, we feel that justice requires a new trial. Having hereinbefore set forth the principal features in which the record is unsatisfactory, it need only be added that, coupled with significant omissions from the testimony, there is an apparent ability to supply evidence that will take the place of inferences which are at best most unsatisfactory.

In these circumstances the judgment of this court must be that the

cause be remanded for retrial. Williams County State Bank v. Gallagher, 35 N. D. 24, 159 N. W. 80; Sutherland v. Noggle, 35 N. D. 538, 160 N. W. 1000. It is so ordered. The costs of the appeal will abide the event of the trial.

ROBINSON, J. (dissenting). This is an appeal from a rather drastic foreclosure judgment on notes and mortgages given by the plaintiff to defendant for a separator and two tractors. The plaintiff sued to cancel the securities and defendant obtained a foreclosure judgment for over $5,000. The deal commenced by the purchase of a 20 mogul tractor for $1,850, and a separator for $475; then a Titan tractor for $2,270. On the Titan tractor the mogul was taken in at a margin of $1,200, and notes were given for $400, $400, $270, in all, $1,070, making $2,270. It is conceded that on the first deal there was paid on the four notes given for the tractor and separator sums as follows: $217.74, $250, $87.70, and $271.10, amounting to $724.54. The contention relates mainly to the Titan tractor. It appears that this was no good; it was a worthless piece of junk. It was a damage to plaintiff. Defendants tried their best to make it work and failed. Then they took it to their yards, where they still have it, or had it at the time of the trial. The plaintiff refused to have anything to do with it. They first sold it to one Sanderson, who, it seems, had no use for it. Then they arranged with Sanderson to sell it, in his name, to the plaintiff, and in like manner they tried to arrange with the plaintiff to sell it, in his name, to some other party. Of course there was a direct conflict in the testimony, but there are facts in the case which speak louder than words. It is certain that in selling the tractor to the plaintiff that the defendants and Sanderson worked together. It is certain the Titan was no good, and one of the facts which bears most strongly against the defendants is the pains they took to make evidence in their favor and to weave a net around the plaintiff, and to hamper him with mortgages on every particle of his property,— his machinery, his crops, and his lands. On March 13, 1913, to secure $3,444, the Harvester Company took a real estate mortgage on a quarter section of land (S. W.¼ 8–162–85). On March 13, 1913, they took a mortgage on personal property described thus:

"One 45-horse power Titan gas tractor #TA354E, International

Harvester Company make; one bay horse 8 years old, weight 1,100 pounds, named Bill, valued $150; one sorrel mare 11 years old, weight 1,300 pounds named Beauty, valued $200; one black mare 4 years old, weight 1,100 pounds named Topsey, valued $250; one black horse 5 years old, weight 1,300 pounds named Prince, valued $250; one cow spotted red and white 8 years old, weight about 1,000 pounds; one wide tire Lake City wagon, complete with double box; one McCormick 7 ft. binder, complete with track, new 1911; one Racine separator 28x48, complete with main drive belt and all other belts, feeder, blower & weigher; one 580 galvanized oil tank for gasolene, complete with wagon gear, together with all increase of said live stock, and all repairs and supplies for the remainder of said property; also all wild and tame crops of every nature now growing or hereafter planted, sown or grown, cultivated or harvested during the year 1913 on the following described real estate situated in Renville county, State of North Dakota, more particularly described as follows, to wit: the southwest ¼ of section 8, township 162, range 85, also undivided ¾ interest in crop on east ½ of the northeast ¼ of section 19, township 162, range 85."

On September 28, 1914, they took a mortgage on the same and some other property and on the crops to be grown during the year 1915 on the S.W.¼ of Sec. 8–162–85 and the N.E.¼ of 9–162–85. Under the crop mortgage they took the grain produced on the land, which was sold, and the proceeds, about $960, is held in a bank to satisfy the judgment. Plaintiff says: "They told me that if I did not turn the wheat over they would clean me out." (33) According to the testimony of plaintiff, the second and third mortgages were obtained by fraud and deception, and by threatening the plaintiff to send him over the road for selling a separator described in the first mortgage. The testimony is long and conflicting and covers 230 typewritten pages. It does show that the plaintiff was sadly overreached, and if he did knowingly give such mortgages he was a mere dolt who needed a guardian. However, we may rest the decision of the case on the fact that the Titan which defendant sold the plaintiff for $2,270 was mere worthless junk; that it was a damage to plaintiff while he experimented in trying to work with it. The notes given by plaintiff for that machine were dated September 6, 1912. They should be canceled and adjudged void, and on the same date the plaintiff should be given credit for $1,200, paid on the machine.

Then all payments which have been made should apply on the prior deal, that is, on the first four notes given for the mogul and the separator, and judgment should be entered in favor of the defendant for the balance due. The money in the bank, $960 more or less, will be at once applied on the same and on payment of the balance if any. The mortgages should be canceled and discharged. The judgment should be reversed and vacated. The plaintiff should recover costs and disbursements on this appeal.

Judgment should be entered accordingly.

D. C. KNAPP, Appellant, v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Respondent.

(173 N. W. 945.)

Actions — Former adjudication not avoided by commencing new action in different county.

A party may not evade the force and effect of a former adjudication by commencing a second action in a different county, or by changing the form of his complaint.

Opinion filed July 23, 1919. Rehearing denied September 8, 1919.

Appeal from the District Court of Ward County, Honorable *K. E. Leighton,* Judge.

Affirmed.

F. B. Lambert, for appellant.

"In order for the first judgment to be binding the issues must be the same in both cases." Noyes v. Belding (S. D.) 62 N. W. 953; Fahey v. Esterly Mach. Co. 3 N. D. 223.

"A bill of lading is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry and deliver. The receipt of the goods lies at the foundation of the contract to carry and

deliver. If no goods are actually received there can be no valid contract to carry and deliver." Citing King v. The Lady Franklin, 75 U. S. 325, 19 L. ed. 455; Pollard v. Winton, 105 U. S. 7, 6 L. ed. 998; Reeves v. Bruening, 13 N. D. 157; Alsterberg v. Bennett, 14 N. D. 596.

Parol evidence was inadmissible. National Bank v. Lang, 2 N. D. 66; Hutchinson v. Cleary, 3 N. D. 270; 1 Hutchinson, Carr. 3d ed. §§ 158, 160; N. W. Fuel Co. v. Burns, 1 N. D. 137; Prairie Twp. v. Haselen, 3 N. D. 328.

Greene & Stenersen, for respondent.

"A judgment on the same cause of action means a case where the same evidence will support both actions, though they happen to be granted on different writs. Thus, where the plaintiff sued in trespass for the taking of staves, and failed after trial on the merits on the ground that he had no right to the staves, he could not thereafter waive the tort and bring assumpsit on the same proof, the two actions being for the same cause." Rice v. King, 7 Johns. 21; Williamson v. C. P. R. I. & P. R. Co. 51 N. W. 62; 1 Freeman, Judgm. § 272; Jacobson v. Miller, 1 N. W. 1015; Roney v. Westlake, 9 Ann. Cas. 186.

"If upon the trial because of insufficiency in the proof there is a dismissal of the complaint, such a dismissal does not prevent the bringing of another action even for the same cause or upon the same or a different theory. Where, however, an action is tried and there is a dismissal upon the merits, the judgment entered upon such dismissal upon the merits is a bar to bringing a new action with respect to any and every issue that was necessarily involved, *or that should have been raised in that action.*" Molder v. Wexler, 182 N. Y. 519, 87 N. Y. Supp. 400; 9 Ann. Cas. 188, note; Miller v. Manice, 6 Hill, 114.

Where there is an opportunity for full presentation of all the facts in the case, the party relying thereon must make a full disclosure thereof if known to him or suffer for a failure to do so. He cannot be permitted to conceal a part of his action or defense or to negligently overlook it, and thus prolong indefinitely the final settlement of the case. 122 N. W. 579; Zalesky v. Insurance Co. 114 Iowa, 516, 87 N. W. 428; Re Cook (S. D.) 122 N. W. 578; Sullivan v. Colby, 18 C. C. A. 193, 71 Fed. 460, 9 N. W. 726, 727; Board of Directors, etc. v. People, 189 Ill. 438, 59 N. W. 977; Re Assessment of Property, 206 Ill. 64, 60

N. E. 75; 9 Ann. Cas. 187; Roney v. Westlake, 216 Pac. 374, 9 Ann. Cas. 184.

ROBINSON, J. On October 17, 1916, this action was commenced in Ward county to recover from defendant $960 for the loss of 1,000 bushels of wheat in August, 1910. Aside from a general denial, the answer avers that the cause of action did not accrue within six years, and that in a former action, in the district court of Burke county, between the same parties for the same identical cause of action, after trial on the merits, it was by the court duly adjudged that the action be dismissed on its merits. In this case the court sustained the plea of a former adjudication and dismissed the action. The case was before this court, as shown by the reports, 34 N. D. 466–497, 159 N. W. 81. The first action was to recover from defendant for the loss of 1,000 bushels of wheat at 94 cents a bushel, with interest from November 1, 1910. It is manifest that each action was brought for the same identical cause, by the same plaintiff against the same defendant, to recover for the loss of the same wheat. In each case the parties and the cause of action are identical. In such a case a party may not evade the force and effect of a former adjudication by varying the form of the complaint or by bringing actions in different counties.

It also appears that this action was not brought within six years from the date the cause of action accrued.

Judgment affirmed.

BRONSON, J. I concur in the result.

GRACE, J. I dissent from the result arrived at in the majority opinion.

CHRISTIANSON, Ch. J. (concurring specially). This is a sequel to Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co. 34 N. D. 466, 159 N. W. 81. As appears from the reported case, the plaintiff sought to recover damages for certain wheat which he asserted was lost by reason of the negligence of the defendant and its employees. As stated in the opinion in that case, the evidence indisputably established that the grain was lost while the shipments were under the control and in the

custody of the Des Lacs Lake Navigation Company, and before they were delivered to the defendant. The plaintiff, however, offered certain evidence tending to show that one Cole, an agent of the defendant railway company, had agreed that the defendant would assume all liability for such shipments while in the possession of the Navigation Company. This court held that this evidence was variant from and inadmissible under the complaint, but expressed no opinion upon the question whether plaintiff might maintain an action against the plaintiff upon special contract. 34 N. D. 491. The plaintiff thereafter instituted this action, and alleges in his complaint that Wm. Cole, a general agent of the defendant company, induced him to open certain elevators along the banks of Des Lacs lake and "promised and agreed with the plaintiff that said defendant would become personally liable for the safe delivery of all grain shipped by said plaintiff from said points until the point of destination, including the transportation down the lake and from each one of said landings;" that plaintiff in relying upon said agreement "shipped grain on the boats of said Des Lacs Lake Navigation Company and over the lines of said defendant railway company;" and that from the time of the shipment of such grain from the different shipping points the defendant, its agents, and servants, or the agents and servants of the Des Lacs Lake Navigation Company over whose line of boats it agreed to transport said grain, had full and exclusive control thereof; that the defendant failed to deliver to the terminal points mentioned in the several bills of lading, 1,000 bushels of grain delivered by plaintiff at the several lake points. The defendant answered denying the alleged contract, and disclaiming all liability. It alleged that the loss of grain occurred while such grain was in the custody and control of the navigation company and before it came into the custody and control of the defendant. The answer further pleaded the judgment in the former action as a bar. It further averred that the plaintiff had notice and knowledge of all the matters set forth in his present complaint at the time of the former action, and therefore was estopped to maintain the present action.

The case came on for trial before the court and a jury. The parties entered into a written stipulation whereby a transcript of the evidence introduced upon the trial of the case reported in 34 N. D. 466, was received in evidence. The plaintiff offered no further evidence what-

soever. The defendant introduced the judgment roll in the former action. This was all of the evidence. Both plaintiff and defendant thereupon moved for a directed verdict. The plaintiff's motion was made upon the ground that plaintiff had fully proved each and every allegation of the complaint, and that no defense had been set up, that the rights of the plaintiff were clear in the premises, and that he was entitled to the judgment prayed for in the complaint. The defendant's motion was based upon the grounds: (1) That the evidence was insufficient to establish that a special contract had been entered into, whereby defendant had assumed liability for plaintiff's grain while the same was being transported on the boats of the Des Lacs Lake Navigation Company; (2) that the judgment in the former action was a bar; and (3) that the undisputed evidence showed that the grain in question was delivered to, and received by, the Des Lacs Lake Navigation Company, an independent common carrier, and that under the Carmack Amendment to the Commerce Act, the initial carrier was liable for the loss of shipments, and that consequently plaintiff's action must be maintained against the navigation company. After the motions had been submitted the trial court said: "I will grant the motion made by the defendant at the close of all the testimony." Later the trial court made findings of fact relating to the proceedings had in the former action and concluded that the judgment therein was bar; and also "that the defendant is entitled to judgment upon the proofs adduced and upon the record in said former action." Judgment was entered in favor of defendant for a dismissal, and plaintiff has appealed.

The writer prepared the opinion for the court in Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co. 34 N. D. 466, 159 N. W. 81. Some of the evidence adduced is referred to in that opinion. The question there was the sufficiency of the evidence to sustain the cause of action there alleged. The members of the court were of the opinion that the evidence did not establish such cause of action. They were also of the opinion that the right to recover under a special contract was not before the court, and that all evidence as to such special contract was variant from, and inadmissible under, the complaint. The sufficiency of the evidence to establish such contract was not before the court, and no opinion was expressed thereon. Of course it was assumed that if another action was maintainable and brought on such special contract,

that that question would be fully tried in the new suit. But as already stated the parties have merely reintroduced the evidence adduced upon the trial of the former action. And the first ground of defendant's motion for a directed verdict challenges the sufficiency of such evidence to establish the special contract upon which liability is predicated.

The plaintiff testified that Cole, the agent of the defendant company, informed him of the elevators at the lake points. The plaintiff thereafter made a trip on one of the boats of the navigation company with Von Neida, the manager thereof. 34 N. D. 477, 478. The plaintiff testified that after he had made this trip, Cole called him up on the telephone.

He said: "He [Cole] wanted to know if I was—what I thought about the elevators on the lake, and I told him I was not very well impressed with them. I says I went on the trial trip with Von Neida, but while he assured me they would have no trouble in getting the stuff down there, still I did not feel very well pleased with the looks of their boats, but he assured me that everything would be lovely, and they would get the grain out."

Q. "Who would?"

A. "Mr. Cole for the Soo Line."

Q. "What did he say?"

A. "I told him I would not take charge of the houses there unless he would guarantee me to get the stuff out, and he said *that they would do everything possible to get it out.*"

The plaintiff further testified that Cole told him that the bills of lading would read from the lake points, but would be given at Kenmare.

The form of the shipping receipts used was set forth in 34 N. D. pp. 475, 476. The receipts were made upon a printed form of the defendant railway company, but the name of the "Des Lacs Lake Navigation Company" was written in and appeared on the face of each receipt. All the receipts issued to the plaintiff contained, among others, the following conditions:

"Section 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line. No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after

said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from such liability so imposed."

"Section 5. . . . Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered, on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to, and after they are detached from, trains."

The evidence shows that in the latter part of October, 1910, the plaintiff caused a claim to be presented against the Des Lacs Lake Navigation Company for the loss of the identical wheat in question. It is true plaintiff claims that he did this at the suggestion of the attorney who represented the defendant and the navigation company; but such attorney contradicted plaintiff's testimony on this point. It may also be mentioned that plaintiff caused certain affidavits to be prepared in his claim against the navigation company. In such affidavits the amount of wheat lost is fixed at 500 bushels, but in the complaint in this and the former suit against the defendant railway company the amount is fixed at 1,000 bushels.

It will be noted that the only positive promise on the part of Cole testified to by plaintiff is "that they would do everything possible to get it [the wheat] out." Nowhere is there any express promise on the part of Cole that the defendant would be responsible for the shipments while they were under the custody and control of the navigation company. The recitals in the shipping receipts were to the contrary. It seems to me that the evidence does not establish an agreement on the part of the defendant to be responsible for the grain shipments while they were being transported by the navigation company. In any event the evidence upon that question is very slight. When the parties moved for directed verdicts they impliedly consented to a disposition of the case without the aid of a jury. The trial court granted the motion of the defendant. The motion might very properly have been granted upon the first ground thereof, *viz.*, that the special contract had not been sufficiently proven. This being so, it is immaterial whether the court was right or wrong in holding that the former decision was a bar to

this action. For "the right of the court to direct a verdict depends upon the state of the evidence when such action is taken. And if such action was proper, it would be sustained, even though the court might give a wrong reason for the course taken." Homeland Realty Co. v. Robison, 39 Okla. 591, 136 Pac. 585; Joslyn v. Cadillac Automobile Co. 101 C. C. A. 77, 177 Fed. 863; Millsaps v. Nixon, 102 Ark. 435, 144 S. W. 915; Wilson v. Michigan C. R. Co. 94 Mich. 20, 53 N. W. 797; Tobin v. McKinney, 14 S. D. 52, 91 Am. St. Rep. 688, 84 N. W. 228.

DES MOINES MUTUAL HAIL & CYCLONE INSURANCE ASSOCIATION, a Foreign Corporation, Respondent, v. JOHN STEEN and John Steen as Treasurer of the State of North Dakota and the State of North Dakota, Appellants.

(175 N. W. 195.)

Insurance — interest on moneys deposited with state treasurer by insurance companies — interest becomes a part of the fund.

As a general rule interest earned on a fund belongs to the owner of the fund. It is *held* that moneys deposited by a foreign mutual hail insurance company under §§ 4896 *et seq.*, Comp. Laws 1913, belongs to the insurance company making the deposit, and that all interest earned on the fund while on deposit with the state treasurer becomes a part of the fund and belongs to the owner thereof.

Opinion filed September 18, 1919.

Appeal from the District Court of Burleigh County, Honorable *W. L. Nuessle,* Judge.

From a judgment in favor of plaintiff, both Steen and the state of North Dakota appeal.

Affirmed.

William Langer, Attorney General, *George K. Foster,* Assistant Attorney General, and *H. A. Bronson,* for appellants.

Section 3 of chapter 112 of the Laws of North Dakota for 1915 requires the clerk of the district court to pay such fees into the general

fund. Mulcrevy v. San Francisco (1914) 231 U. S. 669, 58 L. ed. 425, 34 Sup. Ct. Rep. 260; Berkshire County v. Cande (Mass.) 109 N. E. 838; Barron County v. Beckwith, 142 Wis. 519, 124 N. W. 1030.

The state treasurer shall not receive any fees nor rewards aside from his annual salary. Comp. Laws 1913, § 149.

There is absolutely no duty on the part of the state treasurer, the state, or anyone else to return the whole or any part of the $25,000 or its interest to the company, unless such duty is created by the provisions of §§ 4899 and 4900 of the Compiled Laws of 1913. Jones v. Moore, 198 Fed. 304.

The state treasurer is at liberty or has the option under certain circumstances to pay interest on securities at his election. Sutherland, Stat. Const. 1st ed. § 460.

It is only where an answer admits or leaves undenied the material facts stated in the complaint that a judgment can be rendered on the pleadings. Botto v. Vandament, 67 Cal. 333.

A public officer is not liable for interest or profits made by him from the public funds, in the absence of the statute charging him therewith, although the law makes him criminally liable for putting the money out at interest or making a profit from it. People v. Walsen, 15 L.R.A. 456; Maloy v. Bernalillo County Comrs. 52 L.R.A. 126; State ex rel. Nary v. Dunbar, 20 L.R.A.(N.S.) 1015.

A mere stakeholder is not liable for interest upon money in his hands although he makes profit by use of such money. Jones v. Mallory, 22 Conn. 386; Buckman v. Pitcher, 13 Barb. 556; Havens v. Church, 62 N. W. 149.

Where one receives the proceeds of certain notes, and is not liable for an accounting until the happenings of such contingency, he is not liable for interest until after such contingency. Bellevue Mills Co. v. Baltimore Trust Co. 214 Fed. 817.

On a bill of interpleader by a party claiming the title to certain funds, interest is not allowed during the litigation, where the money is deposited in a bank and the bank paid on said deposit 3 per cent. Delta & P. L. Co. v. Sherwood, 187 Ill. App. 167.

Money received for the use of another. 37 Century Dig. 1915, 2046; 29 Century Dig. 23, 274.

Where money is paid by mistake and there is no fraud or surprise,

interest is not allowed. Claim v. Adams, 1 Dall. 52, 1 L. ed. 33; Ashurst v. Potter, 29 N. J. Eq. 625.

Where money is held as bail or on deposit, interest is not chargeable on such fund. Haswell v. Farmers Bank, 26 Vt. 100; Duncan v. Morgette, 25 Tex. 245.

Theodore Koffel, for John Steen and John Steen as State Treasurer.

The debt created by such deposit, being wholly paid and extinguished, the interest being a mere incident to the debt, cannot exist without it, and the debt being extinguished, the interest must necessarily be extinguished too. 15 R. C. L. 14, notes 9 & 10; Bennett v. Federal Coal & Coke Co. 40 L.R.A.(N.S.) 588; Mason v. Callender, 72 Am. Dec. 102.

Interest is the compensation allowed by law or fixed by the parties for the use or forbearance of money or as damages for its detention. 15 R. C. L. 3.

Interest is the creature of statute, and cannot be recovered unless authorized by it. Pekin v. Raynolds, 83 Am. Dec. 244.

Interest is not recoverable except upon a contract, express or implied, to pay it, or as damages for the unreasonable detention of money which the party was obliged to pay. Evats v. Nason, 11 Vt. 122; Abbott v. Wilmot, 22 Vt. 437; Wood v. Smith, 23 Vt. 706.

Interest is recoverable only by contract or under express provision of the statute. Forschirm v. Mechanics' & Traders' Bank, 122 N. Y. Supp. 168.

Interest is recoverable only when expressly reserved by contract or implied by the nature of the promise. United States v. Sanborne, 135 U. S. 281, 34 L. ed. 112; Sneed v. Wister, 5 L. ed. 717; United States v. Knowles, 106 U. S. 537.

Sullivan & Sullivan, for respondent.

The depositary may not use the thing deposited or permit it to be used for any purpose without the consent of the depositor. Comp. Laws 1913, § 6021; Rhea v. Brewster (Iowa) 107 N. W. 940; 5 R. C. L. 630, par. 15.

If a person with whom a deposit is made uses the fund, he must account to the depositor for the income, profits and advantages derived by him from the pledged property. 31 Cyc. 825.

ROBINSON, J. This is an appeal by John Steen and by the state of North Dakota from a judgment against them, in favor of the insurance company, for $1,250, and interest at 6 per cent. The $1,250 is the accrued interest received on $25,000 which the insurance company deposited with John Steen in March, 1913, as security for loss. The deposit was under the statute, Comp. Laws 1913, § 4896. The interest money was claimed by the state and by John Steen, and each appealed from the judgment. On the pleadings and the conceded facts the trial court found that John Steen received interest on the deposit amounting to $1,250, that the same is the property of the plaintiff, and that judgment should be given for same in favor of the plaintiff and against each of the claimants. On April 14, 1916, judgment was entered accordingly. By statute it is provided thus: So long as the deposit required by this article is kept good and the depositing company is solvent, the state treasurer may permit the company to collect interest on the securities so deposited. § 4900.

Counsel for Steen and the state contends that this statute does not apply to the withdrawal of interest money. Hence, he says, there is absolutely no duty on the part of the state treasurer, the state, nor anyone else to return the whole or any part of the $25,000 or the interest to the company, unless such duty is created by the statute. That is an extremely narrow view of the legal and moral duty of a depositary. The counsel forgets that when one gets hold of money or property of another, unless he has a legal right to it, he is bound to return it regardless of any statute; he is bound to return to the owner, if known, money or property that he finds or picks up in the street, though the statute does not provide that he must do so. And, of course, it is not for the state in such a case to play tweedledum and tweedledee by claiming and insisting on the money and then appealing and objecting to the form of the judgment. The state might well have disclaimed the money, and then there would have been no judgment against it. Now it is manifest that the accruing interest follows the principal, and that when the insurance company concluded to retire from doing business in the state it was entitled to its money, the $25,000, with the accrued interest. There is no principle of law or equity on which either Steen or the state can justly make any claim to the interest. True it is that the ex-treasurer was not legally obliged to put the money at interest,

but he was under a moral obligation to do it. In the parable of the talents the person with one talent hid it in the earth and on the return of his Lord he dug it up and said: "Lo! Here thou hast what is thine." For this he was subjected to severe punishment. So, in disregard of the rights of others, the ex-treasurer might have buried or put in a vault the $25,000. The manly, moral, and proper thing for him to do was to put it safely at interest, and then to pay over the accrued interest with the principal. The judgment in favor of the depositor is clearly right.

Judgment affirmed.

COOLEY, J. I concur in the result.

BRONSON, J., being disqualified, did not participate, Honorable CHAS. M. COOLEY, of First Judicial District, sitting in his stead.

CHRISTIANSON, Ch. J. (concurring specially). Section 4896, Comp. Laws 1913, provides: "No mutual insurance company hereafter organized under the laws of this state or now or hereafter organized under the laws of any state or country, shall engage in the business of hail insurance in this state without first depositing and thereafter keeping on deposit with the treasurer of this state the sum of $25,000 in money, or in lieu thereof bonds of this state or of the United States of the par value of $25,000; provided, that domestic mutual hail insurance companies in lieu of said deposit shall be required to file a bond in the office of the commissioner of insurance in the sum of $25,000, conditional for the carrying out of its contracts and obligations incurred by its policies; said bond to be satisfactory as to form and surety to the insurance commissioner." Section 4897 provides that "said money or securities so deposited shall be and remain in the hands of the treasurer of this state as a fund to secure the payment of all losses occurring under all policies or contracts for hail insurance, made by such company in this state, or covering property situated within the state. And the treasurer of this state shall not permit said deposit or any part thereof to be withdrawn by said company from his custody except as hereinafter provided." Section 4899, Comp. Laws 1913, provides that when any company which has made such deposit desires

to relinquish the transaction of business in this state, it may be permitted to withdraw such deposit upon application to the commissioner of insurance; that when the commissioner of insurance becomes satisfied that all liabilities under policies and contracts have been fully paid and extinguished, he shall "file a certificate to that effect with the treasurer of the state, who shall thereupon deliver such deposit to said company, or its assigns."

In March, 1913, plaintiff deposited $25,000 in cash with the state treasurer, under the provisions of § 4896, supra. The defendant Steen was elected state treasurer at the general election held in November, 1914. Upon his qualification in January, 1915, his predecessor in office turned over to him the said sum of $25,000. Steen afterwards deposited these moneys in various banks. The plaintiff subsequently withdrew from the state, and was permitted to withdraw its deposit. The defendant Steen turned over to it the amount of the original deposit. The plaintiff, however, insisted that it was also entitled to receive whatever interest had been earned thereon. From statements made upon the oral argument it appears that Steen submitted the matter to the then attorney general, and was advised that considerable uncertainty existed as to who was entitled to such interest, and that it belonged either to the plaintiff, to the state, or to the defendant Steen personally. This action was thereupon brought. The action was originally against Steen individually and as state treasurer, later the state of North Dakota was added as a party defendant. The matter was submitted to the court upon the pleadings. The trial court ordered judgment for the plaintiff. The state and Steen have both appealed, so the entire controversy is before this court.

The questions presented in this case are somewhat perplexing. The various authorities cited by counsel for the contending parties are of little or no value, for they deal with entirely different situations. There are many authorities dealing with the right of state treasurers and other custodians of public funds to receive and appropriate to their own use interest on such funds. The conclusions reached by the various courts are far from uniform. Some of the cases hold that it is not a matter of public concern what use was made of the moneys while in the hands of the treasurer; that he is liable for the principal alone, and that his liability ceases when he accounts for the principal. See

Rock v. Stinger, 36 Ind. 346; Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Com. v. Godshaw, 92 Ky. 435, 17 S. W. 737; State v. Walsen, 17 Colo. 170, 15 L.R.A. 456, 28 Pac. 1119; Maloy v. Bernalillo County, 10 N. M. 638, 52 L.R.A. 126, 62 Pac. 1106; Renfroe v. Colquist, 74 Ga. 613; Chase v. Monroe, 30 N. H. 427, 433. Other cases hold that where the treasurer has received interest on public funds he must account for the interest as well as for the principal. See cases cited in note to Adams v. Williams, 30 L.R.A.(N.S.) 855. Counsel for the plaintiff and for the state have cited and rely upon these latter decisions. While they tend to support the contentions of the plaintiff, they clearly do not support the contentions of the state. For these cases merely hold that the interest follows the principal, and that where a custodian has received interest on funds belonging to the public he must pay such interest over to the owner of the money on which the interest has been earned. But the moneys involved in this case were not state funds. They did not belong to the state. They belonged to the plaintiff. The plaintiff had placed them in the hands of the depositary designated by the legislature, to be held as security for the payment of losses which might arise upon insurance contracts made by the plaintiff. The money would eventually either be returned to the plaintiff, or paid to those for the protection of whom it had been deposited. Under no circumstances would the state of North Dakota become the owner of the moneys. The state treasurer was custodian of the moneys because the legislature had designated him. The legislature might as well, if it had seen fit to do so, have required the deposit to be made with some other state or county official, or with banks or trust companies in this state. Thus, securities of domestic life insurance companies are deposited with the commissioner of insurance. Comp. Laws 1913, § 4896. In State ex rel. Olson v. Jorgenson, 29 N. D. 173, 150 N. W. 565, this court considered the status of moneys in the hail insurance fund, and the functions of the state treasurer and state auditor with respect thereto. The court said: "The fund known as the hail insurance fund is composed of moneys which do not belong to the state, and which are not state funds. . . . The treasurer is the custodian of the fund, not a state fund, but a fund belonging to those who contributed it for the purpose named. The commissioner of agriculture and labor is made the commissioner of hail insurance, and is given

charge of the bookkeeping and the administrative features necessary to carry out the purposes of the act. . . . He acts not on a fund raised as state funds are provided, but by reason of the legislative assembly having permitted him and attempted to authorize him to act in another and different capacity, when owners of crops voluntarily request him so to do and make the necessary payments. In the same sense the treasurer is the custodian of the fund. The legislature might with equal propriety have made any other state, county, or township officials the custodians and administrative officials of this or corresponding funds, or it might undoubtedly have constituted some other official, and very likely a private individual, the administrative officer of the fund and business." 29 N. D. 177. This reasoning and language is even more applicable to the moneys deposited by a foreign mutual hail insurance company under § 4896, supra. A deposit made under that section is and remains the property of the company making the deposit. It never becomes the property of the state. I am entirely satisfied that the state has no right to the interest earned upon the funds in question.

Does the interest belong to Steen or to the plaintiff? The plaintiff was not required to deposit money. It might have deposited securities. It might, also, at any time have withdrawn all or any part of the moneys, and deposited securities in lieu thereof. Comp. Laws 1913, § 4900. It received back the full amount of its original deposit, just as soon as it was entitled to do so under the law. The only legal duty which Steen owed to the plaintiff was to safely keep the deposit and return it in accordance with the stipulations which the law attached thereto. He would have fully discharged his duty by keeping the moneys deposited, and returning them to the plaintiff. He was under no legal or moral obligation to earn any interest on the deposit. In depositing the moneys in banks he—not the plaintiff or the state—assumed all risk. If any of the banks had failed, and loss ensued, Steen would have been liable for the loss. The interest was earned by reason of the fact that Steen deposited the funds in banks and assumed the risk incident thereto. The insurance company owned the money upon which the interest was earned; Steen assumed the risk which made it possible for the money to earn interest. There is much force in the argument that under these circumstances the interest earned belongs to Steen, and my mind is not altogether free from doubt upon the point.

While this is so I am not prepared to say that the judgment appealed from is erroneous, but am rather inclined to the view that the interest earned belongs to the insurance company, as the owner of the fund.

BIRDZELL, J. (concurring specially). I concur in the affirmance of the judgment appealed from. As the other opinions filed do not state the basic reason which has led the writer to this conclusion, a brief statement is deemed necessary. Mr. Justice Grace, in his dissenting opinion, has made it clear that the interest on the deposit did not become the property of the officer under whose direction the money was placed on deposit, and it seems to me that his claim is in no wise strengthened by the fact that he went beyond any duty imposed upon him by statute and incurred personal risk in so handling the money. Neither, in my opinion, is it strengthened by the fact that he acted reasonably in so doing. In so far as the acts of the officer were official they were the acts of the state and in so far as they were unofficial they were wholly unauthorized, either by the plaintiff or by the state, and could not, therefore, afford a basis for a personal claim.

The ownership of the fund, then, resolves to a question between the plaintiff and the state of North Dakota, and this question in turn depends upon the legal relationship which arose upon the making of the deposit. If the money were advanced upon the general credit of the state, as a depositor deposits money in a bank, it would be perfectly clear that the relation of debtor and creditor would exist from the time the deposit was made, and that the plaintiff would have no claim to any increment that should accrue prior to the termination of its license to do business in the state. But this is not a general deposit on the credit of the state; it is a special deposit which the state holds as trustee for certain purposes, and the legal relationship between the state and the depositor in these circumstances is that of trustee and *cestui que trust*. In other words, the state holds the fund in trust for the payment of claims, and upon the termination of the right of the plaintiff to do business, and upon its withdrawal after payment of claims in trust for the plaintiff. It seems that this trust relation is expressly recognized by § 4901, Compiled Laws of 1913, which reads: "Any insurance company which has made such deposit, or the commissioner of insurance in the name of the state, or any person entitled to

the benefit of such deposit, may at any time institute in the district court of Burleigh county legal proceedings against this state and other parties properly joined therein to enforce, administer or terminate the trust created by such deposit. The process in such suits shall be served upon the insurance commissioner of this state, who shall appear and answer in its behalf, and he and the treasurer of this state shall perform such orders and decrees as the court may make therein."

It will be seen that this statute recognizes the right of an insurance company to bring proceedings against the state to secure the administration or termination of the "trust created by such deposit." This, to my mind, is a recognition of the obligation of the state to act with respect to this fund simply as a trustee, and when the state acts as a trustee it necessarily incurs all of the obligations of a private trustee. It is elementary that a private trustee cannot enrich himself out of the trust estate, and that he is not entitled to any increment or interest arising out of an unauthorized use of the trust property. Comp. Laws 1913, §§ 6282 and 6292. This principle applies as well to the state as a trustee, and is conclusive against its claim.

Were it not for the recognition of the trust relationship assumed by the state, it would seem to me that the right of the insurance company would be measured by the statute, § 4899, Compiled Laws of 1913, which authorizes the withdrawal of the deposit, as indicated in the dissenting opinion.

GRACE, J. (dissenting). Appeal from the judgment of the district court of Burleigh county, North Dakota, W. L. Nuessle, Judge.

A concise statement of the facts in this case will clearly present the issues involved therein. The Des Moines Mutual Hail & Cyclone Insurance Association is a mutual hail insurance company organized under the laws of the state of Iowa, and has its principal office in the city of Des Moines in that state. It desired to do business in the state of North Dakota. In pursuance of § 4896, Compiled Laws 1913, in the month of March, 1913, it deposited with the treasurer of the state of North Dakota, one Mr. John Steen, the sum of $25,000 in money to secure losses occurring under its policy contracts for hail insurance made by it in the state of North Dakota. Mr. Steen became treasurer of the state of North Dakota about January 1, 1915. Between Jan-

uary 6, 1915, and April 14, 1916, he, as state treasurer, deposited in different banks in the state of North Dakota the said $25,000 and received from them certificates of deposit which drew interest at the rate of 4 per cent per annum. It is conceded that such banks were theretofore designated as legal depositaries. There had accrued as interest on such deposits in such banks until the 14th day of April, 1916, the sum of $1,250. On the last-mentioned date, the insurance company withdrew from the state and received the $25,000 which it had deposited with the state treasurer as aforesaid. It was repaid to it. The sum of $1,250 interest above referred to was received by John Steen as state treasurer, but the same has not been by him paid in to the state treasury of the state of North Dakota. The insurance company claims the $1,250 interest item belongs to it, and that it is entitled to a judgment for that amount against John Steen personally and against him as treasurer of the state of North Dakota and against the state of North Dakota. Mr. Steen claims that he personally is entitled to the $1,250 interest money; that neither the state nor the insurance company is entitled thereto. The state of North Dakota maintains that the money, the right to which is in dispute, is not the property of the insurance company nor the property of John Steen personally, but that it belonged to the state of North Dakota; that it is entitled to a judgment against John Steen for the full amount of $1,250. In this connection the state contends that the insurance company is not entitled to recover anything in this action. The foregoing are all the material facts, and as such are conceded by all the parties to the controversy.

When the matter came on for determination in the trial court, the plaintiff made a motion for judgment on the pleadings. The granting of this motion was strenuously opposed by both the state and Mr. Steen. The court, however, granted the motion of the plaintiff and awarded it judgment on the pleadings against John Steen personally and as treasurer of the state of North Dakota and the state of North Dakota in the sum of $1,250. The complaint is substantially in accordance with the facts we have outlined; also the answer and cross complaint of the defendant state of North Dakota and the defendant Steen contain allegations of fact largely similar to that of the complaint, the principal difference being that each of the contending parties claims the right to the $1,250. The issue presented is: Who is lawfully en-

titled to the $1,250 interest which had been earned as aforesaid? Upon a thorough consideration of the matters involved in this case and of the pleadings, we are convinced that the trial court was in error in ordering judgment on the pleadings in favor of the plaintiff. We are of the opinion that this clearly appears from a thorough analysis of the law and the facts which are presented in this case.

In order to properly determine that the trial court was in error in granting plaintiff judgment on the pleadings, it will be necessary to examine the entire case as if it were here presented on its merits and in the light of the conceded facts. Section 4896, so far as applicable to this case, is as follows: "No mutual insurance company hereafter organized under the laws of this state or now or hereafter organized under the laws of any state or country, shall engage in the business of hail insurance in this state without first depositing and thereafter keeping on deposit with the treasurer of this state the sum of $25,000 in money, or in lieu thereof bonds of this state or of the United States of the par value of $25,000."

This section was amended by the legislature in 1915 by the enactment of chapter 174, Laws of 1915, permitting the deposit of bonds or first mortgages upon lands in North Dakota in lieu of the cash deposit. We think it must be clear that, in depositing cash under § 4896, it could not have been contemplated either by the company so depositing or the state that the company should receive or the state pay any interest thereon. This more clearly appears when we consider that that section was amended so as to permit the depositing of additional securities in lieu of cash and in lieu of securities other than those mentioned in the § 4896.

Section 4897 is as follows: "Said money or securities so deposited shall be and remain in the hands of the treasurer of this state as a fund to secure the payment of all losses occurring under all policies or contracts for hail insurance, made by such company in this state, or covering property situated within the state. And the treasurer of this state shall not permit said deposit or any part thereof to be withdrawn by said company from his custody except as hereinafter provided."

Section 4900 is as follows: "So long as any deposit required by this article is kept good, and the depositing company is solvent, the state treasurer may permit the company to collect the interest on the secur-

ities so deposited, and from time to time to withdraw any such securities on depositing with him others of the value and character required by this article."

It is clear from the foregoing sections that a foreign hail insurance company desiring to do business in the state of North Dakota would first be required to comply with the laws of the state of North Dakota relative thereto before it could be admitted to do business within the state. In its compliance with such laws, it would be dealing with the state. The contract would be between the state of North Dakota in its sovereign capacity and plaintiff. The sovereign power, the state, speaking through its law contracts that the plaintiff may transact its business within the state upon the deposit of $25,000 with the state treasurer as a fund to secure the payment of losses in the manner prescribed in § 4897, and upon otherwise complying with the law relative thereto.

It will be noticed from the examination of § 4899, Compiled Laws 1913, what the requirements are, and in what manner they must be complied with, when the foreign hail insurance corporation desires to cease the transaction of business within the state, after having made deposit above required and after having entered on the doing of its business within the state. When the company which has complied with these requirements ceases to do business within the state, and withdraws from the same, and such withdrawal is in accordance with the requirements of law relative thereto, it is entitled to receive back $25,000, or its deposit theretofore made. The insurance company in this case, in all the proceedings and steps by it taken to comply with the law and come into the state of North Dakota to do business, is dealing with the state of North Dakota, and in relinquishing its right to do business within the state and in its legal withdrawal from the state by compliance with all the laws of the state of North Dakota relative thereto, it is also dealing with the sovereign power of the state of North Dakota. The state of North Dakota exercises its sovereign powers not directly, but by and through well-defined agencies. The sovereign powers which are exercised by the state are many and varied, and are exercised through various departments of state, such as state treasurer, state auditor, state superintendent of public instruction, etc. Such officials are placed in those positions by the electorate of the state

for a certain period of time fixed by law, and for that time to them is delegated certain authority and power to be exercised by them for and on behalf of the state, by and through their respective departments of state. When so acting, while within the scope of their duties as defined by law, or when performing such duties as are incident to their department, whether such duties are defined by law or not, they are representing and acting for the state only. In the discharge of such duties within the scope of their authority, their acts are not personal, but official. They are but the instrumentalities by and through which the state functions. In the exercise of authority and power delegated to them, and in the execution of their respective duties within the scope of their authority, they have no personality other than an official one. In other words, in the execution of their respective duties, they act officially for and on behalf of the state, and not personally for and on behalf of themselves.

In the case at bar, when the $25,000 was received and deposited, it was received by the state through the treasury department, and when it was paid to the state treasurer, he received it for the state, and such reception was a part of his official duties. He received it not in his individual, but in his official, capacity. After the $25,000 was received into the state treasury, whatever Mr. Steen did in the way of taking care of said money and in keeping it safely, or in depositing it with banks which had been designated as legal depositaries and receiving therefor interest-bearing certificates of deposit, was done by him while acting in his official capacity as the treasurer of the state of North Dakota for and on behalf of the state. No other reasonable deduction can be drawn from the facts in the case and from the law of the case as found in the sections above quoted. Those sections are the law of this case. All of Mr. Steen's acts thus being official acts within the line of his duty as state treasurer, it is clear that he as an individual or as state treasurer is not entitled to receive as his own, any of the accrued interest upon such certificates of deposit.

The only remaining question to be considered in this case is: Which of the two remaining parties is entitled to receive the $1,250 interest money, the state or the insurance company? It is conceded the insurance company has received back the full amount of money which it deposited with the state treasurer. That is all it is entitled to receive

back. That is all the law above referred to states it shall receive back. When the state received the $25,000, the only obligation which it entered into with the insurance company was to return it to the insurance company when it withdrew from the state in accordance with the provisions of law. The state was under no obligations to place the money at interest; it was under obligation to keep it safely for the purposes for which it was deposited with the state, during the time the insurance company was doing business within the state, and when it withdrew, to refund the money to it in accordance with the law above stated. It is true that if the insurance company had deposited bonds or first real estate mortgages of the character required by law instead of the money, the state treasurer could permit the insurance company to collect the interest on the security so deposited, but in doing so, the treasurer would be but complying with the requirements of law, and had the company deposited bonds or mortgages in lieu of money, it would have been part of the contract under the law that the insurance company had a right to the interest which accrued upon such bonds during the time they were deposited with the state. The company had the right under the law to deposit securities instead of cash, and, in that event, the treasurer could have permitted it to collect the interest on such securities so deposited, all of which makes it clear that a deposit of cash under § 4896 does not entitle the company to receive any interest on such deposit. In this case, however, bonds or mortgages were not deposited, and it does not follow because the company would be entitled to receive the interest on them if they had been deposited, that it is equally entitled to receive any interest which had accrued on the money which was placed on deposit by the state in its legal depositaries. The law does not say the company is entitled to receive any interest on money when so deposited, and this being true, it is entitled to recover none. It complied with the law and deposited the money. It was admitted into the state for the purpose of transacting its business therein. It became the duty of the state to safeguard such money. It did so by depositing it in legally designated depositaries of the state. The state assumed the risk and burden of keeping said money safely after it had been once received by it into the state treasury; to safeguard it by placing it in legal depositaries theretofore designated by proper authority, and when such money was deposited in such legally designated depositaries the state treasurer

was not liable on his bond if any part of the same became lost through the failure or bankruptcy of any of the depositaries. In such case, the state would be the loser. Comp. Laws 1913, § 372. No doubt the state, to minimize its risk, distributed the money among many depositaries, as will be seen from the list of depositaries which are shown by the records in this case.

The state was to the trouble and expense of placing it in its depositaries. It had assumed the risk of safely keeping the money to secure it for the purposes for which it was deposited, and to return it to the insurance company under the conditions specified in the law relative thereto. Under the law is assumed no other duty toward the plaintiff. The state cannot be held to be under obligations to perform any other duty than that specified in the law as found in the sections above set forth. All other obligations it was under by reason of said law have been wholly performed by the state. There is no other law applicable to this case. That law was enacted for the purpose, and with the intent to set forth and fix the duty and obligation of such corporations as the plaintiff, which desire to be admitted to do business within the state, and also sets forth the corresponding duties and obligations of the state to such corporations. The plaintiff having, in a proper manner as required by law relative thereto, withdrawn from the state, the state was under no other obligations than those it assumed in the law; that is, to return to the plaintiff the amount deposited subject to the requirements of § 4899, above referred to. It must also be borne in mind that the admission of the plaintiff within this state to do business and all the proceedings had with reference to its admission, the payment of the money into the state treasury and thereafter the state keeping and safeguarding it in the manner above set forth, were all done for the plaintiff's interest in the furtherance of its business. The state, as such, would receive no benefit other than what had incidentally accrued to it in the safeguarding of the $25,000 by placing it upon deposit as we have seen, and upon which deposit had accrued the interest in dispute, and which the law does not provide shall be returned to the plaintiff. The state has complied with all its obligations to the plaintiff, and should be and is under no further liability to it. We have examined all the authorities cited in the case, but we are fully convinced that the law which must govern this case is that of our statute above set forth.

MRS. J. E. F. BROWN, Respondent, v. DR. F. E. BALL, Appellant.

(174 N. W. 629.)

In an action brought upon an agreement to refund, at the option of the purchaser, the payments made under a contract to purchase real estate, and where there had been a previous action between the same parties for fraud and deceit in negotiating the sale contract and refunding agreement, it is *held:*

Actions — election of remedies — effect of plaintiff's election in the previous action concerning same contract.

1. The election of the plaintiff in the previous action for fraud and deceit to treat the sale contract as binding was an election for the purpose of that action.

Election of remedies — effect of judgment against plaintiff in former action.

2. Where a contract was adopted for the purposes of an action for fraud and deceit, and where the plaintiff failed to recover in such action, he is not precluded from subsequently maintaining an action for breach of the contract, and it is immaterial that the contract had been broken before the action for fraud and deceit was instituted, and that its performance by the defendant would have compensated for all damages occasioned by the alleged fraud and deceit.

Vendor and purchaser — option to have payments refunded — effect of action for fraud and deceit against vendor.

3. Where a party exercised an option to be reimbursed under a refunding agreement, given in connection with a contract for the sale of real property, and subsequently brought an action for fraud and deceit in negotiating the sale contract and refunding agreement, the bringing of such action did not constitute a waiver of the option.

Vendor and purchaser — effect of option to recover payments.

4. Under a contract in which defendant obligated himself to refund to the purchaser of land "all sums of money paid upon the within contract," commissions earned by a third party, which are, with his consent, accepted by the vendor as payments on the land contract and credited to plaintiff with plaintiff's consent, may be recovered.

Vendor and purchaser — effect of agreement to refund payments made.

5. The evidence is examined and *held* to support the finding that the refunding agreement was negotiated as a part of the sale contract though dated subsequently to it; also that it supports the finding as to the amount expended by the plaintiff under the land contract.

Opinion filed July 7, 1919. Rehearing denied September 19, 1919.

Appeal from District Court of Cass County, *A. T. Cole, J.*

Affirmed.

Watson, Young, & Conmy, for appellant.

This plaintiff having elected to proceed in tort waived her right to sue on the contract exhibit "B," and is estopped from now suing on that contract. The law on the subject is well settled. See 9 R. C. L. pp. 956–958.

"It is well settled indeed, that a party may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again." Thompson v. Howard, 31 Mich. 309; McNutt v. Hilkins, 80 Hun, 235, 29 N. Y. Supp. 1049; Welsh v. Carder, 95 Mo. App. 41, 68 S. W. 580; Roney v. H. S. Halvorsen Co. 29 N. D. 20; Sonnesyn v. Akin, 14 N. D. 256, 104 N. W. 1029; Field v. Elevator Co. 6 N. D. 424, 71 N. W. 135.

By deliberately electing to keep the contract exhibit "A," she disables herself from proceeding under exhibit "B," and waives her right to proceed upon it. Roney v. Halvorsen, 29 N. D. 20, and cases cited; Sonnesyn v. Akin, 14 N. D. 256; 4 L.R.A. 145; 5 L.R.A. 693; 8 L.R.A. 217; 13 L.R.A. 91; Swan v. N. R. Co. (N. D.) 168 N. W. 657; Brown v. Ball, 150 N. W. 893.

Where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point, or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. Cromwell v. Sac Co. 94 U. S. 351, 25 L. ed. 195; 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. Reid, 102 Ill. 596; Wright v. Griffey, 147 Ill. 496, 35 N. E. 732; Leopold v. Chicago, 150 Ill. 568, 37 N. E. 982; Railway Co. v. Carson, 169 Ill. 247, 48 N. E. 402; Markely v. People, 171 Ill. 260, 49 N. E. 502; Young v. People,

171 Ill. 299, 49 N. E. 503; Chicago Theological Seminary v. People, 59 N. E. 979; Stearns v. Lawrence, 83 Fed. 742.

"When a court with jurisdiction of the parties and subject-matter of the litigation makes an adjudication as to a question of law, etc., its adjudication is conclusive on the same questions in any subsequent litigation between the same parties." Appeal and Error, 2 Decen. Dig. No. 1097; Broden v. Graves (N. D.) 127 N. W. 104.

"Questions fairly raised and decided on a former appeal in the same action are not open for consideration on a subsequent appeal, as such decision on the first appeal, whether right or wrong, became and is the law of the case." Schmidt v. Beiseker (N. D.) 120 N. W. 1096; Persons v. Persons (N. D.) 97 N. W. 551; Ottew v. Friese (N. D.) 126 N. W. 503.

"Where more than one remedy to deal with a single subject of action exists, and they are inconsistent with each other, after the choice of one with knowledge, or reasonable means of knowledge, of the facts, the other no longer exists." Rowell v. Smith, 102 N. W. 1; Fowler v. Bank, 113 N. Y. 450, 21 N. E. 172, 10 Am. St. Rep. 487, 4 L.R.A. 145; 9 R. C. L. 956–962; North Dakota cases heretofore cited.

"In cases in which the remedies are not inconsistent, but are alternative and concurrent, there is no election until one of them has been prosecuted to judgment, unless the plaintiff has gained an advantage or the defendant has suffered a disadvantage." 9 R. C. L. 961; 34 L.R.A.(N.S.) 313; Neil v. Burton, 12 N. W. 906.

This defendant is estopped by her laches and conduct from recovery here. State v. Nohls, 16 N. D. 168, 112 N. W. 141; Kenny v. McKenzie (S. D.) 127 N. W. 597; Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685; 10 R. C. L. p. 395, Nos. 142 and 143, and numerous cases cited; Haugen v. Skjervheim, 13 N. D. 616, 102 N. W. 311.

"A recovery cannot be had by an indemnitee who has not performed a covenant which by the terms of the contract is a condition precedent to any liability on the part of the indemnitor." 22 Cyc. 93 and cases cited.

"A limitation of the time for which a standing offer is to run is equivalent to the withdrawal of the offer at the end of the time named. The rule that in equity time is not of the essence of a contract does not apply to a mere offer to make a contract." 32 R. C. L. p. 609; Comp. Laws 1913, §§ 5859 and 5864; Hull Coal & Coke Co. v.

United States Empire Co. 113 Fed. 256; Wells v. Smith (N. Y.) 31 Am. Dec. 275; Garrison v. Cook, 72 S. W. 54; 25 Cyc. 1317—abandonment of action; Johnson v. Duncan, 2 How. Pr. 366; Dyer v. Duffy, 19 S. E. 540, 24 L.R.A. 339; 5 Decen. Dig. No. 278, Contract; Vredenburg v. Sugar Co. 28 So. 122; Thurber v. Smith, 54 Atl. 790, waiver, of tender; Swan v. G. N. R. Co. (N. D.) 168 N. W. 657.

"The burden of proof that a proposal has been accepted, and that notice thereof has been communicated to the proposer, rests upon the party claiming to have accepted the same." 6 R. C. L. p. 607, Contracts; Weaver v. Burr, 8 S. E. 743.

There can be no question but plaintiff cannot recover in this case. Bank v. Story, 93 N. E. 940; Am. Cotton Co. v. Hervig, 37 So. 117; Decen. Dig. No. 108, Sales; Owens Co. v. Doughty, 16 N. D. 10; Poirier Co. v. Kitts, 18 N. D. 556; Fahey v. Machine Co. 3 N. D. 220; Noble v. Growing Co. 36 L.R.A.(N.S.) 472.

Lawrence & Murphy, for respondent.

Assignments of error and specifications not argued nor discussed in the brief are deemed abandoned by appellant. Supreme court rules of North Dakota 1914, rule No. 34; 2 Cyc. 1014; 4 Standard Cyc. Proc. 585; 2 Spelling, New Trial & Appeal, § 679; Hayne, New Trial & Appeal, 279; Nokken v. Mfg. Co. 11 N. D. 399, 92 N. W. 487; Kelly v. Pierce, 16 N. D. 234, 112 N. W. 995; Foster I. Co. v. Smith, 17 N. D. 178, 115 N. W. 663; Schmidt v. Beiseker, 19 N. D. 35, 120 N. W. 1096; State v. Wright, 20 N. D. 216, 126 N. W. 1023.

In Schmidt v. Beiseker, 19 N. D. 35, 120 N. W. 1096, this court said: "The point covered by such specifications is not argued or referred to in appellant's brief, and hence is deemed abandoned."

"The doctrine of election of remedies applies only where there are two or more remedies, all of which exist at the time of election and which are alternative and inconsistent with each other, and not cumulative, so that after the proper choice of one, the other or others are no longer available." 9 R. C. L. p. 958.

"A class of cases is to be distinguished from those which are subject to the doctrine of election of remedies."

And an action on a contract induced by fraud is not inconsistent with an action for damages for the deceit. Union Cent. Ins. v. Schil-

der, 130 Ind. 214; Gall v. Gall, 126 Wis. 390, 5 L.R.A.(N.S.) 603, 105 N. W. 953. Notes in 8 L.R.A. 216 and 10 Am. St. Rep. 487.

"The principles governing election of remedies are necessarily based upon the supposition that two or more remedies exist. If in fact or in law only one remedy exists, there can be no election by the pursuit of another and mistaken remedy." Water Co. v. Hutchinson, 160 Fed. 41, 19 L.R.A.(N.S.) 219; Harrill v. Davis, 168 Fed. 187, 22 L.R.A.(N.S.) 1153; Agar v. Winslow, 123 Cal. 587, 56 Pac. 422; Am. Process Co. v. Brick Co. 56 Fla. 116, 47 So. 942; Bank v. Hilson, 64 Fla. 206, 60 So. 189; McCoy v. McCoy, 32 Ind. App. 38, 69 N. E. 193; Zimmerman v. Robinson, 128 Iowa, 72, 102 N. W. 814; Wells v. W. U. 144 Iowa, 605, 123 N. W. 371; note in 8 L.R.A.(N.S.) 144; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, and many other cases cited therein.

"A judgment against the plaintiff in an action for deceit is not a bar to another action on a contract in regard to the same subject-matter not involving the charge of deceit." Salem R. Co. v. Adams, 23 Pick. 256; Steel v. Chamberlain, 60 N. Y. 272; Cromwell v. Sack Co. 94 U. S. 351, 24 L. ed. 195; 6 Wait, Actions & Defenses, 781; Opinion and notes found in 22 L.R.A.(N.S.) 1160.

Birdzell, J. This is an appeal from a judgment in favor of the plaintiff for $954.75. The judgment was rendered in an action brought for breach of a contract to repay money expended by the plaintiff in the performance of a land-purchase contract. The facts are as follows: The defendant in 1910 was engaged in the real estate business in the city of Fargo, in the capacity of sales agent for the Columbia Land Company. He worked on a salary of $350 per month, and the lands he was selling were high-priced fruit lands in Oregon. In the month of January, 1910, the plaintiff entered into a contract with the Columbia Land Company for the purchase of 10 acres for $2,250, the contract being dated January 14, 1914. The plaintiff claims that as an inducement to enter into the contract, the defendant executed the agreement upon which this suit is founded. The agreement is as follows:

"Whereas, Mrs. J. E. F. Brown of Fargo, Cass county, North Dakota, did on or about the 14th day of January, A. D. 1910, enter into a

contract with the Inland Irrigation Company, a corporation, in the state of Oregon, to purchase certain real estate described as follows, to wit: The northwest quarter (N.W.¼) of the southeast quarter (S.E.¼) of the northwest quarter (N.W.¼) in section nine (9), in township four (4), north of range twenty-nine (29), in the county of Umatilla and state of Oregon, containing ten (10) acres, for and in consideration of the sum of two thousand two hundred and fifty ($2,250) dollars:

Now, therefore, F. E. Ball individually, and the Columbia Land Company, a corporation, hereby agree to refund to Mrs. J. E. F. Brown, of Fargo, North Dakota, any time within three years from date, within three (3) months after demand, all sums of money paid upon the within contract heretofore described, with five (5) per cent interest from date, upon the surrender by her of all her rights thereunder.

Dated at Fargo, Cass county, North Dakota, this 28th day of January, A. D. 1910.

F. E. Ball,
Columbia Land Company,
By F. E. Ball, its V. P.

In October, 1910, the plaintiff demanded of the defendant the return of the moneys paid out by her on the land contract, and she claims that no part of the same has been returned, except $50 on April 3, 1911, and $25 on September 5, 1911.

In August, 1913, the plaintiff commenced an action against the defendant, in connection with which she caused the defendant to be arrested under the Arrest and Bail Statute. Although a breach of the agreement in suit was alleged in that action, the plaintiff elected to treat it as one for fraud and deceit. The alleged deceit consisted in inducing the plaintiff to enter into the land-purchase contract by making misrepresentations as to the financial responsibility of the defendant and as to his official connection with the Columbia Land Company, of which it was alleged he had falsely represented himself to be vice president, and to have authority to bind the company to the terms of the above-quoted agreement to refund. It was alleged that there was "a balance due and not refunded of $954.75, with interest thereon

at 5 per cent per annum from and since the 28th day of January, 1910, and the same and the whole thereof has been by the said defendant, F. E. Ball, in the course of his said agency for this plaintiff, fraudulently converted to plaintiff's damage of $954.75, with interest." And that "plaintiff has demanded said sum last named from said defendant, F. E. Ball, but he has not paid nor accounted for nor refunded the sum or any part thereof, and wholly refuses to do so."

In that action the defendant was arrested, furnished bail immediately, and thereafter moved to vacate the order of arrest. The order was vacated and from that order an appeal was taken to this court, where the order was affirmed. Brown v. Ball, 29 N. D. 223, 150 N. W. 890. The order was vacated for the reason that the affidavit and the complaint upon which the order was based, failed to allege any facts showing that damages had resulted from the alleged fraud and deceit. A sufficient cause to warrant the arrest under §§ 7489 and 7491, Compiled Laws of 1913, therefore, did not exist.

During the pendency in this court of the appeal from the order, the case was tried below on an amended complaint and answer, and at the end of the trial the court directed the jury to return a verdict for the defendant. Under the amended complaint the *ad damnum* clause is the same as under the original pleading, the plaintiff claiming $954.75, with interest; but the paragraph which sets forth the basis for the claim does not cure the defect which this court found to be inherent in the original complaint; that is, it does not allege the damages sustained by the plaintiff by reason of the affirmance of the sale contract. The paragraph is as follows: "That by reason of the premises, *viz.*, the fraud and deceit of the said defendant, F. E. Ball, as in this complaint set forth and alleged, coupled with the said neglect and refusal by both the defendant and the said Columbia Land Company to refund her money as hereinbefore alleged, the plaintiff has suffered loss and damage in the full sum of $954.75, with interest thereon from and since January 28, 1910, at the rate of 5 per cent per annum."

In the present action, the plaintiff and defendant each having moved for a directed verdict, the trial court directed the entry of a judgment for the full amount claimed.

The first contention of the appellant is that the plaintiff, having

heretofore elected to sue the defendant for fraud and deceit instead of bringing an action upon the refunding agreement, is estopped to sue upon the latter.

When the motion was made to dissolve the order of arrest, the defendant was required to elect, as between the action for damages for fraud and deceit and the action for the breach of the agreement to refund, both of which the complaint purported to cover. The plaintiff thereupon elected to treat the action as a tort action. In treating the action, however, as one to recover damages for deceit, it became essential for the plaintiff to adopt the contract thus wrongfully foisted upon her, and to show what damages were occasioned thereby. Brown v. Ball, supra. It will be noticed, nevertheless, that in the above quotation from the amended complaint, the plaintiff still predicated her damages upon fraud and deceit, together with the refusal of the defendant and the Columbia Land Company to refund her money. In view of the previous election to stand upon the cause of action for fraud and deceit, we cannot assume, in the absence of evidence, that there was involved in the trial the question of the breach of the agreement to refund. So, in viewing this record in connection with the contention that the plaintiff is estopped to sue upon the agreement, we must consider that the previous action was defeated for the failure to make out a case in fraud and deceit. The question then resolves to this: Does the inclusion of a cause of action upon the contract to refund in a complaint which also purports to allege a cause of action for fraud and deceit, and the abandonment of the former under an election, binding for purposes of the action, preclude the plaintiff from subsequently maintaining an action for the breach of the agreement? We are convinced that the appellant bases his case upon the strongest possible ground when he urges that the plaintiff is estopped to pursue this action upon the contract, but we cannot agree with counsel in his conclusion that an estoppel exists. Upon the argument counsel relied upon the expression of this court in Kallberg v. Newberry, post, 521, 170 N. W. 113, but in that case it was said (page 117): "The real basis for a binding election is estoppel, and if the election is held binding or not binding, depending upon whether or not the elements of an estoppel are present, no injustice can result. In the present case the appellant first sought to avail himself of his right to rescind, and

in the action brought *litigated every issue that is material to the maintenance of his present action. His adversary not only relied upon his choice to the extent of meeting the issues presented, but, after the determination of the case, he dealt with others on the strength of the result. . . . If the contract, as found in the previous suit to be, had not been performed, and this action were brought for its breach, a different question would be presented.*"

In the statement quoted it will be seen that allowance was made for just such a situation as exists in the present case. In the former suit there was involved the damage that the plaintiff sustained by reason of the fraud,—damages that would have been entirely obviated had the contract in question been performed. In the action for fraud and deceit, therefore, had the defendant been able to show that he had performed the contract to refund, he would not only have defeated that action, but he would have litigated an issue which could not again be litigated in this suit. The defendant, however, does not attempt to prove that the performance of the contract to refund was litigated in that action, and the only inference to be drawn from this is that it was not performed. This, then, forms an issue which is material to the present suit, and which was not litigated in the former suit. When analyzed, the appellant's position amounts to this: Having been put to the trouble and expense necessary to defeat an action for fraud and deceit in negotiating a land contract and a refunding agreement, he should not be held liable for the performance of the latter agreement. We confess that we are unable to see upon what principle the refunding agreement, which was at least honestly made so far as the plaintiff was concerned, can be discharged by such considerations. There are numerous grounds upon which the deceit action could be terminated adversely to the plaintiff, which would presuppose the continuation of the obligation to refund. We can see no basis for an estoppel that precludes the plaintiff from maintaining the present suit for breach of the agreement to refund.

But, it is contended, that since the action for fraud and deceit, which was begun by the plaintiff after the exercise of her option to surrender the contract and recover her money, is predicated upon an affirmance of the land contract, she cannot subsequently avail herself of the option. It is claimed that the starting of the action for fraud and

deceit was a waiver of the exercise of the option. This contention appears to us to be without merit for the reason that there is no legal ground for compelling the plaintiff to hazard whatever value attached to the refunding agreement upon the outcome of an action which could be maintained upon independent grounds.

It is also contended that the decision of this court in Brown v. Ball, 29 N. D. 223, 150 N. W. 890, establishes the law of this case concerning election. The following language of the court is relied upon: "Having affirmed the contract, and thereby elected to retain any benefits accruing to her thereunder, it requires no argument to demonstrate that she cannot recover back what she parted with, either on the theory of conversion or otherwise. The complaint is silent as to the value of that which she has elected to retain, and consequently she does not show that she has suffered any detriment through the alleged wrongful acts of the defendant. If, instead of affirming the contract and retaining the benefits, if any, thereunder, plaintiff had, upon discovering the alleged fraud, disaffirmed or rescinded the same by restoring what she received thereunder, she might, under the views of the writer as expressed by him in Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026, have maintained an action to recover the money which she parted with through such fraud, even upon the theory of the conversion of such moneys by the defendant; but she has seen fit by her election to affirm the contract and to ask damages for the fraud and deceit, and, as before stated, she is precluded by such election." It is to be remembered in connection with the previous decision of this court, that but a single question was under consideration; that of the correctness of the order dissolving the arrest. The court professed to deal with no other question. The quoted portion of the opinion, when carefully read in the light of the question under consideration, only demonstrates the insufficiency of the complaint upon which it was sought to justify the arrest, and it was written in the light of the election, which was conclusive, for purposes of that action, to treat the land as retained by the plaintiff. It is perfectly apparent that in the above discussion the court did not have in mind the agreement to refund, and that it was only stating the reasons which led it to hold that the affidavit and complaint containing the order of arrest must show prima facie wherein the plaintiff has suffered actual damage. This

is clearly demonstrated by the latter portion of the quotation, wherein the court considered the right of the plaintiff to rescind the contract and recover back the money paid on common-law principles.

It is also argued that the refunding agreement is without consideration. It is dated January 28, 1910, whereas the sale contract is dated January 14, 1910. Of course, if it should appear that the only consideration supporting the refunding agreement was the pre-existing sale contract, this contention would be well founded. The plaintiff testifies positively that she did not sign the sale contract until after the refunding agreement—or guaranty, as she calls it—had been executed; and from all of the evidence we are satisfied that the refunding agreement was an inducement to the execution of the sale contract by the plaintiff.

It is next contended that the judgment is excessive. The plaintiff testified that she had paid on the contract $1,029.75, of which amount $75 had been refunded to her by the defendant. The defendant, on the other hand, testified that she had paid but $450 on the contract. Plaintiff's exhibits C, D, E, and F, consist of two checks,—one for $250, dated January 28, 1910, and one for $200, dated March 5, 1910, which bear the indorsement of the Columbia Land Company, a promissory note for $330, dated January 14, 1910, and payable to the order of the Columbia Land Company on or before July 14, 1910, which is marked "Paid" on April 11, 1910, by the Columbia Land Company, and a receipt for $249.75, dated March 5, 1910, and acknowledging the receipt on behalf of the Columbia Land Company "a/c Land contract." The payments represented by the checks are admitted. The note, as to date, due date and amount, corresponds with the description of the first note required by the contract to be executed, and the plaintiff's testimony to the effect that she has paid the note, together with the acknowledgment of receipt apparently on behalf of the Columbia Land Company, and the possession of the note by the plaintiff, is more convincing to our minds than the denial of such payment by the defendant, who might or might not be familiar with the fact. It seems to be the defendant's contention that both the plaintiff's note for $330 and the receipt for $249.75, acknowledging payment on the contract, were given by the Columbia Land Company to the plaintiff's husband in discharge of its obligations to him for com-

missions. Plaintiff testifies that both the note and receipt were brought to her by her husband, and that she has no distinct recollection of paying out the amount of money represented by these two instruments. As we view the case, it is immaterial whether the note and the receipt in plaintiff's possession represent money payments by her or whether they represent credits upon the land contract of amounts of money represented by commissions earned by her husband. If plaintiff's husband and the Columbia Land Company consented to liquidate the latter's liability to him by applying the amount on plaintiff's contract and the plaintiff assented to this, she would be clearly entitled, under the refunding agreement, to be reimbursed for the moneys thus credited by the Columbia Land Company. If the plaintiff's husband was content to be paid for his services in this manner, the plaintiff's right to be reimbursed for the payments thus made on her behalf is just as clear as though her husband had advanced money payments under the contract. Anything is a payment under the contract which the other contracting party is willing to receive as a payment, and we cannot see wherein the defendant can complain. He does not even claim that such credits were fraudulently made.

The evidence well supports the finding of the trial court as to the amount for which judgment should be entered.

For the foregoing reasons, the judgment appealed from is affirmed.

CHRISTIANSON, Ch. J., and ROBINSON, J., concur.

BRONSON, J. I dissent. I agree neither with the reasoning nor with the result obtained by the majority in this case. The judgment ought to be reversed upon principles of law, as well as of justice. The plaintiff ought to be estopped and bound by her election of remedies, and the proceedings had in the former case.

GRACE, J., concurs in dissent.

JOHN E. STRONG, Appellant, v. JAMES NELSON and Minnie Nelson, Respondents.

(174 N. W. 869.)

Appeal and error — order granting new trial and denying motion for judgment *non obstante* not appealable.

1. Where a party has made a motion for judgment *non obstante*, or in the alternative for a new trial, and the trial court has granted a new trial and denied the motion for judgment *non obstante*, such order is nonappealable as to the moving party.

Appeal and error — new trial.

2. Where the trial court has granted a new trial upon insufficiency of the evidence to justify the verdict, this court will not reverse such order unless there is a manifest abuse of discretion.

Opinion filed October 3, 1919.

Action on a note, in District Court, Barnes County, *Coffey*, J.

Appellant appeals from order granting new trial.

Affirmed.

Knauf & Knauf, for appellant.

The stationery indicated that J. E. Strong and R. B. Lowe were connected and interested in the land business. This was competent evidence under the circumstances of this case. Farmers Bank v. Saling (Or.) 54 Pac. 190; Peninsular Sav. Bank v. Currie (Mich.) 82 N. W. 511.

It is well settled that, where the consideration for a contract for the purchase of land fails, the law implies an obligation on the part of one who has received the purchase price to make restitution to the party from whom he received it. Strong v. Nelson (N. D.) 165 N. W. 511.

The statute provides and the decisions so hold, that the motion for a direct verdict should be made at the close of the evidence. Comp. Laws 1913, § 7643; Landis Mach. Co. v. Konantz Saddlery Co. 17 N. D. 310, 116 N. W. 333.

M. J. Englert, for respondents.

BRONSON, J. This cause involves cross appeals. The plaintiff made a motion for judgment *non obstante,* or in the alternative for a new trial. The trial court granted a new trial. The plaintiff has appealed from that part of the order denying judgment *non obstante;* the defendants have appealed from such order granting a new trial. The action was instituted to recover upon a promissory note for $550 made in December, 1911. The defendants, in their answer admit the note and the nonpayment thereof, and, by way of defense, set up a transaction with the plaintiff in the month of July, 1914, for the trade of a certain shoe stock for Cuban land; the delivery of such shoe stock to the plaintiff and the failure of the plaintiff to transfer the Cuban land or in any manner to furnish title thereto, and, further, false and fraudulent representation made in connection therewith. The trial court submitted to the jury the evidence upon the issues framed, and the jury returned a verdict for the defendants for $356.56, being the amount due the defendants in excess of the amount due on the note.

We have difficulty in discovering any merit in either appeal. As to the plaintiff, the order granting a new trial is a nonappealable order; this relief as he sought he has received. Stratton v. Rosenquist, 37 N. D. 116, 163 N. W. 723. There is little evidence to show that the plaintiff was in fact the party with whom the defendants made the trade of the shoe stock for the Cuban land in July, 1914. The plaintiff wholly denies any connection with the transaction; any receipt of the stock or any ownership of the land involved. Evidently the trial court granted a new trial by reason of this uncertainty in the evidence. Where the trial court has so granted a motion for a new trial this court will not disturb its order in that regard, unless a manifest abuse of discretion is shown. Aylmer v. Adams, 30 N. D. 514–520, 153 N. W. 419; State v. Cray, 31 N. D. 67, 153 N. W. 425. The record does not show any abuse of discretion in this regard. The order of the trial court is in all things affirmed, without costs to either party.

NETTIE L. McBRIDE, Appellant, v. FRED H. McBRIDE, Respondent.

(174 N. W. 870.)

Divorce — insufficiency of evidence to sustain charge of cruelty and intemperance.

This is a suit for divorce on the ground of cruelty and intemperance. The evidence does not sustain the charge.

Opinion filed October 7, 1919.

Appeal from the District Court of Pierce County, Honorable *C. W. Buttz,* Special Judge.

Affirmed.

Richard E. Wenzel, for appellant.

"A judgment dismissing a suit for divorce does not bar a subsequent suit therefor unless it was rendered after a trial of the issues and upon the merits." Haldeman v. United States, 91 U. S. 584; Rincon Water Co. v. Anaheim Union Power Co. 115 Fed. 543; Bishop v. McGillis (Wis.) 51 N. W. 1075; Wakely v. Delaplaine, 15 Wis. 554; Goeldner v. Goeldner (Iowa) 139 N. W. 889; Craig v. Craig, 87 S. E. 727; Kershaw v. Kershaw, 5 Pa. Dist. R. 551; McPherson v. Swift, 22 S. D. 165, 116 N. W. 76; Taylor v. Neys, 11 S. D. 605, 79 N. W. 998; 14 Cyc. 726.

"Condonation is revoked and the original cause of divorce revived.

"1. When the condonee commits acts constituting a like or other cause of divorce; or,

"2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith or not fulfilled." Comp. Laws 1913, § 4392; Mosher v. Mosher, 16 N. D. 269; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Douglass v. Douglass, 81 Iowa, 258, 47 N. W. 92; Powelson v. Powelson, 22 Cal. 358; Braun v. Braun, 194 Pa. 287, 75 Am. St. Rep. 699; Fitzpatrick v. Fitzpatrick, 21 Misc. 378, 47 N. Y. Supp. 737; Sharp v. Sharp (Ill.) 6 N. E. 15; Gardner v. Gardner, 9 N. D. 192; Taylor v. Taylor, 5 N. D. 58; 14 Cyc. 643(G).

"Any unjustifiable conduct on the part of either husband or wife, which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the health . . . or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty under the statutes." Thompson v. Thompson, 32 N. D. 536.

Harold B. Nelson, for respondent.

"Where an agreement or stipulation is made between parties to dismiss a suit, and there is no dispute as to the fact of such agreement, the courts will carry it into effect upon motion." 14 Cyc. 430, and note 67; 23 Cyc. 1134, and cases cited in note 26.

"Where parties have agreed to a settlement of an existing lawsuit, and put it in writing, and signed it, such arrangement must stand until set aside for such fraud as should vitiate it upon a rescission, attempted as soon as practicable after the fraud is known, and with no lack of diligence in discovering it." Royl v. Hammond, 58 N. W. 654; Lewless v. Railway Co. 32 N. W. 790; 23 Cyc. 1141.

"Ordinarily a decree in equity is in fact rendered on the merits when no qualifying words such as 'without prejudice' are used." Bigelow, Estoppel, pp. 63, 79; Durant v. Essex Co. 7 Wall. 107; Hughes v. United States, 4 Wall. 237; Adams v. Goves, 75 Iowa, 642; Bradley v. Bradley, 160 Mass. 258, 35 N. E. 482; Munn v. Mather, 111 Pac. 566; United States v. Parker, 120 U. S. 89; Fletcher v. Holmes, 25 Ind. 458; Leeman v. Osborne, 153 Ind. 172, 52 N. E. 1058.

A judgment or decree dismissing a suit without any reservation for its renewal, is not a judgment of nonsuit, it is final, and as *res judicata* concludes the parties. 1 Herman, Estoppel, § 256; Bert v. Hoppie, 3 Cal. 137; Bank v. Hopkins, 2 Dana, 395; Philpots v. Blaisdell, 10 Nev. 19; Luffer v. Allen, 55 Ill. 556.

The entry of judgment in a divorce action dismissing the complaint, without the addition of the words, "without prejudice," purports to be a final judgment on the merits, and is a bar to any subsequent suit upon the same cause of action. 9 R. C. L. 464, § 276; Brown v. Brown, 75 Am. Dec. 154. See also note in 26 L.R.A.(N.S.) 577.

Whether or not this grievous mental suffering has been inflicted in any particular case is purely a question of fact to be determined from

a consideration of all of the circumstances of the case, including the mental characteristics of the party complaining so far as they may be developed. Mahnken v. Mahnken, 9 N. D. 188; Mosher v. Mosher, 16 N. D. 269.

"No conduct is considered cruelty which results in mere unhappiness." 1 Nelson, Div. & Sep. pp. 314, 328, 367; Peck v. Peck, 33 N. W. 393; Taylor v. Taylor, 45 N. W. 307; Fairchild v. Fairchild, 11 Atl. 426.

Robinson, J. "'Tis said, alas! that love should wound itself and sweet affection prove the spring of woe." In the springtime of life, some thirty years ago, the parties to this action met, loved, and plighted their vows. She has borne him five children, now young men, whose ages vary from twenty-nine to seventeen years; but now, as the passions of youth have naturally waned, and "age has cloyed love and use destroyed love," she brings this suit to sever the bonds of matrimony. She avers that during the past two years defendant has treated her in a cruel and inhuman manner, by calling her bad names, abusing and assaulting her, and by making false charges against her chastity. She also avers that he has been guilty of intemperance in the excessive use of intoxicating liquors.

It appears that in January, 1917, she commenced a former action on the same grounds, and in two months they made a settlement. He, in a manly way, to some extent, confessed and did penance by conveying to her money and property worth several thousand dollars—enough to secure her in all the comforts of life—and she still retains the same. Hence, it may be said that she is a free and independent lady; if she does not like the defendant, she does not have to live with him. Two weeks after the settlement the poor lady found it necessary to go to a hospital and to endure an operation for cancer of the breast. There she remained for some five weeks, and during that time he did not fail to kindly visit her twice a day. Soon after her return from the hospital he became enraged and fumed and scolded on seeing the fee bill presented to her by the attorney in the divorce suit, and again he had recourse to the bottle. Then she insisted that he should live at the hotel and not at his home. This he did for several months, and in the meantime he furnished all the usual supplies for the house, until the plain-

tiff left it and refused to live with him and commenced this suit. At the time of the marriage defendant was a bartender in a saloon at Towner. Then for eight years he was county judge. Then he kept a drug store and made it a success. So there is no charge that the plaintiff was ever denied all the comforts of life. Defendant swears that he still loves her and that she has been to him a good and true wife. His hope is that "time and regret may recall her again." The trial court justly dismissed the action, and the good lady appeals.

The statute permits a divorce for extreme cruelty and for habitual intemperance. Comp. Laws, § 4382. Extreme cruelty is the infliction by one party to the marriage of grievous bodily injury or grievous mental suffering upon the other. § 4385. Habitual intemperance is that degree of intemperance which disqualifies the person a great portion of the time from properly attending to his business or which reasonably inflicts a course of great mental anguish upon the innocent party. § 4386. Habitual intemperance must continue for one year before it is a cause of divorce.

There is no showing that defendant has been guilty of any such intemperance or cruelty. It is true that he has been given to the excessive use of liquor, and at times, when under the influence, he has used bad and drunken language to the plaintiff, but he has never assaulted or struck her, or neglected to provide well for her and her family. Indeed, there is no just claim that since the settlement the defendant has given the plaintiff any just cause for divorce. The claim is that by his subsequent conduct the contract of settlement has been revoked so that all the sins of his life now rise up against him, but the claim is neither just nor legal. The record shows no cause for a divorce at any time, and the settlement was no ordinary condonation. There was a valid contract, based upon a consideration of several thousand dollars, which the defendant has received and retained. The whole conduct of the defendant taken into consideration does not in this case show cause for dissolving the marriage.

The judgment is affirmed, without costs.

CHRISTIANSON, Ch. J., concurs.

GRACE, J., I concur in the result.

BIRDZELL, J. (concurring). I concur in an affirmance of the judgment, but I desire to add to the opinion already written in the case a brief statement indicating more adequately the reasons which lead to the conclusion. A careful reading of the record fails to result in a conviction that the plaintiff has sustained the burden of proof either upon the charge of cruelty or of habitual intemperance. The testimony in relation to the cruelty charges, particularly, is conflicting, and the trial judge, who had the benefit of a better opportunity to weigh the testimony of the witnesses, has found against the plaintiff. This finding should stand. It is noteworthy that two sons of the marriage, who were in the best position perhaps to corroborate the testimony of one or the other of the parents with respect to those charges, did not testify. It is true that the record shows that the plaintiff made some effort to obtain testimony from this source, but in view of the methods available for obtaining testimony we can hardly assume, upon appeal, that it was impossible for either party to obtain needed evidence where the witnesses are living, available, and competent. Perhaps the natural explanation of their failure to testify is their desire to discountenance the proceeding. The record in its present state leaves a well-grounded doubt in the mind as to whether the defendant was guilty of extreme cruelty toward the plaintiff.

Upon the charge of intemperance, it is frankly admitted by the defendant that he has fought a hard fight against the seductive wiles of strong drink, and that he has four times taken the Keeley cure with all of its attendant unpleasantness. But his business must have militated considerably against his efforts to avoid drink. At the time the parties were married the defendant was a bartender in a saloon at Towner. Later, he was county judge for a period, and thereafter and for a long period since he has been engaged in the drug business. It appears that he has not drunk sufficiently to preclude a successful management of his business, for he has accumulated considerable property. The spells which the plaintiff attributes entirely to drink the defendant attributes to other physical causes. A substantial doubt also exists with respect to this charge.

Considering the ages of the parties, their period of life, and the length of time they have lived together, along with the inconclusive character of the testimony to prove the charges upon which relief is

sought, I am of the opinion that justice would not be subserved by reversing the judgment of the trial court and granting a divorce.

BRONSON, J., concurs.

LEO KUKOWSKI, Respondent, v. EMERSON-BRANTINGHAM IMPLEMENT COMPANY, John Madison, and Northwestern Trust Company, Appellants.

(175 N. W. 706.)

Attachment — liability of attachment creditor — liability of sheriff for failure to keep attached property safe.

A debtor whose property was attached at the suit of the creditor, after paying the judgment, brought suit against the attaching creditor, the sheriff, and the surety on the latter's official bond to recover damages occasioned by the failure to safely keep the property attached. The defendant sheriff failed to turn over the property attached to his successor, who learned of the attachment through agents of the attaching creditor. Some of the damage occurred before the expiration of the term of office of the defendant, but the major part of it occurred during the term of his successor and after the latter had notice of the attachment. Judgment was rendered on a special verdict. It is *held:*

1. There being no finding and no evidence that the attaching creditor directed the sheriff as to the storage and care of the attached property, it is not liable for the breach of duty on the part of the sheriff in failing to safely keep the property and to turn the same over to his successor.

Attachment — sheriff and constables — liability of sheriff for loss of attached property while in his hands.

2. It is the statutory duty of a retiring officer, under § 682, Compiled Laws of 1913, to deliver to his successor all property appertaining to his office, and where this duty is not performed and there is no direct evidence of assumption of possession by his successor, the outgoing officer remains liable to the owner for the care of the property.

Attachment — sheriffs and constables — incoming sheriff not charged with possession of property attached by outgoing sheriff.

3. Knowledge on the part of a sheriff that his predecessor had previously taken property under a warrant of attachment does not impose upon the former the duty to make a search for the warrant of attachment, nor to assume possession of the attached property.

Trial — special verdict — effect of special verdict inferring negligence.

4. Where the findings in a special verdict are consistent only with negligence and with the breach of statutory duty on the part of an officer, they imply negligence, and it is not necessary that there shall be an affirmative finding to that effect.

Sheriffs and constables — damages for breach of bond in attachment levy.

5. The liability of a surety on an official bond is ordinarily the same as the liability of the officer, and where the condition of the bond is that the officer will pay over and deliver the property according to law, the measure of damages for the breach of the condition is the difference between the full value of that which would have been delivered had the officer complied therewith and that which he is able in fact to deliver.

Opinion filed October 8, 1919.

Appeal from District Court of Golden Valley County, *Crawford*, J.

Reversed in part and affirmed in part.

Lawrence & Murphy, for appellant Emerson-Brantingham Implement Company.

There is no statutory liability on the part of the attaching auditor for the safe-keeping of the property attached. Comp. Laws 1913, §§ 4431, 7540, 7542, 7543, 7553, 7559.

"The sheriff must deliver over to the defendant or to the person entitled thereto, on reasonable demand, all of the attached personal property remaining in his hands." Comp. Laws 1913, § 7562.

Where plaintiff's judgment is satisfied, the sheriff must surrender the property to the defendant. Comp. Laws 1913, § 7563.

This appellant is not liable jointly with the sheriff for his failure to safely keep the property held under the warrant of attachment. 99 Am. Dec. 554; Blanchard v. Brown, 3 N. W. 248; Michaels v. Storke, 5 N. W. 1036.

"An attaching creditor cannot be held liable for the wrongful acts of the sheriff not shown to have been done at his direction." Webb v. Van Vleet-Mansfield Drug Co. 120 Ark. 236, 179 S. W. 357; Pittsburg, J. E. R. Co. v. Wakefield Hardware Co. 143 N. C. 54, 55 S. E. 422; Munns v. Loveland, 49 Pac. 743; Abbott v. Kimball (Vt.) 47 Am. Dec. 710; Hyde v. Cooper, 26 Vt. 558.

If an officer, in the discharge of his official duty, commits a trespass, and the party does not control the officer in any way, then the party

cannot be implicated in the original wrong. Abbott v. Kimball (Vt.) 47 Am. Dec. 710; Burt v. Decker (Iowa) 19 N. W. 874; Sparkman v. Swift, 81 Ala. 231, 8 So. 160.

One who places in the hands of an officer a valid writ, without directions as to the manner of its service, will not be liable for torts committed by the latter while engaged in the execution thereof; but where he, with knowledge of the facts, advises an abuse of the process of the court, such as a trespass against the person or property of another, he will be regarded as a wrongdoer from the beginning. Taylor v. Ryan, 15 Neb. 573, 19 N. W. 475; Hyde v. Cooper, 26 Vt. 552; Murray v. Mace (Neb.) 59 N. W. 388; Supply Co. v. Hunter (Okla.) 148 Pac. 83; Adams v. Hotel Co. (Wis.) 82 N. W. 703; Teel v. Miles (Neb.) 71 N. W. 296; Cole v. Edwards (Neb.) 72 N. W. 1046.

R. F. Gallagher, for appellant John J. Madison.

"A sheriff is held to the same degree of prudence, vigilance, and care with respect to property under seizure and in his custody as a careful and prudent man would be likely to exercise over his own property; but he is not liable as an insurer." 35 Cyc. 1670; Creswell v. Burt, 16 N. W. 1730; 106 Am. St. Rep. 394.

It is generally held that the degree of care required of a sheriff in respect to property under attachment is the same as that of a bailee. Standard Wine Co. v. Chipman, 97 N. W. 679; 6 C. J. 1160, 1161.

Whether the bailee has exercised the care is a question for the jury. 6 C. J. 63.

Negligence in a particular case is generally a matter for the jury to determine, and is always so when the measure of duty is ordinary and reasonable care. Williams v. Sleepy Hollow Min. Co. 37 Colo. 62, 7 L.R.A.(N.S.) 1170, 86 Pac. 337; Cunningham v. Union R. Co. 4 Utah, 206, 7 Pac. 795; West Chester, etc., R. R. Co. v. McElwell, 67 Pa. 315.

A question of negligence cannot be taken from the jury, although the facts are not in dispute, if they are such that from them different minds might draw different conclusions. Williams v. Sleepy Hollow Min. Co. 7 L.R.A.(N.S.) 1170, 86 Pac. 337; Williams v. Sleepy Hollow Min. Co. 35 L.R.A.(N.S.) 350, 116 Pac. 786; Winona v. Botzet, 23 L.R.A.(N.S.) 204; Jackson v. Grand Forks, 45 L.R.A.(N.S.) 75;

Farmers Mercantile Co. v. N. P. R. Co. 146 N. W. 550; Lane v. Lenfest (Minn.) 42 N. W. 84.

Where a jury returns a special verdict alone, unaccompanied by a general verdict, defendant's failure to object that no question was submitted to them as to whether or not defendant was negligent and as to whether the accident or damage was caused by such negligence, is not a waiver of his right to afterwards attack the special verdict because of its failure to pass on all material and controverted questions. Sherman v. Menominee River Lumber Co. 45 N. W. 1079; Kelly v. R. Co. (Wis.) 9 N. W. 861; Ottell v. Ry. Co. (Wis.) 61 N. W. 289; Dugal v. Chippewa Falls, 77 N. W. 878.

It is the duty of the trial court to frame the special verdict, and to include therein every material issue raised by the pleadings and evidence.

A judgment cannot be entered upon a verdict which fails to do this, if the immediate issue might have been so resolved as to prevent such judgment. Strasser v. Goldberg (Wis.) 98 N. W. 554; Ortell v. Ry. Co. (Wis.) 61 N. W. 289; Hildman v. Phillips, 82 N. W. 566; Sherman v. Lumber Co. 45 N. W. 1079; McFetridge v. Insurance Co. 62 N. W. 938; Dugal v. Chippewa Falls, 77 N. W. 878.

Where alleged negligence of the defendant is the ground upon which plaintiff seeks to recover, the question of the proximate cause of the injury or damage complained of must be fairly and substantially answered by the special verdict, or it will not support a judgment. Jewel v. Railway Co. 54 Wis. 618, 12 N. W. 83; Kerkhoff v. Paper Co. 62 Wis. 674, 32 N. W. 766; Atkinson v. Transp. Co. 60 Wis. 156, 18 N. W. 764.

The failure to submit the question of negligence and the proximate cause of the damage to the tractor in this case amounted to a withdrawal of the same from the consideration of the jury.

"The case should not be drawn from the jury unless the conclusion follows as a matter of law from the evidence, that no other conclusion can be had upon any view which could be properly taken of the facts which the evidence tends to establish." 145 U. S. 593, 12 Sup. Ct. Rep. 905; Elliott v. Railway Co. 150 U. S. 245, 14 Sup. Ct. Rep. 85; Lewis v. Prien (Wis.) 73 N. W. 654.

Madison cannot be held liable for the damage that accrued after

Smith received notice of the attachment and location of the tractor. State v. Ruth, 9 S. D. 84, 68 N. W. 189; Howley v. Scott, 123 Minn. 159, 51 L.R.A.(N.S.) 137, 143 N. W. 257; Wood v. Lowdin, 49 Pac. 133.

Where a bailee accounts for his failure to deliver goods by showing their loss or destruction by fire or theft, and these facts appear or are proved with reasonable certainty, the burden is upon the bailor to prove that, notwithstanding such loss, the same was due to the negligence of the bailee, and the burden of proof never shifts from him. Clafin v. Meyer, 31 Am. Rep. 467; Stone v. Case, 43 L.R.A.(N.S.) 1169 and note, 124 Pac. 960; Yazoo, etc. R. Co. v. Hughes, 22 L.R.A.(N.S.) 975 and note; Standard, etc., Ins. Co. v. Trades Exp. Co. 148 Pac. 1019; Firemen Fund Ins. Co. v. Schreiber, 150 Wis. 42, 135 N. W. 507; Ann. Cas. 1913E, p. 823.

Bangs, Hamilton, & Bangs and *W. J. Mayer,* for appellants Madison and Northwestern Trust Company.

However clear and undisputed the evidence upon the issues is found to be, the court cannot render judgment on a special verdict making such findings, without usurping a part of the functions of the jury; thereby infringing a right guaranteed by the Constitution and the laws. Moore v. Moore, 67 Tex. 293, 3 S. W. 285; Hodges v. Easton, 106 U. S. 408.

The facts to be found in a special verdict are the issuable facts presented by the pleadings. Phœnix Water Co. v. Fletcher, 23 Cal. 481; Chicago, St. L. & P. R. Co. v. Berger, 124 Ind. 275, 24 N. E. 981; Neutz v. Coal & Coke Co. 139 Ind. 411, 38 N. W. 324.

It is the duty of the trial court to frame the special verdict and include therein each material issue raised by the pleadings and evidence. Orttel v. R. R. Co. 89 Wis. 127, 61 N. W. 289.

It is error to fail to submit an issue made by the pleadings. Kenyon v. Kenyon, 72 Wis. 234, 39 N. W. 361; 22 Enc. Pl. & Pr. p. 981.

"It was the province of the jury to pass upon the issues of fact, and it was the right of the defendants, secured by the Constitution of the United States, to have them do so." U. S. Const. article 7 of Amendments; N. D. Const. § 7.

"Where it is a disputed question whether the injuries were the proximate result of the negligence complained of, the special verdict must

find specially both negligence and that such negligence was the proximate cause of the injuries, or it is fatally defective." McGowan v. R. R. Co. 91 Wis. 147, 64 N. W. 891; Kucera v. Lumber Co. 91 Wis. 637, 65 N. W. 374; Deisen Ricter v. Kraus-Merkel Malting Co. 92 Wis. 164, 66 N. W. 112; Sheridan v. Bigelow, 93 Wis. 426, 67 N. W. 732 and cases cited; Groth v. Thomann, 110 Wis. 488, 86 N. W. 178; Hallum v. Omro (Wis.) 99 N. W. 1051; Jamestown v. Irving (Wis.) 99 N. W. 346.

A sheriff who seizes property under a writ of attachment has a special property therein, and by virtue of this special property he may bring trover for conversion, or sue a receiptor in assumpsit or trover, or may resort to replevin to restore the same to his possession. 20 Enc. Pl. & Pr. 113–115.

"Where the duties are such as are owed by the officer to the particular individual with whom he deals, a breach of the duty gives rise to a corresponding liability to such person only." 25 Enc. Law, 523, 723, 724.

"To charge the sureties in the officer's bond, the act complained of must either have been one which he rightfully might have done as an officer, or one which was actually done by him as an officer under a claim of right to do so, as such." 25 Enc. Law, 724.

"The duration of the surety's liability is ordinarily coextensive with the officer's official tenure of office." 25 Enc. Law, 725; 1 Enc. Law, 1131.

"A recipient or custodian is merely the bailee or agent of the officer, and is bound to deliver the property to the sheriff on demand, and for his failure to do so, the sheriff may maintain an action for its possession or for damages for its conversion." 25 Enc. Law, 708.

Keohane & Jones and *Pugh & Thress,* for respondent.

The lien or right acquired by the attaching creditor by virtue of the issuance of the attachment and the levy thereunder is an actual and substantial security, and constitutes a cloud on the legal title; and, although arising by operation of law, has been held to be as specific as if created by voluntary act of the debtor and to stand upon as high equitable grounds as a mortgage lien. 6 C. J. 268; Shinn, Attachm. § 313.

And where disputed questions of fact are submitted to the jury, the findings of the jury thereon are conclusive, if there is sufficient testi-

mony to support them. Senn v. Steffan, 37 N. D. 491, 164 N. W. 102.

The act nowhere provides that property held under a levy of a writ of attachment is to be surrendered to the new sheriff. Baker v. Baldwin, 48 Conn. 131; Smith v. Bodfish, 33 Me. 136; Morton v. White, 16 Me. 53; 35 Cyc. 1543.

The sheriff or officer taking the property into his custody under a writ of attachment is considered to be in the position and having the responsibilities of a bailee for hire, and his duty and responsibilities are measured by the law of bailments. 25 Am. & Eng. Enc. Law, 712; Murfree, Sheriffs, § 961; Drake, Attachm. § 292; State v. Copeland (Tenn.) 54 Am. St. Rep. 840, 848; Mechem, Pub. Off. 301; 49 Pac. 437; United States v. Thomas, 15 Wall. 337, 21 L. ed. 89, 92; Mechlenburg County v. Beals (Va.) 36 L.R.A.(N.S.) 285; Palmer v. Costello, 41 App. D. C. 165, L.R.A.1915A, 193 and note.

The court submitted to the jury all controverted facts. Only the controverted facts need be submitted. Welch v. Fargo & M. St. R. Co. 24 N. D. 478, 140 N. W. 680; Swallow v. First Nat. Bank, 35 N. D. 616, 161 N. W. 207; Russell v. Meyer, 7 N. D. 339, 75 N. W. 262; Ortell v. C. M. & St. P. R. Co. (Wis.) 61 N. W. 280; State v. Hanner (N. C.) 57 S. E. 154, 24 L.R.A.(N.S.) 1 and note; 38 Cyc. 1924.

Where property attached has become lost or has depreciated in value, through the fault of the custodian, the creditor must bear the loss, as between him and the debtor, with recourse to the officer. People v. Hopson, 1 Denio, 574; Peck v. Tiffany, 2 N. Y. 451; Re Dawson, 110 N. Y. 114.

BIRDZELL, J. This is an action to recover damages sustained by the plaintiff through the dismantling of a gas tractor and the loss of its various parts, alleged to have been occasioned by the lack of care of the engine on the part of the sheriff who had seized it under a warrant of attachment. The action is against the sheriff who seized it, the attaching creditor, and the surety upon the official bond of the former. From a judgment in favor of the plaintiff against all the defendants for $3,253.32, each of the defendants has perfected a separate appeal. The facts necessary to an understanding of the questions presented on the various appeals are as follows:

In January, 1914, the defendant Madison was sheriff of Golden Val-

ley county, North Dakota, and the defendant Northwestern Trust Company was surety on his official bond. On the 6th of January, 1914, the defendant Emerson-Brantingham Implement Company commenced an action against this plaintiff, Leo Kukowski, to recover the purchase price of a gasolene tractor. A warrant of attachment was issued in the action, under which Madison took possession of the tractor. He took it to Beach and stored it in a yard in the rear of a machine shop with the consent of the proprietor, one Kastien. Other engines were also stored there while awaiting or undergoing repairs. Madison's term of office expired in January, 1915, and he was succeeded by S. A. Smith. In the spring of 1915 agents of the attaching creditor discovered that the tractor was being damaged through the disappearance of some of its parts, and they notified Sheriff Smith of that fact and of the further fact that the tractor was held under a warrant of attachment, at the same time requesting Smith to take care of it. The suit in which the engine was attached was terminated by the rendition of a judgment in favor of the plaintiff, which was satisfied by Kukowski, the judgment debtor, on October 13, 1915. Upon paying the judgment, Kukowski became entitled to a return of the attached property, and he brings this action for the damages occasioned by the failure to protect the property while in the possession of the sheriff under the warrant.

Upon the trial, the jury returned a special verdict upon which the judgment appealed from was entered. The material findings of the jury are as follows: (1) That the fair market value of the engine at the time it was taken under the warrant of attachment was $3,000; (2) that the fair market value of the engine at the date when the term of office of the defendant Madison expired (January 4, 1915) was $2,800; (3) that the fair market value of the engine in the spring of 1915, when Sheriff Smith had the first conversation with an agent of the attaching creditor, was $2,800; (4) that the fair market value of the engine on October 13, 1916, was $100; (5) that the value of the parts which had been removed before the expiration of the defendant Madison's term of office (excluding freight and labor) was $170; (6) that the defendant Madison did not notify his successor in office that the tractor was held under a warrant of attachment and that he did not turn over any records showing this fact; (7) that the agents of the attaching creditor notified Madison's successor, Smith, of the attachment

in the spring of 1915, and requested that the property be cared for by him; (8) that Sheriff Smith, in the fore part of 1915, inquired of Kastien as to what had become of the parts previously taken from the tractor; (9) that the attachment proceedings were never set aside and that the judgment in that case had become final. The jury also finds that, during the conversation between Smith and Kastien, the time of which is not specified, Smith stated in substance that if he caught anyone taking parts from the tractor he would make them suffer for it.

The appeal of the defendant Emerson Brantingham Implement Company involves only a narrow question of law and will be first considered. The contention of the appellant is that where an attachment creditor lawfully sues out a writ of attachment and obtains a judgment in the action, there being no proceedings to test the validity of the attachment, the judgment creditor is not liable for any breach of official duty on the part of the sheriff in failing to keep the property held under the warrant. Section 7542, Compiled Laws of 1913, which specifies the requisites of a warrant of attachment, states that the warrant must require the sheriff to attach and safely keep property of the defendant sufficient to satisfy the plaintiff's demand, unless the defendant delivers to him an undertaking in favor of the plaintiff conditioned to pay any judgment which the plaintiff may obtain in the action, or an undertaking that the property about to be attached shall be forthcoming. The statute clearly makes it the official duty of the sheriff to attach and safely keep the property which the warrant authorizes him to seize. For a breach of such duty, the sheriff is liable to the party in whose favor the duty exists. Where the attaching creditor would sustain a loss due to the negligent keeping of the property by the sheriff, he could doubtless recover; and similarly could the owner of the property recover upon obtaining a dissolution of the attachment. Bailey v. Hall, 16 Me. 408; Briggs v. Taylor, 35 Vt. 57; 2 Cooley, Torts, 3d ed. p. 888 (*542). And it may even be true, though upon this we express no opinion, that as between the creditor and the debtor, so long as the judgment remains unsatisfied and the property is held under the warrant, the damage resulting through the negligence of the sheriff could be applied on the judgment, thus putting the creditor to his remedy against the sheriff. Re Dawson, 110 N. Y. 115, 6 Am. St. Rep. 346, 17 N. E. 668; People v. Hopson, 1 Denio, 575. But it does not follow from any of these

propositions that the attaching creditor whose judgment has previously been fully satisfied by the attachment debtor is liable for the negligence of the sheriff resulting in damage to the property seized. Such a liability can only be predicated upon an agency of the sheriff to act for the attaching creditor. The official acts of the sheriff are not to be considered as the private acts of the litigant, who has the right to invoke legal process. The rule of nonliability of parties for official acts of those intrusted with legal process is that stated by Cooley as follows: "But every party has a right to assume that the officer will proceed to execute lawful process in a lawful manner, and if, instead of doing so, the officer proceeds illegally, the party is not responsible, unless he participated in or advised the abuse." 2 Cooley, Torts, 3d ed. p. 895 (*549). So far from indicating that the defendant the Emerson-Brantingham Implement Company participated in the negligence of the sheriff, both the record and the findings of the special verdict indicate that the company desired to have the property protected, and that they took no steps beyond securing the issuance of the warrant in a case in which they were legally entitled thereto. The record fails to disclose any basis for liability on the part of the defendant company.

The principal question raised on the appeal of Madison is that concerning his liability for the damages which arose after his term of office had expired, and after his successor had received some notice that the tractor had been attached. The most pertinent findings of fact by the jury affecting this question, aside from the findings as to the time when the damage occurred, are that Madison did not notify his successor in office that the tractor was held under the warrant of attachment, and that he did not turn over to him any books, papers, or other records showing that fact. It is contended that these findings, either standing alone or taken in conjunction with the other findings, are not sufficient upon which to base the judgment against Madison, for the reasons: (1) That there is no finding of negligence in the care or storage of the tractor; (2) that there is no finding that negligence on the part of Madison was the proximate cause of the injury; and (3) that there is no finding as to whether Madison's successor assumed dominion over the tractor, thereby absolving him from the further liability for its care. These contentions may be best considered in their inverse order.

For the purposes of this appeal, it stands admitted that the property was originally taken by Madison; that it had been damaged or depreciated to the extent of $200 before the expiration of his term of office, and that the remainder of the damages, upon which the judgment is based, was suffered during the term of Madison's successor. And in view of the findings, it must also be considered that Madison, at the time he relinquished the office to his successor, failed to notify him of his proceedings under the warrant of attachment, to turn over the warrant of attachment to him, or to do any affirmative act that would devest him of the possession which he had assumed under the warrant. Also that Madison did not, at any subsequent time, take any affirmative steps to accomplish a delivery of the property to his successor. It is contended, however, that it became the official duty of Smith, as soon as he learned of the attachment and of the prior proceedings under the warrant, to assume possession of the property and safely keep it as though it had been originally taken by him, or, if such duty did not exist, that there was sufficient evidence of assumption of possession by him to require an affirmative finding as to whether or not the property was in his possession at the time the greater part of the damage was sustained.

The evidence of the assumption of possession by Smith went no further than to establish that, after he had been notified of the attachment by the agent of the Emerson-Brantingham Implement Company, he went to see the engine and made some remark to the effect that if he caught anybody taking it or taking parts from it he would see that he suffered the consequences. There is no direct testimony that Smith ever assumed possession of the property, and if he considered that he was in possession it would seem that there would have been a definite understanding between him and Kastien, upon whose lot Madison had arranged to store the tractor. In view of Madison's failure to take affirmative steps to transfer possession to Smith, as found by the jury, and of the lack of direct evidence going to establish assumption of possession on the part of Smith, we are of the opinion that it was unnecessary to submit to the jury the question as to whether Smith assumed possession.

The question, then, on this branch of the case resolves to this: Did it become the official duty of Smith, as soon as he learned of the attach-

ment, to assume possession so that the obligation to safely keep would rest henceforth upon him? There is no statute imposing such a duty upon the incumbent of an office. On the other hand, it is expressly made the duty of an outgoing officer to "deliver to his successor in office all public moneys, books, records, accounts, papers, documents, and property in his possession belonging or appertaining to such office." Compiled Laws 1913, § 682. This duty was not performed in the instant case unless it can be said that Madison delivered the property in question when he relinquished the office, and when, later, interested parties notified his successor that the property had been taken. At common law, an officer who had partially executed a writ might complete the execution after the expiration of his term of office, and to this end the possession of any property taken might be rightfully continued in him. McKay v. Harrower, 27 Barb. 463. The statute referred to above apparently changes this rule by requiring the outgoing officer to deliver to his successor not only the property, but the papers or documents which might evidence his right of possession. This, in our opinion, imposes an affirmative duty, which, if unperformed, leaves the property in the possession of the outgoing officer, and subjects him to such risks as are incident thereto. He has a ready means of terminating the obligations resting upon him by reason of his prior official acts, but if he fails to avail himself thereof, he incurs the peril of his failure. We cannot hold on this record that it ever became the official duty of Smith, the successor in office, to make a search for the warrant of attachment which presumably remained in Madison's possession (Comp. Laws 1913, §§ 7545 and 7546), it not appearing that it was ever turned over to Smith, nor to assume possession without the warrant at the risk of becoming liable for conversion. We are therefore of the opinion that under the record and the findings Madison did not succeed in terminating his obligation to safely keep the property in question.

As to the further contention that there is no finding of negligence upon the part of Madison, which was the proximate cause of the injury, it is true that there is no direct finding of negligence in the care or storage of the tractor. But it is also true that the facts as found by the jury leave no room to doubt that in their opinion an engine which was practically as good as new became worthless while being stored unused within the period of two years. We cannot so far ignore common ex-

perience as to conclude that such facts can be consistent with the exercise of due care in the safeguarding of the property. It is our opinion that these findings, considered in the light of common experience, amount to a finding of negligence. It is not necessary that the term "negligence" be used, neither is it necessary that expressions be employed to the effect that the dictates of reasonable prudence were not followed. The findings leave no room to doubt that the jury was of the opinion that the obligation to safely keep the property had been broken; and for the reasons previously assigned, the finding must be taken to relate to Madison's obligation rather than Smith's.

The appeal of the defendant Northwestern Trust Company presents substantially the same questions as the appeal of Madison. It was the surety upon his official bond, and the same considerations that determine the liability of the principal likewise determine the liability of the surety. It is, however, urged that in any event the only official duty which Madison neglected to perform was that of failing to deliver the property to his successor, and that the damages which the plaintiff suffered were not suffered as a consequence of that breach of duty, but resulted from the subsequent failure to keep the property safely. This, it is contended, is a wholly unofficial duty which arose subsequent to the expiration of Madison's term of office and consequently one for which the surety is not liable. The condition of the official bond is that the principal shall discharge the duties of his office, "and render a true account of all money and property of every kind that shall come into his hands as such officer, *and pay over and deliver the same according to law.*" The latter condition has not been performed, and the damages which the plaintiff has suffered by reason of its nonperformance are measured by the difference between the value of that which would have been delivered to the plaintiff had the condition been performed and that which the principal is in fact able to deliver. This liability cannot be diminished by speculative considerations based upon what might or might not have happened had the property been regularly turned over to the successor in office. Until the principal has performed his obligation to make a legal delivery, the surety is in no position to assert that the damages were in fact occasioned by the neglect of nonofficial duties. The decisive fact is that a delivery which will fulfil the bond cannot be made, and for the deficiency the surety, as well as the prin-

cipal, must respond to the injured party. This is strictly within the language of the bond. For authority in support of the above holding, see King v. Nichols, 16 Ohio St. 80; Brobst v. Skillen, 16 Ohio St. 382, 88 Am. Dec. 458.

For the foregoing reasons, the judgment appealed from is reversed as to the appellant Emerson-Brantingham Implement Company, and affirmed as to appellants Madison and Northwestern Trust Company. It is so ordered.

N. C. McDONALD, Appellant, v. MINNIE J. NIELSON, Respondent.

(175 N. W. 361.)

Schools and school districts — professional certificate required by superintendent of public instruction.

In an action in the nature of quo warranto involving the title to the office of superintendent of public instruction of this state, it is *held:*

1. That a professional certificate issued under the provisions of § 737, Rev. Code 1899, is a teacher's certificate of the highest grade issued in this state, within the purview of § 1105, Comp. Laws 1913.

Schools and school districts — collateral attack on certificate on ground that it was issued without adequate examination — qualifications of superintendent of public instruction.

2. That such certificate cannot be collaterally impeached on the ground that it was issued without adequate examination.

Opinion filed October 10, 1919.

From a judgment of the District Court of Burleigh County, *Nuessle*, J., plaintiff appeals.

Affirmed.

Carmody, Louden, & Mulready, Ed. S. Allen, and *J. A. Hyland,* for appellant.

All the laws require of a state superintendent of public instruction is that he possesses the qualifications to enable him to properly and intelligently perform the duties of such office. State ex rel. Thompson v.

McAllister, 38 W. Va. 485, 24 L.R.A. 343, 18 S. E. 770; Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L.R.A. 579; Darrow v. People, 8 Colo. 420; State v. Covington, 29 Ohio St. 102; Enge v. Cass, 28 N. D. 219.

The Constitution is not a grant of authority so far as the legislature is concerned, but is a limitation of legislative power; and the legislative power of the general assembly is unlimited, except by such restrictions as the Constitution has imposed in express terms or by necessary implication. Scow v. Czarnicki, 264 Ill. 305, 106 N. E. 276; Idaho Power Co. v. Bloomquist (Idaho) 141 Pac. 1083; State v. Patterson (Ind.) 105 N. W. 228; State v. Medler (N. M.) 142 Pac. 376; Sheenan v. Scott, 143 Cal. 687; State v. McAllister, 38 W. Va. 485, 18 S. E. 770, 24 L.R.A. 343.

The provision in the Constitution, that no person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector, does not by implication forbid the legislature to require other reasonable qualifications for office. State v. Covington, 29 Ohio St. 102; Rogers v. Buffalo, 123 N. Y. 173, 9 L.R.A. 579, 25 N. E. 274; Darrow v. People, 28 Colo. 420.

"This office holds that the highest teacher's certificate issued in this state is a first-grade professional, issued since July 1, 1911, or a life professional issued prior to that date when held by a graduate of a standard college or university." Opinion of William Langer, Attorney General, Oct. 23, 1918.

William Langer, Attorney General, and *Edward B. Cox,* Assistant Attorney General, for respondent.

"The provisions of this Constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise." Art. 1, § 21.

It is not within the power of the legislature to add to the qualifications fixed by the Constitution or to impose the additional restrictions, and that provision of the act must be considered void. People v. McCormick, 261 Ill. 413, 105 N. E. 1053; Feibleman v. State, 98 Ind. 516; Sheenan v. Scott, 145 Cal. 684, 79 Pac. 350; State v. Goldhardt, 87 N. E. 133; Dapper v. Smith, 138 Mich. 104, 101 N. W. 60.

"If the legislature has by this act deprived citizens of the right to participate in the elections therein provided who are qualified to partici-

pate under the Constitution, aye, even if the legislature has deprived one citizen so qualified of such right, the act is void, as an attempted exercise of power it does not possess." Rison v. Farr, 24 Ark. 161, 87 Am. Dec. 52, decided in 1865.

Not only does the Constitution fail to confer upon the legislature by express words or necessary implication the power to add to or in any way alter the qualifications for the office of state superintendent of public instruction, as set forth in § 82 of the Constitution, but also by plain implication and express words such power is absolutely denied to the legislature. Enge v. Cass, 28 N. D. 219, 148 N. W. 607.

CHRISTIANSON, Ch. J. This is an action in the nature of quo warranto. It involves the title to the office of superintendent of public instruction of the state of North Dakota.

The plaintiff, McDonald, was elected to the office of superintendent of public instruction at the general election held in November, 1916. His term ended on January 5, 1919. The plaintiff and the defendant were opposing candidates for the office of superintendent of public instruction at the election held in November, 1918, with the result that the defendant received 5,547 more votes than the plaintiff. The state board of canvassers thereupon issued a certificate declaring said defendant, Minnie J. Nielson, to have been duly elected to said office; and at the proper time she duly qualified as required by law. The plaintiff, however, refused to surrender the office, but was compelled to do so by writ of mandamus issued out of this court. State ex rel. Langer v. McDonald, 41 N. D. 389, 170 N. W. 873. The plaintiff thereafter instituted this action in the district court of Burleigh county. The trial court ordered a dismissal thereof, and plaintiff has appealed.

This entire controversy hinges upon § 1105, Comp. Laws 1913, which reads: "There shall be elected by the qualified electors of the state at the time of choosing members of the legislative assembly, a superintendent of public instruction, who shall have attained the age of twenty-five years, who shall have the qualifications of an elector for that office, and be the holder of a teacher's certificate of the highest grade, issued in this state. He shall hold his office at the seat of government for the term of two years, commencing on the first Monday

in January following his election, and until his successor is elected and qualified."

The plaintiff contends that the defendant is not "the holder of a teacher's certificate of the highest grade issued in this state," and hence is not eligible to the office of the superintendent of public instruction. The defendant makes two answers to this contention: (1) That she is "the holder of a teacher's certificate of the highest grade issued in this state" within the meaning of § 1105, supra; (2) that § 1105 contravenes §§ 82 and 128 of the state Constitution.

It appears that the provision embodied in § 1105 was first enacted in 1890. As enacted it read as follows: "There shall be chosen by the qualified electors of the state at the times and places of choosing members of the legislative assembly a superintendent of public instruction, who shall have attained the age of twenty-five years, and shall have the qualifications of a state elector and is the holder of a state certificate of the highest grade, issued in some state, or is a graduate of some reputable university, college or normal school. He shall hold his office at the seat of government for the term of two years from the first Monday in January following his election, and until his successor is elected and qualified." Laws 1890, § 1, chap. 62.

The law remained as enacted until 1911, when it was amended and re-enacted in the form in which it is now found in § 1105, Comp. Laws 1913. It will be noted that the original enactment provided that the state superintendent of public instruction must be "the holder of a state certificate of the highest grade, *issued in some state,* or a graduate of some reputable university, college, or normal school." By the enactment of 1911, the legislature changed the law so as to provide that the superintendent of public instruction must "be the holder of a teacher's certificate of the highest grade, issued in *this* state," and eliminated the alternative provision, or be "a graduate of some reputable university, college or normal school." Aside from these changes the statute remains as originally enacted in 1890.

From 1897 to 1905 the laws of this state provided for two different forms or grades of teachers' certificates issuable by the superintendent of public instruction and valid throughout the entire state. One was known as a normal certificate. Such certificate was valid for a term of five years, unless sooner revoked, and authorized the holder to teach

in any of the public schools of the state. It was issuable only to persons of good moral character, who had completed a prescribed course of study in a normal school, or passed an examination prescribed by the superintendent of public instruction. Rev. Code 1899, § 738. The other was known as a professional certificate. Such certificate was valid for life, unless sooner revoked, and authorized the holder to teach in any of the common or high schools of the state, without further examination. The statute provided that such certificate should be issued only to persons of good moral character, who passed a thorough examination in all the branches included in the courses of study prescribed for the common and high schools of the state, including methods of teaching and such other branches as the superintendent of public instruction might direct. It further provided that such certificate should in no case be granted unless the applicant had had at least five years' experience as a teacher, and could satisfy the superintendent of his ability to instruct and properly manage any high school of the state. Rev. Code 1899, § 737. Sections 737 and 738 also provided that the state superintendent of public instruction might, under certain conditions, grant professional certificates to graduates of the normal course in the state university, or to graduates of any of the normal schools of the state. These provisions, however, are not material to this controversy.

It appears from the record in this case that the defendant, Minnie J. Nielson, on November 27, 1900, received from the then superintendent of public instruction a normal certificate under the provisions of § 738, supra. The result of the examination taken by her is indorsed on the certificate. It appears therefrom that she was examined in twenty-four different subjects, including methods of teaching, history of education, pedagogy and psychology. It also appears that in the subjects enumerated she received very favorable marks. The record also discloses that on December 8, 1902, the then superintendent of public instruction issued a professional certificate to the defendant. The certificate refers to the previous normal certificate issued to the defendant and recites that she has spent two years in study at the state university, and performed twelve years of successful work as a teacher. The certificate states that the defendant has "given satisfactory evidence that she possesses the necessary qualifications of moral charac-

ter, skill, and education to instruct and properly manage any high school of the state;" and that, therefore, the said superintendent of public instruction has "granted to the said Minnie Jean Nielson this *professional certificate,* which shall be valid for life, and which authorizes the holder to teach in any of the common or high schools of the state." This latter certificate was concededly the highest certificate issued in this state at the time it was issued, and at all times between that date and July 1, 1911.

Chapter 266, Laws 1911, repealed the former provisions relative to teachers' certificates, and provided for the issuance in the future of teachers' certificates of the following classes:

1. Second-grade elementary certificate.
2. First-grade elementary certificate.
3. Second-grade professional certificate.
4. First-grade professional certificate.

The second-grade elementary certificates authorizes the holder to teach in any grade in the rural and graded schools up to and including the eighth grade. Comp. Laws 1913, § 1360. The first-grade elementary certificate authorizes the holder to teach in any grade in any school up to and including the eighth grade, and in the ninth grade in schools doing not over one year of high school work. Comp. Laws 1913, § 1361. The second-grade professional certificate qualifies the holder to teach in any of the common, graded, or high schools of the state, except in the high school departments of schools doing four years of high school work. Comp. Laws 1913, § 1362. The first-grade professional certificate qualifies the holder to teach in all the common, graded, and high schools of the state. Comp. Laws 1913, § 1363.

Manifestly the changes made in the former law as disclosed by § 1105, supra, do not indicate any intention on the part of the legislature to disqualify those then holding a teacher's certificate of the highest grade issued in this state from holding the office of superintendent of public instruction. But it is contended that inasmuch as the same legislature also provided for new forms and grades of teachers' certificates, these latter provisions must be read in connection with, and in effect become a part of, § 1105, supra. The plaintiff therefore contends that since July 1, 1911, the first-grade professional certificate

as defined by § 1363, supra, is the highest grade teacher's certificate issued in this state, and that inasmuch as the defendant does not hold such certificate, she is ineligible to the office of superintendent of public instruction. Assuming, but not deciding, that plaintiff is correct in his contention that § 1105, supra, must be construed in connection with §§ 1361–1363, Comp. Laws 1913, we are nevertheless of the opinion that it does not lead to the result which he claims. It is a cardinal rule of statutory construction that statutes will be construed as prospective only, unless an intent to the contrary clearly appears. It has been said "that a law will not be given a retrospective operation, unless that intention has been manifested by the most clear and unequivocal expression." And in another case: "The rule is that statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction." Lewis's Sutherland, Stat. Constr. 2d ed. § 642. The legislature clearly intended the provisions of the 1911 law relative to teachers' certificates to apply to the future. There was no intention to abrogate or annul, or affect the standing of, professional certificates granted under the former law, or to require holders of such certificates to requalify under the new law. It frequently happens that the legislature prescribed new standards and requirements for admission to the different professions. That has been true of the legal profession. The requirements for admission to the bar in this state are to-day far more stringent than they were some years ago, yet it would be absurd to say that the certificates of admission to the bar issued to-day are "higher" than the certificates issued when the requirements for admission were less stringent. Of course, all certificates of admission to the bar are of equal standing and entitle the holders thereof to the same rights and privileges. That is also true of professional life certificates issued to teachers in this state prior to July 1, 1911, and *first-grade* professional life certificates issued under the law which became effective July 1, 1911. These two certificates are of equal standing. By their terms they entitle the holders to exactly the same privileges, *viz.*, to teach in any of the common or high schools of the state, without further examination. It also appears that this is the construction which has been placed upon this statute by those who have occupied the office of superintendent of public instruction,

including the plaintiff himself. For it appears from the record herein that the plaintiff has at no time sought to requalify under the law which became effective July 1, 1911, but has contented himself with the qualification made prior to July 1, 1911, under the same section under which the professional certificate has issued to the defendant in this case. We are of the opinion that the defendant at the time of her election was and now is the holder of a teachers' certificate of the highest grade issued in this state.

The plaintiff asserts, however, that the professional certificate held by the defendant is void for the reason that it was issued to her without examination. We have already referred to the terms of the statute under which the certificate was issued. We have also referred to the normal certificate issued to the defendant some two years before the professional certificate was issued, and the indorsement thereon of the marks received by the defendant in the examination held as a basis for issuing such certificate. The examination papers were doubtless available to the superintendent of public instruction who issued the professional certificate. Under the terms of the statute the superintendent of public instruction was the judge of the extent of the examination to be given to applicants for professional certificates, and he was invested with power and discretion to determine whether the applicant had the qualifications required by the statute. See Van Dorn v. Anderson, 219 Ill. 32, 36, 76 N. E. 53. The presumption is that he did his duty and issued certificates only to those whom he found to be properly qualified to receive them. The record shows that the defendant had been actively engaged as a teacher for some twelve years before she received the professional certificate, and that since that time she has been continually engaged either as a teacher or county superintendent of schools. The defendant acted under the certificate for more than sixteen years before she was elected to the office of superintendent of public instruction, and during this time the validity of the certificate has not been questioned.

The statute provides a plain, speedy, and adequate method for revocation of teachers' certificates. Comp. Laws 1913, §§ 1374, 1375. If the plaintiff in good faith believed that the certificate held by the defendant was invalid and properly subject to revocation, why did he fail to institute proceedings for revocation while he was at the head of

the educational department of the state? His failure to act, then, is somewhat significant, and might well be held to estop him from speaking now. Such was the holding of the supreme court of Illinois in an analogous case. See Van Dorn v. Anderson, supra. We do not, however, place our decision on this ground. There is another and controlling reason why the attack upon the certificate must fail. The superintendent of public instruction is a constitutional officer. Under the law it was part of his sworn duty to determine what persons were qualified to receive professional teachers' certificates. In the performance of that duty he determined that the defendant was so qualified, and he issued to her a certificate in kind and form as prescribed by law as formal evidence of his determination, and he entered upon the proper record in his office an entry of such determination. It seems self-evident that the certificate or commission so issued ought not to be subject to collateral impeachment. And such is the rule supported by the overwhelming weight of authority. Union School Dist. v. Sterricker, 86 Ill. 595; Doyle v. School Directors, 36 Ill. App. 653; Van Dorn v. Anderson, 219 Ill. 32, 76 N. E. 53; Kimball v. School Dist. 23 Wash. 520, 63 Pac. 213; State ex rel. Lindburg v. Grosvenor, 19 Neb. 494, 27 N. W. 728; Wells v. School Dist. 41 Vt. 353.

Inasmuch as we are of the opinion that the defendant is possessed of the qualifications prescribed by § 1105, Comp. Laws 1913, it becomes unnecessary to express any opinion upon the constitutionality of that section.

The judgment appealed from must be affirmed. It is so ordered.

GRACE, J. I concur in the result.

ERNEST A. ASHER, B. H. Asher, and William Asher, Appellants, v. N. CHRIST JENSEN, Respondent.

(175 N. W. 365.)

Vendor and purchaser — concealment and misrepresentation — rescission of contract — where an examination is made and conditions known caveat emptor applies.

In a purchaser's action to rescind a contract for the sale of land upon the ground of fraudulent concealment and misrepresentation by the vendor, where it appears that the purchaser had full opportunity to and did personally examine the land involved, and the record discloses no concealment and no positive misrepresentations of fact, it is *held* that the rule of *caveat emptor* applies.

Opinion filed October 10, 1919.

Appeal from District Court of Stark County, *Crawford,* J.

Judgment affirmed.

C. H. Starke, for appellants.

"If there be in any way whatever misrepresentation or concealment, a court of equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend that a court of equity will set aside the conveyance only on the ground of actual fraud." Wild v. Gibson, 1 H. L. Cas. 605, 1 Clark & F. 505; Decker v. Schultz (Wash.) 27 L.R.A. 335.

Courts do not permit the cheat and the sharper to take refuge behind the credulity of his victim. 20 Cyc. 32, b, 45, 49, 62.

The rule of *caveat emptor* is not founded upon the highest standard or morals, and it is no longer a shield and protection to the deliberate frauds and cheats of sharpers. Strand v. Griffith, 38 C. C. A. 444; Shumaker v. Mather (N. Y.) 30 N. E. 755; Fargo Gaslight & Coke Co. v. Fargo Gas & E. Co. 2 N. D. 219, 37 L.R.A. 593 (Syl.).

Ordinarily one who buys property has a right implicitly to rely upon the representations of the seller; and if they were false and made

NOTE.—On right to rely upon representations made to effect contract as a basis for a charge of fraud, see note in 37 L.R.A. 593.

with intent to deceive the purchaser, the seller will not be allowed to urge that the buyer by investigation could have discovered their falsity. 13 C. J. 392, § 301; Wilson v. Robinson, 155 Pac. 732; Griffith v. Gifford (Wash.) 165 Pac. 874; Chisum v. Huggins (Okla.) 154 Pac. 1146; Bunting v. Crehlon (N. D.) 168 N. W. 727.

J. P. Cain, for respondent.

"A court of equity will not undertake any more than a court of law to relieve a party from the consequence and carelessness, where the means of knowledge are at hand and equally available to both parties, and the subject of the purchase is alike open to their inspection." Slaughter v. Gerson, 13 Wall. 379, 20 L. ed. 627; Hulett v. Achey, 39 Wash. 91; Washington Cent. Improv. Co. v. Newlens, 39 Pac. 366; West Seattle Land & Improv. Co. v. Herren, 16 Wash. 665, 48 Pac. 341; Griffith v. Strand, 19 Wash. 686; Walsh v. Bushell, 26 Wash. 576; Sampson v. Beale, 27 Wash. 557; Sherman v. Sweeny, 29 Wash. 321; Pigott v. Graham, 93 Pac. 435.

Where the means of information are accessible or are availed of, and a personal examination is made by a purchaser of property before purchasing, he will not be permitted thereafter to say that he was induced to purchase on the statements and representations of the vendor which related to matters discoverable upon ordinary inspection. Girder v. Clopton, 27 Ark. 244; Tuck v. Downing, 76 Ill. 71; Southern Development Co. v. Selvia, 125 U. S. 247, 31 L. ed. 678; Williamson v. Holt, 147 N. C. 515; Graffenstein v. Epstein, 23 Kan. 443.

"In the sale of property, especially real estate, which may be seen of all men, the law imposes a duty upon the vendee as well as the vendor, and it refuses assistance to those who have it abundantly in their hands to take care of themselves, everyone *sui juris,* capable of contracting and being contracted with, is his own guardian." 2 Kent, Com. p. 486.

Every person reposes at his peril in the opinion of others when he has equal opportunity to form and exercise his own judgment. *Simplex commendatio non obligat.* Harrison v. Walter, 89 Mo. App. 164; Younger v. Hogue, 211 Mo. 444; Cornwall v. McFarland Real Estate Co. 150 Mo. 377; Irving v. Thompson, 18 Me. 418; Woodruff v. Garner, 27 Ind. 4; Van Velsor v. Seeberger, 25 Ill. App. 598; Stone v. Moore, 75 Ga. 565; Moore v. Turveville, 5 Am. Dec. 562;

Wright v. Gully, 28 Ind. 475; Long v. Warren, 68 N. Y. 426; Brown v. Bledsoe, 1 Idaho, 746; Rockafellow v. Baker, 41 Pa. 319; Shephard v. Goben, 142 Ind. 318; Pratt v. Philbrook, 33 Me. 17; Short v. Pierce, 11 Utah, 29; Andrus v. St. Louis Smelting & Ref. Co. 130 U. S. 643, 32 L. ed. 1054; Reynolds v. Palmer, 21 Fed. 433; White v. Walker, 6 Fla. 478; First Nat. Bank v. Swan, 3 Wyo. 356; Callum v. Branch Bank, 4 Ala. 21; Ramsey v. Wallace, 100 N. S. 75; Lake v. Tyree, 90 Va. 719; Farrel v. Lovett, 68 Me. 326; Fields v. Rouse, 3 Jones, L. 72; Gordon v. Parmalee, 2 Allen, 212; Calahan v. McKinley, 52 Iowa, 222; Parker v. Moulton, 114 Mass. 99.

BIRDZELL, J. This is an appeal from a judgment of dismissal in a purchaser's action to rescind a contract for the purchase of a half section of land in Montana. The alleged grounds of relief are fraudulent concealment and misrepresentations made by the vendor. The plaintiff Burl Asher and the defendant had been acquainted for some time prior to the making of the contract, both living in Dickinson. In the spring of 1917, while on an automobile trip through the southwestern part of this state, these parties discussed prospectively the sale and purchase of the land in question. In September of the same year William Asher, of Livingston, Montana, a brother of Burl Asher, came to Dickinson, and the two, together with Jensen, the defendant, went by automobile to Culbertson, Montana, to look over the land with a view to its purchase, arriving there on the evening of September 4th. On the following day the three went to look over the land. The farm was occupied by a tenant by the name of Krueger, who had lived there about five years. It appears that prior to their arrival at the farm Jensen had warned the Ashers with respect to any statements the Kruegers might make concerning the farm, as they would be interested in any proposition looking toward the termination of their tenancy. The parties spent considerable time looking over the land on the first day, and spent the night with a relative of the defendant a few miles distant, returning for further inspection the following day. The Ashers had been raised upon a farm in Indiana and desired to purchase this land to enable another brother, Ernest Asher, to secure a larger farm than he was then occupying in Indiana. A contract was entered into, dated September 7th, whereby the Ashers agreed to purchase the land in

question for $6,000, $2,000 to be cash and $4,000 on the 1st of January, 1918. Some town lots in Billings, Montana, were accepted as part of the purchase price. In the spring of 1918, Ernest Asher came out from Indiana with his family, taking up his residence on the land. He soon complained that the land was full of gravel and that the well went dry, whereupon William Asher again went to Culbertson and looked at the land. In May, William requested a rescission of the contract, demanding a return of the money payment and of the lots given in exchange. The alleged fraudulent representations relate to the quantity of water that the well would supply and to the character of the subsoil.

There is a sharp conflict in the testimony with reference to what statements were made concerning the well, the Ashers contending that the defendant stated that there were 40 feet of water in the well; that there was good water on the place and plenty of it; that the well gives plenty of water. Jensen denies, however, that he made any representation concerning the capacity of the well, but that he did state its depth and that the water was good water. It appears that when the parties first arrived on the farm they went to the well and observed that the tank was full of water. Mrs. Krueger, however, who testifies by deposition, states that it had been filled that morning with water hauled from a coulee near by. There is nothing to indicate that Jensen knew that the water in the tank had been hauled from the coulee, and the testimony throughout on the question of the quantity of water clearly indicates that the well was capable of supplying water enough to fill the tank, so that the condition observed that morning cannot be said to amount to a fraudulent concealment of fact on the part of Jensen. Even though the testimony of the plaintiff as to what the defendant said concerning the well be true, it would only establish that the defendant had used a relative term in describing the capacity of the well, and the testimony as a whole does not show that the statement was so extravagant in its application to the well in question as to amount to fraud. The well was useful and had been used for a number of years. It had supplied water enough that the tenant Krueger felt justified in demanding of Jensen that he construct a windmill, which request was heeded by Jensen. The record as a whole leaves the impression that the well was capable of supplying the ordinary needs upon a farm of this character, and that, while it gave out occasionally, the supply would

be replenished within a comparatively short time. We are satisfied that no positive misrepresentation of fact concerning the well was made and no fraud practised concerning the same. A rescission of the contract is not warranted on this ground.

As to the representations concerning the subsoil, it must first be observed that the parties had ample opportunity to make a complete examination of the land; that they were upon the land and in its vicinity for two days, and that no artifice was resorted to to prevent them from satisfying themselves fully as to the character of the land that they were purchasing. They went about the land and observed a rocky knoll, and they could not have failed at the same time to observe the appearance of the surface. The witnesses for the plaintiff even testify that gravel was apparent upon the surface in a number of places. In the light of what a casual examination would show, the testimony as to Jensen having filled up a gravel pit by hauling in dirt is of no consequence, because it would conceal no condition that was not otherwise plainly apparent. Burl Asher testifies that Jensen did not try to prevent him from going to any part of the land that he wanted to see, and William Asher says that the gravel is easy to be seen; that a man walking over the fields that were sown to grain would be apt to see it; Mrs. Krueger's testimony being to the same effect. We find no evidence of any fraud or concealment or of any attempt upon the part of the defendant to prevent the plaintiffs from using their powers of observation, and it must be borne in mind that the plaintiffs, who had been raised upon a farm, were presumably capable of satisfying themselves as to what they were purchasing. The parties were, therefore, dealing upon equal footing.

The record as a whole rather impresses us that the attempt to rescind the contract springs from the disappointment of Ernest Asher, who was perhaps too prone to compare the cheaper land upon which he located with the more expensive and productive land which he had abandoned in Indiana. The contract cannot be rescinded for mere disappointment experienced by one of the parties. Upon the record before us the rule of *caveat emptor* applies. If this contract could be rescinded on the record before us, it is difficult to conceive of a land sale resulting in disappointment to one of the parties that could not likewise be rescind-

ed. For the foregoing reasons, the judgment appealed from is in all things affirmed.

GRACE, J. I concur in the result.

ZINA KAUFN SWIDEN, Respondent, v. ALEX ZANDER HASN, Aleck Zander Hassan, Alik Zander Hasen, Alix Zander Hasen, Albert Hones, M. Jones, Ashley State Bank, J. H. Allen & Company, J. H. Wishek, The Bankers Loan Company, Esther Skorish and H. Skorish, Copartners as Skorish & Sons, County of McIntosh, State of North Dakota, and All Other Persons Unknown Claiming Any Estate or Interest in or Lien or Encumbrance upon the Property Described in the Complaint, Appellants.

(175 N. W. 213.)

Homestead — effect of fraud in releasing homestead right and in obtaining mortgage.

1. In an action to determine adverse claims where it appears that the widow was entitled to a homestead estate in the homestead of her deceased husband, and that she, an Assyrian, unacquainted with the language, customs, and law of this country, not knowing her legal rights in the homestead, was induced to execute a mortgage of such land as security for the payment of claims against the estate of her deceased husband as well as against herself by her advisers, occupying a confidential relation towards her, also Assyrians by birth, having experience with the language, customs, and even the law of this country; and where, further, it appears from the record that nothing whatever was received by the widow from the estate of her husband, and no probate thereof had, and that her advisers, the appellants, exercised a proprietary interest in the homestead so mortgaged, receiving the rents and profits and disposing of the buildings thereupon,—it is *held* that the findings of the trial court to the effect that such mortgage was secured by fraud, deception, and overreaching are sustained upon the record.

Homestead — rights of wife in property of deceased husband.

2. Under the laws of North Dakota, the homestead estate of the deceased husband descends to the surviving wife, when there are no children, as to the entire fee thereof, free from any claims existing against such estate excepting those specifically prescribed by statute.

Opinion filed October 19, 1919.

Action in District Court, McIntosh County, to determine adverse claims.

From a judgment in favor of the plaintiff the defendants Hasn and Jones have appealed and demand a trial *de novo.*

Affirmed.

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

It is not necessary that the person signing actually himself affix his signature. If he simply touch the pen or even the hand of another, and the cross is made by his direction or with his acquiescence, the signing is sufficient. Bartlett v. Drake, 100 Mass. 175, 1 Am. Rep. 101; Gardner v. Gardner, 52 Am. Dec. 740; Northwestern Loan & Bkg. Co. v. Jonasen, 79 N. W. 840; Conlan v. Grace, 36 Minn. 270, 30 N. W. 880; Harris v. Harris, 59 Cal. 620; Lewis v. Watson, 22 L.R.A. 297.

The four facts essential to a proper acknowledgment are set forth in Cannon v. Daming, 3 S. D. 421, 53 N. W. 863.

To overthrow an acknowledgment instrument, fair on its face, the evidence must be "so full and satisfactory to convince the mind that the certificate is false or forged." Griffin v. Griffin, 125 Ill. 43, 17 N. E. 785; Marston v. Brittenham, 76 Ill. 611.

"The certificate makes a prima facie case; that is the least that can be claimed for it." Dock Co. v. Russell, 68 Ill. 438; Borland v. Volrath, 33 Iowa, 130; Blarson v. Ford, 108 Ill. 26.

"Good faith will be persumed on the part of all persons and officers in the execution, acknowledgment, filing, and recording of written instruments." Laws 1913, § 5580.

Courts have, with great uniformity, in this class of cases (actions to impeach written instruments) required the proof that should destroy the recitals in a solemn instrument to be clear, satisfactory, and specific, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt. McGuin v. Lee, 10 N. D. 169; Larson v. Duitel (S. D.) 85 N. W. 1008; Droge Elev. Co. v. Brown Co. (Iowa) 151 N. W. 1048; Punch v. Williams, 34 Wis. 268. See also Maxwell Land Grant Case, 121 U. S. 380, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; Veazie v. Williams, 8 How. 134–157, 12 L. ed. 1018; United States v. San Jacinto Tin. Co. 125 U. S. 273–300; 8 Sup. Ct. Rep. 850, 31 L. ed. 747, and other numerous notations cited.

John D. Lynch, Dan R. Jones, and *A. G. Divet,* for respondents.

Occupying this position of confidence he (Jones) could not deal with her to his own advantage without not only refraining from deceiving her, but further without affirmatively advising her of what was and was not to her best interest. He must guard her interests in preference to his own. Comp. Laws 1913, §§ 6275 and 6281; Field's Civ. Code, §§1171 and 1177; Liland v. Tweto, 19 N. D. 551; Gardner v. Ogden, 22 N. Y. 333; McFadden v. Jenkins (N. D.) 169 N. W. 151; King v. White (Ala.) 24 So. 710; Thomas v. Whitney (Ill.) 57 N. E. 808; 2 Pom. Eq. Jur. §§ 948, 953, 956 and cases cited.

On examination Jones would not answer direct, or give details. This examination went to the credibility of the witness; he withheld certain evidence and the presumption is that if the evidence had been given it would have been adverse and tend to lessen his credibility. Jones, Ev. Blue Book, § 19; Cole v. Lake Shore & C. R. Co. (Mich.) 54 N. W. 638; Robinson v. Life Ins. Co. 144 Fed. 1005; Manhard & C. Co. v. Rothschild (Mich.) 80 N. W. 707; Wigmore, Ev. § 285; Wyldes v. Patterson, 31 N. D. 282; Nelson v. Hall (Mo.) 79 S. W. 500; McDonough v. O'Niell, 113 Mass. 92; Smith v. Tosini (S. D.) 48 N. W. 299.

The rule is a trustee under such circumstances must affirmatively account, and, failing, the most possible liberality will be indulged in in construing the evidence, and he will be held liable for the largest amount that may under the evidence be in his hands. Blanvelt v. Ackerman, 23 N. J. Eq. 495; Irre Gaston Twist, 35 N. J. Eq. 6; Landis v. Scott, 32 Pa. 495; McCulloch v. Tompkins (N. J.) 49 Atl. 474; Perrin v. Lepper (Mich.) 40 N. W. 859; Biddle Purchasing Co. v. Snyder, 96 N. Y. Supp. 356; Merritt v. Merritt, 67 N. Y. Supp. 188.

Nothing is deemed a consideration for a contract that is not so intended by the parties. Fire Ins. Asso. v. Wickham, 141 U. S. 564, 35 L. ed. 860; Philpot v. Gruninger, 81 U. S. 570, 20 L. ed. 743; Kilpatrick v. Newloud, 16 Pa. 117; Ellis v. Clark, 110 Mass. 389.

Mere casual transactions not in the regular course of the party's business are not provable by the books of account. 2 Enc. Ev. 625 and 626.

Cash items are not so provable. 2 Enc. Ev. 645–648; Lyman v. Beckle, 7 N. W. 673; Schafer v. McCracken, 58 N. W. 910; Smith v. Rentz, 15 L.R.A. 171; Prince v. Smith, 4 Mass. 454.

Items of money paid out on orders are not so provable. Branning v. Vorhees, 14 N. J. L. 590; 2 Enc. Ev. 620 and 648.

BRONSON, J. This is an action to determine adverse claims. The defendants, Hasn and Jones, appeal from a judgment of the trial court quieting title in the land involved and declaring the mortgage of such defendants to be not a lien upon such land. A trial *de novo* is demanded in this court. The facts substantially are as follows:

On June 2, 1909, the plaintiff, the respondent herein, executed a mortgage to the appellants upon 160 acres of land in McIntosh county to secure an indebtedness of $1,175. This mortgage contained a misdescription of the land involved. This mortgage was later foreclosed by action in 1914, attempted service being secured by publication. The judgment rendered in such foreclosure action was later vacated in March, 1917, by reason of jurisdictional defects. In August, 1917, action again was instituted to foreclose such mortgage by the appellants herein, and, thereafter, in October, 1917, this action herein to determine adverse claims was instituted; the appellants by separate answer set up the mortgage in question as a lien upon the land; to such answer, the respondents replied, setting up fraud, deceit, misrepresentation, lack of consideration, and abuse of confidential relations in avoidance of such mortgage. At the trial commencing June 5, 1918, it was stipulated that the evidence taken might apply to both of said actions; that the actions, however, should not be consolidated, but as separate judgment should be entered in each.

The land in question was homesteaded by the deceased husband and final proof made shortly before his death. After his death some contest was made concerning this final proof, but subsequently, nevertheless, a governmental patent was issued upon the final proof of the deceased husband. The parties before this court are Assyrians. The respondent and her deceased husband were married in Assyria and came from some town therein known as Karoun. For sometime prior to his death the deceased husband had been afflicted with tuberculosis. He sent for his wife then in Assyria. She arrived some time in December, 1908. Thereafter she lived on the homestead with her husband excepting such times as he was away taking medical treatment at various places until the time of his death from his affliction, during the

last days of May, 1909. Immediately, after the funeral of the deceased husband, the appellants secured this mortgage from the respondent as security for the payment of claims against the deceased husband for moneys advanced in making proof on the land, for moneys borrowed, traveling expenses of the wife paid, funeral expenses, and also to cover other claims of creditors against the deceased. Trouble apparently soon arose between the relatives of the deceased husband, particularly his brother and the respondent. In accordance with her testimony, not only was this mortgage secured from her, but also all of the personal property of the deceased husband was taken away from her. She was driven from home and the home of her brother-in-law. She fled into the hills; there she was picked up by one Swiden and subsequently some two months thereafter married the brother of her new protector. From the record apparently she has never received anything from the estate of her deceased husband, and apparently there has never been any probate thereof.

The trial court, in its findings, in effect determined that the signature of the respondent to the mortgage in question was induced by fraud, deception, misrepresentation, and overreaching of the appellants, in abuse of confidential relations existing and without consideration, reciting in detail the particular acts and circumstances which gave rise to such fraud and deception.

Ths appellants herein have challenged these findings principally upon the grounds that the record discloses that the respondent, with full understanding, executed the notes and mortgages in question, based upon a valid consideration for the settlement of the debts of her deceased husband as well as her own debts, properly chargeable to her as the wife of the deceased and personally. That furthermore upon principles of estoppel and laches the court erred in setting aside this mortgage after it had been unquestioned for some seven years. The principal controversy concerning the exercise of fraud, deception, or overreaching centers around the circumstances attending the execution of the mortgage. The record is voluminous; no good purpose will be served in trying to recite in detail the conflicting contentions of the parties. There is evidence in the record to support the findings of the trial court to the effect that this respondent, an Assyrian by birth, unacquainted with either the language, the customs, or laws of this country, practically immediately

after the funeral of her husband was induced to sign this mortgage to cover the claims of her deceased husband through the activities of the appellants, who thereafter assumed proprietary rights in the homestead of the deceased husband, renting the land from year to year, receiving the proceeds thereof, and even selling and disposing of the buildings thereupon. The appellants were engaged in business at Ashley, North Dakota. They were Assyrians, but they had been in this country sufficiently long to have become not only fairly shrewd business men, but also to a certain extent at least acquainted with the language, the customs, and even the law of this country. They consulted a lawyer concerning their right to take a mortgage from this respondent. There appears nothing in the testimony of any advice given by these appellants to this respondent of her rights in the estate of her deceased husband. The respondent was here in a country foreign to her, without money or friends. The appellants occupied a confidential relation toward her. This relation necessitated the exercise of the highest good faith, to treat fairly the respondent in business transactions. After a review of the entire record, we are satisfied that the findings of the trial court should not be disturbed. In this case, particularly, where much of the evidence was taken through an interpreter the trial court was in a much better position to visualize the conduct and actions of the parties concerned as they appeared before the court than this court is upon the cold record. The appellants contend that they befriended the deceased husband, assisting him in securing final proof of the land with money and legal advice; aided him in his last sickness by money and direct attention; sent for the respondent, and furnished money for her transportation, and otherwise assisted and aided the respondent after her arrival. Even though this be true, this furnished no occasion, and certainly did not afford any excuse, for the appellants to act toward the respondent otherwise than in her interest. These appellants knew or easily could have ascertained, acquainted as they were with American customs and law and knowing how to secure legal advice, that the respondent as the widow of the deceased was entitled to an interest in this land, in fact the entire interest thereof by statute; and that a method was provided, not by the invention of the parties, but by legal proceedings through the county court, to adjust, determine, and settle all of the claims against the estate of the deceased. The appellants knew,

or were in a position to know from their experience, that this homestead of the deceased by statute belonged absolutely to the respondent, free from any claims of creditors of the deceased husband. Comp. Laws 1913, §§ 5607, 5631, 5743. See Calmer v. Calmer, 15 N. D. 120, 124, 106 N. W. 684. There is ample evidence in the record to warrant the finding of the trial court that the respondent was ignorant of this knowledge, and that the appellants, taking advantage of her condition, situation, and experience, did secure by deceptive practices the execution of this mortgage to cover claims and demands that then were not legally and could not be made legally, under statute, a charge upon this land. We are further satisfied upon this record that the delay of the respondent in instituting this action, inexperienced in and unacquainted as she was with the language and institutions of this country, has not subjected her to the principles of estoppel and laches asserted by the appellants. The judgment of the trial court should be in all things affirmed. It is so ordered.

H. B. HUNTLEY, Respondent, v. SAM GEYER, Appellant.

(175 N. W. 619.)

Evidence — application of the "hearsay" rule.

1. Certain testimony *held* to be inadmissible as hearsay for the reasons stated in the opinion.

Physicians and surgeons — proof of value of services.

2. In an action to recover upon an implied promise to pay for his services, a physician has the burden of proving the value thereof.

Opinion filed October 20, 1919.

Appeal from the District Court of Cass County, *Cole,* J.

Defendant appeals from the judgment and from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

Reversed and remanded for a new trial.

A. C. Lacy, for appellant.

The court was clearly in error in permitting the plaintiff to testify

as to conversations he claimed to have had with one of the sons of defendant, out of defendant's hearing, without first laying a foundation to show that said son, if he made said statements, had authority to make them. 1 Elliott, Ev. §§ 318, 319; Swan v. Warner (N. Y.) 90 N. E. 430.

A plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proof. Mondran v. Goux, 51 Cal. 153.

In the absence of statutory enactments, it is necessary in actions on a contract, to allege the consideration, except in the case of contracts under seal, bills of exchange, and negotiable notes, all of which by intendment import a consideration. Schwerdt v. Schwerdt (Ill.) 83 N. E. 613; Central Secur. Co. v. Milwaukee-Waukesha Brewing Co. (Wis.) 164 N. W. 994.

Consideration must consist of a present and a further act. A past act cannot serve as a consideration for a promise. 3 Am. & Eng. Enc. Law, 838; Winch v. Trust Co. 32 N. Y. Supp. 244; McArthur v. Dryden, 6 N. D. 436, 71 N. W. 125.

A mere admission of liability for or promise to pay the debt of a third person, no consideration therefor being shown, is not binding. Bunnell v. Empire Laundry Machinery Co. 5 N. Y. Supp. 591; Rossford v. Swift, 39 N. Y. Supp. 337.

No liability of construction will excuse the failure to plead a material fact. McCormick Harv. Mach. Co. v. Rae, 9 N. D. 482, 84 N. W. 346.

In an action on a contract, the contract given in evidence must agree in substance and in terms with that stated in the declaration. Russell v. South Britain Soc. 9 Conn. 508; Supreme Lodge, K. P. v. Weller (Va.) 25 S. E. 891.

A party cannot sue upon one contract and recover upon another. Green v. Southern States Lumber Co. (Ala.) 50 So. 917; Walker v. Bohaman (Mo.) 147 S. W. 1024; Barber v. Clark Imp. Co. (Mo.) 111 S. W. 846; Jenkins v. Clapton (Mo.) 121 S. W. 759; Stuart v. Calahan (Tex.) 142 S. W. 60; Bagley v. Black (Tex.) 154 S. W 247; New Jersey Foundry & Mach. Co. v. United States, 49 Ct. Cl. 235.

The reasonableness of the amount charged for the services rendered

by a physician and surgeon must be proved. Sidsner v. Fetter, 19 Ind. 610; Styles v. Tyler (Conn.) 30 Atl. 165.

As to the necessity of proving value of professional services see also: Mitchell v. Davis (Minn.) 53 N. W. 363; Kolka v. Jones (N. D.) 71 N. W. 564.

Where the complaint seeks to recover goods sold to defendants as partners under the name of W. Co., it is error to admit evidence to show, and to instruct the jury on the theory that the W. Co. was a corporation and the goods were sold to it, and that defendant undertook to be responsible for the price or that the defendant bought out the corporation and assumed the debt. Kelly, D. & Co. v. Johnson (Wash.) 32 Pac. 752; Miller v. Hallock (Colo.) 13 Pac. 541; Reiggles v. Blank, 15 Ill. App. 436; Benson v. Dean (Minn.) 42 N. W. 207.

Consideration must consist of a present or future act. A past act cannot serve as a consideration for a promise. Mills v. Wyman, 5 Pick. 207; Funk v. Funk (Ky.) 122 S. W. 511; 2 Am. & Eng. Enc. Law, 834; Bunnell v. Empire Laundry Machinery Co. 5 N. Y. Supp. 591; Ventress v. Gunn (Ala.) 60 So. 560.

To recover on an account stated, plaintiff must declare upon an account stated, and if he proceeds upon the original cause of action, the rules of evidence governing an action on an account stated will not apply. Bump v. Cooper (Or.) 26 Pac. 848; Packet v. Platt, 22 Minn. 413; McCormick Harv. Mach. Co. v. Wilson, 40 N. W. 771; Edwards & McC. Lumber Co. v. Baker (N. D.) 50 N. W. 718.

An account stated alters the nature of the original indebtedness, and is itself in the nature of a new promise or undertaking. Foster v. Allanson, 2 T. R. 479.

When an account is stated, the balance struck becomes an original demand, the transaction amounts to an express promise to pay that balance, and the account cannot be examined to ascertain the items of that balance. Christofferson v. Howe (Minn.) 58 N. W. 830. Citing: Hawkins v. Long, 74 N. C. 781; McClelland v. West, 70 Pa. 183; 1 Am. & Eng. Enc. Law, 124.

Burfening & Conmy, for respondent.

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the

merits." Comp. Laws 1913, § 7478; Maloney v. Geiser Mfg. Co. 17 N. D. 195; Robertson v. Moses, 15 N. D. 351; Mallorum v. Holmes, 15 N. D. 411; Rickel v. Sherman, 34 N. D. 298.

"The rule is firmly settled that this court will not weigh conflicting evidence, nor disturb the order of a trial court granting or denying a new trial, where there is substantial conflict in testimony." Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011; Lang v. Bailes, 19 N. D. 562, 125 N. W. 891; Taylor v. Jones, 3 N. D. 255, 55 N. W. 593; Black v. Walker, 7 N. D. 414, 75 N. W. 787; Thompson v. Scott, 34 N. D. 503.

CHRISTIANSON, Ch. J. The plaintiff, a physician and surgeon, brought this action to recover for certain professional services. In his complaint he alleges that he is duly licensed to practise in this state; that at Leonard, North Dakota, between March 9, 1911, and May 1, 1911, at defendant's special instance and request, he rendered medical and surgical services for the said defendant of the reasonable and agreed value of $272, and which said amount the defendant then and there agreed to pay said plaintiff; that no part of said account has been paid except the sum of $66, paid between March 9, 1911, and December 23, 1911. The answer admits that the plaintiff is a physician and surgeon duly licensed to practise in this state; but denies all the other averments of the complaint. The case was tried to a jury upon the issues thus framed. A verdict was returned for the plaintiff for the amount demanded in the complaint. The defendant moved in the alternative for judgment notwithstanding the verdict or for a new trial. The motion was denied, and the defendant has appealed from the judgment and from the order denying such motion.

It appears from the evidence that the professional services for which plaintiff seeks to recover were rendered in the treatment of one Walter Geyer, a son of the defendant. At the time the services were rendered Walter Geyer was about twenty-four years of age. He was making his home with his parents, but was operating an adjoining farm for himself. The plaintiff testified that about March 9, 1911, one of Walter Geyer's brothers came to plaintiff's office, and informed plaintiff of Walter Geyer's illness, and obtained some medicine for him. The plaintiff further testified that at that time the brother stated that he

had been sent by the defendant to consult the plaintiff with regard to Walter's illness. This testimony was admitted over objection that there was no showing that the son who called on the plaintiff had been authorized by defendant to do so, and that the alleged statements were hearsay as to the defendant, and inadmissible. The objection was overruled and the evidence admitted. This ruling is assigned as error.

We are of the opinion that the court erred in permitting the plaintiff to testify to the statements which he claims defendant's son made at the time he called plaintiff to treat Walter Geyer. The defendant denied that he had sent the son, or had in any manner requested or authorized the calling of the plaintiff. Plaintiff made no showing whatever that the son had actually been sent by the defendant. Clearly plaintiff's testimony as to what the son said would not be admissible to prove that the defendant had sent him. It was purely hearsay. And in view of the condition of the evidence in this case, we are not prepared to say that the admission of this evidence did not affect the result.

The defendant, also, contends that there was no evidence tending to show either that the compensation of the plaintiff had been agreed upon, or that his services were reasonably worth the amount awarded. We believe that this contention is well founded. There is no evidence tending to show that the amount of plaintiff's compensation was fixed by agreement. Neither did the plaintiff nor anyone else testify that the services rendered by the plaintiff were reasonably worth the amount which the plaintiff recovered or any other amount. The plaintiff contented himself by stating what he had done, and identifying certain charges he had made upon his books therefor. Nowhere did he testify that the services were reasonably worth what he charged therefor. In the absence of an express agreement as to amount, the law implies a promise to pay for a physician's services as much as they are reasonably and ordinarily worth on the professional market. 21 R. C. L. p. 415. Where a physician seeks to recover for such services he has the burden of proving the value thereof. 9 Enc. Ev. 828.

The judgment and order appealed from must be reversed and the cause remanded for a new trial. It is so ordered.

BRONSON and BIRDZELL, JJ., concur.

GRACE, J. I concur in the result.

ROBINSON, J. I dissent on the ground that the record shows no issue on the value of the services.

MARY OLSON, Appellant, v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Respondent.

(175 N. W. 371.)

Carriers — evidence of intoxication of passenger — negligence of carrier not shown by evidence.

In an action against a railroad company brought to recover damages occasioned by the death of the plaintiff's husband, where it appeared that the deceased before the accident resulting in his death had ridden as a passenger in a smoking car a distance of approximately 110 miles; that he had been riding in a seat with a man with whom he was personally acquainted; that he was intoxicated to a degree that he staggered when he walked and was unable to converse intelligently; that he was several times up and about the coach, and as the train neared a station other than his destination he walked to the front end of the coach and out onto the platform, from which place he probably fell and was killed, it is *held* that the evidence is insufficient to show any breach of duty on the part of the carrier.

Opinion filed October 20, 1919.

Appeal from judgment of District Court of Ward County, *Leighton*, J.

Affirmed.

McGee & Goss and *Sinkler & Eide*, for appellant.

It is unlawful for a railroad company to expel a drunken man, or to

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NOTE.—For authorities passing on the question of duty of carrier to passenger who has fallen from train, see note in 27 L.R.A.(N.S.) 768.

On intoxication as affecting negligence of passenger, see notes in 40 L.R.A. 134; 47 L.R.A.(N.S.) 736; and L.R.A.1916F, 102, from which it appears that where a railroad company accepts as a passenger one whom they know at the time, because of his intoxication, to be mentally and physically incapable of self-protection, the fact of his intoxication does not excuse them from the duty to use reasonable and ordinary care to prevent injuring him.

allow him to be injured after having taken him on a trip, knowing his condition. Haug v. Great Northern R. R. Co. 8 N. D. 23; Railroad Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186; Railroad Co. v. Velleley, 32 Ohio St. 345; Railroad Co. v. Weber, 33 Kan. 543, 6 Pac. 877; Railroad Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70; Price v. Railroad Co. 112 Am. St. Rep. 79; Railroad Co. v. Cooper, 16 Am. St. Rep. 334; Benson v. Railway Co. (Wash.) 130 Am. St. Rep. 1096; Kradel v. Railway Co. 15 N. C. C. A. 502.

Where a passenger is received in an intoxicated condition which is apparent to carrier's employee, a higher degree of care toward him is required than in case of a passenger in full possession of his faculties. 5 N. C. C. A. 633; Warren v. Railway Co. 243 Pa. 15; Thompkins v. Oswego, 40 N. Y. S. R. 4.

And the extent of the intoxication of passenger and the conductor's knowledge of his condition and the safety of the place from which he was subjected from the train are questions for the jury. Louisville & N. R. Co. v. Johnson (Ala.) 31 L.R.A. 372.

John E. Green (John L. Erdahl, of counsel), for respondent.

"They [the jury] should have been clearly instructed that if the drinking of the plaintiff contributed at all to his injury, he could not recover." 34 N. W. 714.

BIRDZELL, J. This is an appeal from a judgment of dismissal. The action is brought by the surviving wife of a deceased person, Henry Olson, to recover damages for the death of the latter. At the conclusion of the plaintiff's case, the trial court, on motion of the defendant, dismissed the case upon the ground that the evidence was insufficient to show negligence on the part of the defendant. The facts shown by the record are that on the 19th of November, 1917, one Henry Olson, a man in middle life, became a passenger upon one of the defendant's trains, boarding the train at Raymond, Montana. He was destined for Minot, North Dakota. As the train neared the station of Bowbells, about 110 miles east of Raymond, he went to the front steps of the smoking car, where he fell from the train and was killed. A witness, Fred Tuk, who was the only witness called by the plaintiff to testify to the facts concerning the accident, stated that he was acquainted with Henry Olson during his lifetime; that he was a passenger on the train the day

Olson was killed and was riding in the smoker; that Olson came into the smoking car from the back end and at the time he came in the witness noticed that he had been drinking, as he staggered when he walked; that Olson sat down beside the witness in the seat; that he was so intoxicated he was unable to converse in an intelligent manner; that he had whisky with him, which he was drinking on the train; that the conductor and other employees of the railroad were in the coach at times when Olson was there and when he was drinking. In explaining Olson's action the witness said: "It is hard to explain what a drunk man will do. He staggered around when he walked, that is the best he could do. He got up and staggered around the car, talking foolish like all drunk men do." From the testimony of this witness it would appear that Olson was in a drunken condition, and that this fact would be noticeable to anyone seeing him move about or hearing him attempt a conversation, but Tuk does not testify that Olson's condition was in fact observed by any of the trainmen. He thought, however, that Olson had gotten up from his seat four, five, or six times and staggered about the car. As to the immediate facts leading up to the accident, the testimony of this witness is that Olson got up and went to the front end of the car; that it was quite dark and he did not come back again. This was as the train approached Bowbells. He staggered and clutched the seats as he went. When the train stopped at Bowbells he notified the conductor that the man was missing, whereupon the conductor remarked that these people think trains are wagons, and said he would send the depot agent back to look for him. The witness went on to Kenmare, and upon arriving there notified Olson's brother-in-law, Ross, that he had fallen off the train, whereupon the witness, Ross, and the deputy sheriff went back to Bowbells and found Olson lying dead about 20 or 30 feet from the track, with a mark on his head indicating that he had come in contact with some blunt instrument. There was a pint whisky bottle near the body, which was not entirely empty.

The only assignment of error argued upon this appeal is that the court erred in directing a verdict on the ground of the lack of evidence of negligence. It is contended that the evidence above narrated constitutes sufficient proof of the negligent omission of duty on the part of the defendant's employees to warrant a verdict favorable to the plaintiff. We are of the opinion that no question of fact upon which liabil-

ity could be predicated is presented by this record. While the evidence does not directly prove that the defendant's trainmen were cognizant of the condition of the passenger, for the purpose of testing the liability of the defendant it might be considered sufficient to warrant an inference that they did know of his condition. Benson v. Tacoma R. & Power Co. 51 Wash. 216, 130 Am. St. Rep. 1096, 98 Pac. 605. Conceding that the trainmen knew of Olson's condition, it does not necessarily follow that there was a breach of duty on the part of the defendant in not taking steps to guard him. The remaining circumstances must be considered. The testimony shows that Olson was seated beside the witness Tuk, with whom he was personally acquainted and who would in all human probability manifest all of the interest in his safety that any employee of the defendant would be expected to manifest under these circumstances. To hold on this record that the defendant was negligent would be equivalent to charging a railroad company with the duty either of putting an intoxicated man off the train at a proper place, or to detail an employee to specially guard him while *en route*. We are aware of no authority which goes to this limit in defining the duty of a carrier of passengers. In the place where this passenger was when his condition was noticed by the agents of the defendant, if it was noticed at all, he was as safe from injury as was any other passenger in the coach. The carrier, then, cannot be charged with negligence except upon the supposition that it would be the duty of a reasonable man to anticipate that the passenger would be likely to leave the car and become exposed to danger.

We have carefully examined the authorities cited by the appellant, but they go no further than to lay down the principle that a carrier whose agents receive and transport a drunken passenger are bound to exercise toward him a higher degree of care than is exercised toward the other passengers, and to employ such measures for his protection from injury as humanity dictates. For instance, as was held in Haug v. Great Northern R. Co. 8 N. D. 23, 42 L.R.A. 664, 73 Am. St. Rep. 727, 77 N. W. 97, 5 Am. Neg. Rep. 467, a railroad company may be liable if it discharged an intoxicated passenger at a station other than his destination, or if it fails to give him proper shelter and care to prevent injuries which are likely to befall an unaccompanied person in an intoxicated condition; and to the same effect is Louisville, C. & L.

R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186, 8 Am. Neg. Cas. 286, and other authorities cited by the appellant. This is not a case such as Benson v. Tacoma R. & Power Co. supra, where the conductor, with notice of the condition of the passenger, observed him in a dangerous position upon the platform and took no measures for his safety. As above stated, this passenger, at the time his condition was observed by the agents of the company, if it was observed, was in as safe a place as could be provided for him, and he was apparently attended. Negligence, in our opinion, cannot be predicated upon a supposed duty of seeing that he did not venture to a place where he would expose himself to danger.

The judgment appealed from is affirmed.

BRONSON, J. I concur in the result.

CHRISTIANSON, Ch. J., and ROBINSON, J., concur.

GRACE, J. I dissent.

VIOLA GORDON WRIGHT, Appellant, v. W. A. MYERS, Respondent.

(174 N. W. 883.)

Trover and conversion — grain stored in elevator — effect of forbidding sale by owner.

This is mainly a suit for the conversion of grain which was not converted. The grain was properly placed in a grain elevator, where it is held because the plaintiff forbade its sale. She may not thus, in effect, hold the grain and sue for its conversion.

Opinion filed October 20, 1919.

Appeal from the District Court of Wells County, Honorable *J. A. Coffey*, Judge.

Affirmed.

J. J. Youngblood, Hanchett & Johnson, and *Frederick O. Storlie*, for the appellant.

A part owner of personal property having same in his possession may be liable to the other owner for a conversion of his interest by doing any act in connection with the property inconsistent with or subversive of the rights of the other owner. Grigsby v. Day (S. D.) 70 N. W. 88; Fraine v. North Dakota Grain & Land Co. 170 N. W. 307; Willard v. Monarch Elevator Co. 10 N. D. 405.

A transfer of an elevator receipt by a consignee is a conversion of the grain represented thereby, as against the holder of the bill of lading with draft attached. Hamlin v. Carruthers, 19 Mo. App. 567.

Any disposition of the property without the consent of the owner is an actionable conversion. Allsop v. Joshua Hendy Machine Works (Cal.) 90 Pac. 38; Great Western Smelting Co. v. Evening News Asso. 102 N. W. 286.

Acts of the defendant inconsistent with a continued recognition of plaintiff's title amount to a conversion. Joyce v. Sage Bros. Co. (Ill.) 91 N. E. 996.

Mixture of chattels belonging to different owners may amount to a conversion. Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627.

"In an action for trespass the question of damages is a question particularly for the jury." Drake v. Palmer, 4 Cal. 11; Sayles v. Bemis (Wis.) 15 N. W. 432.

B. F. Whipple and *Edward P. Kelly,* for respondent.

To entitle one to maintain an action for conversion of personal property, he must show that at the time of the alleged conversion he had possession or legal right to the immediate possession and a general or special ownership in the property converted. Parker v. Bank, 8 N. D. 419.

ROBINSON, J. This is mainly a suit for the conversion of grain which has not been converted. The appeal is from a judgment on a directed verdict for defendant. As tenant of plaintiff, defendant farmed her land on the usual cropping conditions. He caused the grain to be threshed, hauled to the grain elevator, and took storage tickets, thus:

September 11, 1918. Ticket to Walter Myers, 281 Bu. 2 rye.

October 21, 1918. Ticket to Myers & Wright, 70 Bu. 1A durum.

October 19, 1918. Ticket to Myers & Wright, 72 Bu. 1 durum.

October 19, 1918. Ticket to Myers & Wright, 141 Bu. 1 durum.

Those tickets are by the Osborne-McMillan Elevator Company at Manfred, North Dakota.

In directing the verdict the court justly said: Mrs. Wright is entitled to her grain, and defendant is willing to give it to her, and he is entitled to some offsets against it, but under the law plaintiff is not entitled to recover at all for conversion. The bulk of the grain in dispute was properly hauled to the grain elevators, and storage tickets in evidence as a part of the record were taken for the grain. It has not been sold because the plaintiff by her attorney, Youngblood, directed the elevator company to hold the grain, and not to sell it. Thus the plaintiff does in effect hold the grain, while she sues for the conversion of the same. She may not thus play fast and loose. While holding the grain she may not sue for its conversion.

They are other minor disputes concerning the proper disbursement of moneys which she sent to defendant to buy seed grain and to repair the farm buildings, and concerning an alleged trespass on 40 acres which he farmed, when neither he nor the plaintiff knew that it belonged to her. But such claims are not fairly stated or presented for an adjudication. With common business courtesy the parties could easily have stated and settled their matters, and, if not, then the proper action was one for a sale or division of the grain and its proceeds, and an accounting. So far as it appears from the record, defendant has always been ready and willing, and he is still ready and willing, to have the grain sold and to divide the proceeds in accordance with the contract on receiving the amount justly due to him. The judgment is affirmed, with costs.

BRONSON, J. I concur in the result.

ROSS OLIVER ARROWSMITH, Respondent, v. BANKERS CASUALTY COMPANY, of Minneapolis, Minnesota, a Corporation, Appellant.

(175 N. W. 207.)

Insurance — accident insurance — conflict as to payment of premium and date of accident.

In this case the evidence is examined and *held* to sustain the verdict.

Opinion filed October 28, 1919.

This is an appeal from the District Court of Hettinger County.

Affirmed.

E. T. Burke and *Jacobson & Murray,* for appellant.

M. S. Odle, for respondent.

The holder of a check is bound to use due diligence in obtaining the money, and must present it and demand payment within a reasonable time. 5 R. C. L. 506, § 30.

"The acceptance of a check implies an undertaking of due diligence in presenting it for payment; and if the party from whom it is received sustains loss by want of such diligence, it must be held to operate as actual payment." 5 R. C. L. 501, § 25.

Robinson, J. In cranking a Ford automobile the insured sustained a fracture of his right arm just above the wrist. The jury assessed his damages at $225, and defendant appeals.

On May 10, 1916, defendant made to the plaintiff an accident insurance policy. He paid: Insurance fee, $4; first-year premium, $27.50; second-year premium, $27.50.

The suit arises on a question concerning the date of the injury and the date of the last payment, which was made by check dated October 28, 1917. The check was marked paid December 10, 1917. The cashier of the company testifies that according to its books the check was received on November 28, 1917. The plaintiff testifies that at Mott, North Dakota, he mailed the check to plaintiff at Minneapolis, on or about the date of the same.

The first proof of the accident as written by plaintiff's physician shows it occurred on December 2, 1917. It shows that he treated the plaintiff six times; namely, December 3, 4, 6, 8, 12, and 16. That proof was made on December 19, 1917. Then on February 19, 1918, a final proof was made, giving the date of the accident as November 25, 1917; that proof was followed in the complaint made on May 1, 1918. Most people have a poor memory of dates, and in general there is no reason for remembering dates. In this case it seems that the jury concluded that the correct date of the accident was December 2, 1917, the date given in the first proof of loss. The jury had evidence sufficient to sustain a conclusion that the check for $27.50 was received prior to November 25, 1917. Certain it is the check was received and used, and no offer was made to return either the check or the money received on it.

The defense was conducted on the theory that the plaintiff was bound by the date of the accident as alleged in his complaint and that the check had not been received prior to that time, but on each point there is ample evidence to sustain the verdict. The jury had a right to conclude that the accident occurred on December 2d, and that the check was mailed to and received by defendant long prior to the accident.

Affirmed.

IRA STODDARD, Respondent, v. J. B. REED, Doing Business under the Name of J. B. Reed Transfer & Storage Company, Appellant.

(175 N. W. 219.)

Damages — negligence — driving heavy load down grade with team not under control as constituting negligence — question of negligence properly submitted to jury.

This is an action to recover damages caused by a dray running against a motor vehicle. The evidence clearly shows that the defendant was guilty of negligence in going upon a slippery down-grade thoroughfare with a heavily loaded dray and a team not under control.

Opinion filed October 28, 1919.

Appeal from County Court, Ward County, *Murray*, J.

Affirmed.

Bradford & Nash, for appellant.

Defendant cannot recover on a claim of negligence not pleaded. Hall v. N. P. R. Co. 16 N. D. 64; Carter v. Kansas City R. Co. 21 N. W. 607; Flint & P. Marquette R. Co. v. Stark, 38 Mich. 714.

One in charge of a runaway team cannot be held liable for colliding with a vehicle on a highway to the injury of its occupants if the runaway is shown not to have been due to his negligence, and where the driver made an honest and earnest effort to avoid the vehicle and endeavored to warn the injured person of his danger. Kimball v. Stackpole, 60 Wash. 35, 35 L.R.A. 148, 110 Pac. 677; Cadwell v. Arnheim, 152 N. Y. 182, 46 N. E. 310; reversing 81 Hun, 39, 30 N. Y. Supp. 753; Hannock v. White, 11 C. B. N. S. 588, 31 L. J. C. P. N. S. 129.

The fact that horses are unmanageable or beyond control is not necessarily negligence. Ford v. Whitemen, 45 Atl. 543; Cunningham v. Belknap, 22 Ky. L. Rep. 1580, 60 S. W. 837; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372.

Where an injury is due to the negligence of both parties, no recovery can be had. Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co. 24 N. D. 40.

E. R. Sinkler and *M. O. Eide*, for respondent.

Where there is no objection to the testimony of the plaintiff's witnesses on incompetent evidence, where there is no motion to strike out such testimony, such testimony stands and must be considered as competent, and the appellant in this case is bound by this testimony. 9 Enc. Ev. 111; Web v. Sweeney, 69 N. E. 200; People v. Smith, 53 Pac. 802; Chew v. Holt, 82 N. W. 901.

"On variance between allegations in a pleading, no proof shall be deemed material unless it actually mislead the adverse party to his prejudice in maintaining his action or the defense upon the merits. Whenever it shall be alleged that a party has been misled, the fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just." N. D. Comp. Laws 1913, § 7478; 17 N. D. 195; 15 N. D. 351; 15 S. D. 379.

ROBINSON, J. This is an appeal from a verdict of twelve accepted jurors and from a judgment of the county court of Ward county for $114.50. The complaint avers that on December 1, 1916, in Minot, North Dakota, at the corner where Main street and Central avenue intersect, the plaintiff was driving an Overland car in a westerly direction on the right side of the avenue when defendant going north on Main street with an heavily loaded dray, down a slippery incline, ran against the plaintiff's car to his damage of $114.50.

Concerning the amount of the damage there is no dispute, but defendant claims that by reason of the failure of plaintiff to keep out of the way of the dray team he was guilty of contributory negligence. At the time of the accident the dray was heavily loaded, it was on a down grade, the road was slippery, and the horses were not sharp shod so they could not hold back, the driver lost control, and the horses were pushed against the plaintiff's car.

In going upon a slippery down grade with a heavy load, with a team not under control and not able to hold back, the defendant was clearly guilty of negligence, and that negligence was the approximate cause of the accident. Manifestly the case was fairly tried and submitted to the jury and the verdict was well sustained by the evidence. There was no reasonable cause for the appeal.

The judgment is affirmed.

GRACE, J. I concur in the result.

CHRISTIANSON, Ch. J. (concurring). Appellant asserts that the evidence in this case does not establish actionable negligence on the part of the defendant; and that, in any event, the evidence shows that plaintiff was guilty of contributory negligence as a matter of law. It is therefore contended that the trial court erred in denying defendant's motion for a directed verdict. While I deem the questions of negligence and contributory negligence somewhat close, I believe that there was sufficient evidence to require their submission to the jury.

Appellant further contends that the court erred in its rulings on the admission and exclusion of evidence. It is not apparent that any of the assignments are well taken. And inasmuch as no argument has been submitted in their support, they should be deemed abandoned.

BOVEY SHUTE LUMBER COMPANY, a Corporation, Appellant, v. W. G. CONNERS, Respondent.

(175 N. W. 222.)

Indemnity — complaint fails to state cause of action.

1. The complaint in the action is examined and *held* not to state a cause of action against the defendant. The demurrer thereto was properly sustained.

Judgment not binding on party who is not joined in action.

2. One who is not in any manner made a party to an action is not bound by a judgment therein.

Judgment — indemnity — agent not held as indemnitor.

3. For the reason stated in the opinion, the defendant is *held* not to be an indemnitor.

Opinion filed October 30, 1919.

Appeal from an order of the District Court of Ramsey County, *C. W. Buttz,* J.

Order affirmed.

Cuthbert & Smythe, for the appellant.

"Indemnity may be defined as the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit." 22 Cyc. 79.

Everyone is responsible for the consequence of his own negligence; and if another person has been compelled to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him. Smith v. Foran, 23 Conn. 244, 21 Am. Rep. 647; Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355; Old Colony R. Co. v. Havens, 148 Mass. 363, 12 Am. St. Rep. 558, 19 N. E. 372.

Rollo F. Hunt, for the respondent.

"A cause of action accrues against a bond or contract to do a certain act as soon as there is a default in performance, whether the obligee or promisee has suffered damage or not, whereas in the case of a bond or contract conditioned to indemnify damage must be shown before the party indemnified is entitled to recover." 22 Cyc. 80.

"Judgments are admissible when the subject-matter again comes into controversy between the same parties." Phillips v. Jamieson, 16 N. W. 318.

There is no indemnity pleaded in the complaint. There is a wide distinction between indemnity and suretyship or guaranty, and a still greater distinction between indemnity and an agreement to pay. 14 R. C. L. 44; 22 Cyc. 80.

"A definition of indemnity as an obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit, though somewhat narrower than the broad definition given above, is often quoted." 14 R. C. L. 43; Joy v. Elton, 9 N. D. 428.

A party cannot intervene unless he had such a direct and immediate interest that he will either lose or gain by the direct operation and legal effect of the judgment which may be rendered. Dickson v. Dows, 11 N. D. 407.

The notice was entirely insufficient and unreasonable, even assuming this a case of indemnity.

All authorities hold that there must be a reasonable notice given. 14 R. C. L. 63.

"The notice should be clear and precise, should inform the one to whom it is addressed that he must appear and defend or be concluded, and must be given so as to afford a reasonable time to prepare for the trial." 83 Am. Dec. 386; note in Somers v. Schmidt, 24 Wis. 417; Boyd v. Whitfield, 19 Ark. 447; Davis v. Wilbourne, 1 Hill, 27, 26 Am. Dec. 154; Consolidated & etc. Co. v. Bradley, 68 Am. St. Rep. 409.

GRACE, J. This is an appeal from an order made by Judge C. W. Buttz, of the district court of Ramsey county, sustaining a demurrer interposed by the defendant to plaintiff's complaint in said action. The complaint, in substance, shows that the plaintiff is a Minnesota corporation authorized to do business in the state of North Dakota, engaged in the retail lumber and fuel business; that between the 1st day of October, 1909, and the 1st day of April, 1910, the defendant was in the employ of the plaintiff as agent and manager of plaintiff's lumber and fuel business at the village of Mylo, and had charge of the sales, collections, and books of the plaintiff; that it was his duty to conduct said business and to keep an accurate account of the same and report to plaintiff, and turn over to it the proceeds of sales and collections; that dur-

ing the time mentioned while the defendant was so employed, one Alvin Martin for value made, executed, and delivered to plaintiff his promissory note for $548, and delivered the same to the defendant as agent of the plaintiff and for the plaintiff. The note became due, and certain payments were made thereon, and action was brought by the plaintiff in the district court of Rolette county against Martin to recover the balance due on the note. To this cause of action, Martin pleaded payment of the note, and further alleged that during all of the time that the payments were supposed to have been made, the defendant Conners had the note in charge, and was charged with the duty of collecting and reporting the same to the plaintiff, and that no other person connected with the plaintiff had anything to do with the collection of the note or the payments thereof.

The action against Martin came on for trial at Rolla on the second day of October, 1914; that at said trial, Martin was called for examination under the statute, and testified that he had made payments for the benefit of the plaintiff of which the plaintiff had no knowledge, and with which Martin was not accredited upon the books of the plaintiff by the defendant Conners; that at said trial plaintiff for the first time received any notice or knowledge that the defendant Martin claimed to have made payments to the plaintiff, and thereupon asked leave to amend its complaint, and was given thirty days in which to do so. The parties stipulated the transfer of the action to the county of Ramsey for trial, and the same was thereafter tried anew at the November, 1917, regular term of court at the city of Devils Lake.

Prior to said term of court at Devils Lake, the plaintiff served upon defendant Conners a notice to appear, intervene, and defend as to items of payment claimed by Martin to have been made to defendant Conners, and which he had not reported or accounted for to the plaintiff, said notice being exhibit "A," and it is made a part of the complaint. The notice was served upon Conners upon the 6th day of December, 1917, at the county McLean. The plaintiff and defendant Martin appeared at the trial; W. G. Conners did not appear, nor make any application to appear or defend as to the claims of Martin regarding the sums paid by him.

At the trial, Martin testified he had paid to Conners the following sums of money: December 22, 1909, $100; December 24, 1909, $200;

February 26, 1910, $100; November 10, 1911, $91.85. The cause was submitted to a jury that returned a verdict that defendant Conners had received from Martin for the benefit of plaintiff, the sum of $400; that the said sum of $91.85 paid November 10, 1911, was paid to a representative of plaintiff other than the defendant Conners. The defendant Martin was allowed and accredited the sum of $400. It is further alleged that no part of the sums claimed to have been paid by Martin to the defendant Conners was accounted for by Conners to the plaintiff, nor accounted for or turned over to the plaintiff, except the payment of $100 paid by Martin on the 26th day of February, 1910. Plaintiff further claims that by reason of the failure of defendant Conners to report such payments, he caused the plaintiff to believe that same had not been paid; that thereby the plaintiff was caused to believe that payments had not been made, and by reason thereof brought and maintained the action against Martin which it otherwise would not have done. The defendant Martin not having disputed owing a small balance, and the dispute and contention between the plaintiff and Martin having arisen by reason of the defendant Conners not having reported and accounted for the sums paid by Martin to him, the plaintiff claims that the cost of the litigation against Martin caused it to expend in attorneys' fees, costs, and disbursements, $178.25, and claims that it is entitled to recover that amount against defendant Conners in addition to $300 paid by Martin to Conners, and not accounted for by defendant Conners to plaintiff.

To the complaint, the defendant demurred. The demurrer was sustained. The plaintiff maintained that the court erred in sustaining the demurrer. We are of the opinion that the court did not err in sustaining the demurrer. The complaint most certainly does not allege a cause of action against the defendant. Admitting all the allegations of the complaint to be true, it does not set forth a cause of action against the defendant. The action brought by the plaintiff against Martin was one to recover the amount claimed to be due upon a certain promissory note. Conners was not made a party to that action as he could not well have been, for it is not maintained that he was a signer of the note, nor a surety nor a guarantor thereof. To have made Conners a party to the action between plaintiff and Martin, it would have been necessary to have proceeded in the ordinary manner of commencing an action, *viz.*,

by the service of the summons upon him. Nothing of this kind was done nor attempted to be done. It must follow that Conners was not a party to that action.

In the trial of the action between plaintiff and Martin, the court had no jurisdiction over Conners, and the judgment entered in that action had no legal force or effect as to him, and did not operate to make the judgment in the action against Martin effective against him. It was a mere waste of time and effort to serve the notice. The legal effect of the notice in that action was nothing. The plaintiff had a perfect remedy against Conners if he had cared to exercise it, which was an action in accounting. This plain and simple remedy was at the disposal of the plaintiff at all times. If he had at any time sued Conners, he could have compelled him to account for any and all moneys collected and received by him while acting as its agent. If it had done this, the defendant would also have been afforded his day in court, and could have set forth his defenses if any he had. The plaintiff, however, maintains that the complaint alleges a cause of action for indemnity, and seeks to recover upon that theory. As we view the matter, there is no merit in plaintiff's contention in this regard. The allegations of the complaint do not in the remotest degree set forth or even shadow forth any cause of action against the defendant, either on the theory or principle of indemnity or otherwise.

Section 6641, Comp. Laws 1913, defines indemnity as follows: "Indemnity is a contract by which one engages to save another from legal consequence of the conduct of one of the parties or of some other person." There is no such contract in this case; there are no relations between the parties which rest upon the principle of indemnity. The relation between the plaintiff and his defendant was that of principal and agent. If Conners in the performance of his duties as agent received and collected money which it was his duty to turn over to the plaintiff, and he did not do so, the plaintiff, if he had proceeded in time, and had not slept upon his rights, could have, as above stated, brought an action for accounting. If plaintiff, however, has seen fit not to avail himself of the plain remedy which the law afforded it, and has slept upon its rights, it must suffer the consequences of its own neglect.

The plaintiff's argument is very ingenious. It seeks to show the applicability of the principle of indemnity by endeavoring to show that

the failure of Conners to turn over the money which Martin paid to him, to the plaintiff, was a tort, and claims for that reason Martin would have had a right of action against Conners for conversion or negligence, etc. Such reasoning is entirely unsound. Conners was the authorized agent of the plaintiff. He had full authority and it was part of his duty to collect the money from Martin. He rightfully collected and received the money from Martin. If this be true, Martin could not sue him for conversion or negligence, for Conners rightfully received and collected the money from him, and lawfully had the possession of the same. What was done with the money thereafter was no concern of Martin's. He had paid it to an authorized agent of the plaintiff, and the defense of payment, under such circumstances, was a complete defense to the extent that payment was made, to any action which the plaintiff might bring against him. What Conners did with the money was no concern of Martin's. That was a matter which concerned Conners and the plaintiff. We conclude, therefore, there is no principle of indemnity involved in this action. There is no contract of indemnity, either expressed or implied. The relations of the parties were such that the principle of indemnity does not apply. The relation between the plaintiff and Conners was, as above stated, that of principal and agent, and the law and principles which govern that relation are applicable.

The case of Grand Forks v. Paulsness, 19 N. D. 293, 40 L.R.A. (N.S.) 1158, 123 N. W. 878, has been cited by plaintiff and appellant in support of their contentions. It, in no sense, supports appellant's position. That case, in no manner, sustains the position of the plaintiff. It is wholly unnecessary to enter into a discussion of the facts and law involved in that case. The complaint and the facts stated herein do not constitute a cause of action against defendant, and the trial court very properly sustained the demurrer to the complaint.

The order of the trial court appealed from is affirmed. The respondent is entitled to the statutory costs of appeal.

STATE OF NORTH DAKOTA EX REL. S. S. McDONALD, Plaintiff, v. J. M. HANLEY, District Judge, Defendant.

(175 N. W. 569.)

Prohibition — writ of prohibition will issue only when proceedings are outside of or in excess of jurisdiction.

1. A writ of prohibition will issue to arrest the proceedings of a tribunal, corporation, board, or officer only when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person; and when there is no plain, speedy, and adequate remedy in the ordinary course of law. Comp. Laws 1913, §§ 8470, 8471.

Prohibition — judges — jurisdiction of district judges — can act in another district on request.

2. In this case it is *held*, for reasons stated in the opinion, that it was not an act without or in excess of jurisdiction for the defendant, Judge Hanley,—one of the judges of the sixth judicial district,—to act as judge of the fourth judicial district upon and pursuant to the written request of one of the judges of said fourth judicial district.

Opinion filed October 31, 1919.

Original application for a writ of prohibition by S. S. McDonald against J. M. Hanley, Judge of the Sixth Judicial District, acting Judge of the Fourth Judicial District.

Writ denied.

Wm. Lemke and *L. J. Wehe,* for relator.

Wm. Langer, Attorney General, and *F. E. Packard,* Assistant Attorney General, for defendant.

CHRISTIANSON, Ch. J. This is an application for a peremptory writ of prohibition against the defendant, J. M. Hanley, acting as judge of the district court of Burleigh county. The application for the writ is made by one of the members and in behalf of the Workmen's Compensation Bureau. It is averred that the said defendant, purporting to act as judge of the district court of Burleigh county, has issued an order to show cause in a proceeding pending in the district court of said county. It further averred that Burleigh county

is situated in the fourth judicial district; that said defendant is not one of the judges of said district, but is one of the judges of the sixth judicial district in this state, and has no authority to act in the fourth judicial district. The petition further avers that said defendant was not acting by virtue of or pursuant to a written request from either of the judges of said fourth judicial district. The return filed by the defendant, however, shows the latter averment to be incorrect. It appears from said return that the defendant was acting as judge of the district court of Burleigh county by virtue of a written request from Judge Nuessle, one of the judges of the fourth judicial district.

A writ of prohibition will issue to arrest the proceedings of a tribunal, corporation, board, or person, only when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person (Comp. Laws 1913, § 8470), and when there is no plain, speedy, and adequate remedy in the ordinary course of law (Comp. Laws 1913, § 8471).

Our Constitution provides that, except as therein otherwise provided, the district courts shall have original jurisdiction of all causes both at law and equity, and that they and the judges thereof shall have jurisdiction and power to issue original and remedial writs, with authority to hear and determine the same. N. D. Const. § 103.

Our statute provides: "All orders made, judgments given or other acts done by any judge of the district court in any action, special proceeding or other matter, civil or criminal, shall be deemed and held to be the orders, judgments and acts of the court, and the several judges of the district court shall have jurisdiction throughout the state to exercise all the powers conferred by law upon the district court or judges thereof, subject to the limitations in this article provided." (Comp. Laws 1913, § 7352.)

"No judge of the district court shall hear or determine any action, special proceeding, motion or application, or make any order or give any judgment in any action or proceeding not pending in the judicial district for which he is elected except in the following cases:

"1. Upon the written request of the judge of the district in which such action or proceeding is at the time pending." (Comp. Laws 1913, § 7353, subd. 1.)

"*No order or judgment given by the judge of any district contrary*

to the limitations of the preceding sections shall for that reason be void, but such order or judgment may be vacated upon application within thirty days from the time the same shall have been made or given to the judge of the district in which the action or proceeding in which the same was made or given is pending, and if appealable, by the supreme court on appeal." (Comp. Laws 1913, § 7354.)

Under these statutory provisions the action of the defendant was not without or in excess of jurisdiction. Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491; State v. Heiser, 20 N. D. 357, 127 N. W. 72. Hence, if these provisions are in force the writ must be denied. But the relator contends that these provisions are no longer in force; that they are inconsistent with and were impliedly repealed by Senate Bill No. 1, and House Bill No. 124, Laws 1919.

Senate Bill No. 1, as declared in its title and as evidenced by its contents, is an act to amend and re-enact § 7664, Comp. Laws 1913, relating to a change of judges in civil actions in the district courts on the ground of prejudice of the judge of the district court wherein the action is pending. The only material change made by the new law is: Under the old law the district judge against whom an affidavit of prejudice was filed designated the district judge to sit in his place; under the new law the district judge to be called in is designated by the supreme court. There is nothing in the new law which in any manner prohibits judges from acting in a different district from that in which they are chosen. On the contrary the act expressly recognizes the right of the supreme court to call a judge from another judicial district if it sees fit to do so. See § 4, Senate Bill No. 1, Laws 1919.

House Bill No. 124, Laws 1919, provides for redistricting the state into judicial districts, and matters incidental to such redistricting. Under the former laws of this state there were twelve judicial districts with one judge in each district. House Bill No. 124 divides the state into six judicial districts, with two or more judges in each district. It authorizes the supreme court to fix the location of the chambers of the district judges, provide for the terms of court, and prescribe rules of procedure therein. House Bill No. 124, Laws 1919, does not directly or by implication say that actions must be tried in the judicial district in which they are commenced. On the contrary § 7 of the act provides: "Change of venue may be taken from one judge to

another in the same district, *or in another district,* or from one county to another, *or from one district to another,* as is now or may hereafter be provided by law." We find nothing in the act indicating any intention on the part of the legislature to say that a judge in one district shall be disqualified from acting in another district. Nor is anything said indicating any intention that a judge chosen in one district may not properly be called into another district.

Whatever conflict there may be between House Bill No. 124, Laws 1919, and §§ 7352, 7353, and 7354, Comp. Laws 1913, arises by reason of the power conferred upon the supreme court by the latter enactment. If the prior statutes are repealed it is because the power to regulate the functions therein prescribed has been conferred upon the supreme court, and for no other reason. This court has not up to this time made any order changing the procedure theretofore existing in the district courts. On the contrary this court did on August 5, 1919, enter an order that until the further order of this court:—

1. The terms of court in each of the counties of the state continue as heretofore or now established and prescribed by statutes, or special terms heretofore designated or ordered by the district courts be continued as so established and ordered.

2. That in each of the judicial districts as now established by law the rules of procedure which heretofore obtained in the twelve judicial districts of the state shall remain in force in each of the various judicial districts as now established by law as they theretofore obtained therein.

The purpose of this order was to preserve the procedure formerly existing so far as it was possible to do so, until this court might formulate such new rules as it deemed necessary and expedient.

It follows from what has been said that the defendant was not acting without or in excess of his jurisdiction in the proceeding in question. The writ of prohibition must therefore be denied. It is so ordered.

ROBINSON and BIRDZELL, JJ., concur.

BRONSON, J. (dissenting). This is an original application to this court to prohibit a district judge of the sixth judicial district from acting

as a judge of the district court in the fourth judicial district. On August 25, 1919, Judge Hanley, of the sixth judicial district, issued an order to show cause in the district court, Burleigh county, of the fourth judicial district, acting in behalf of and at the written request of Judge Nuessle, a judge of such fourth judicial district. The order issued involves an application for a peremptory writ of mandamus to compel the Workmen's Compensation Bureau to permit the state auditor to examine and inspect the books, records, and documents of such bureau.

This proceeding challenges the authority of Judge Hanley to so act as judge and to determine the proceedings involved in the district court of the fourth judicial district.

The respondent judge bases his right to so act under the provisions of § 7353, Comp. Laws 1913, in connection with the general jurisdiction conferred upon district judges by the Constitution, § 103 and §§ 7349, 7350 and 7352, Comp. Laws 1913. Section 7352, Comp. Laws 1913, provides as follows:

"No judge to act on matters not pending in his district. Exceptions. No judge of the district court shall hear or determine any action, special proceeding, motion or application, or make any order or give any judgment in any action or proceeding not pending in the judicial district for which he is elected excepting in the following cases:

"1. Upon the written request of the judge of the district in which such action or proceeding is at the time pending.

"2. When, upon the application of either party to such action or proceeding and upon due notice to the opposite party, if he shall have appeared and is entitled to such notice, it shall be made to appear by affidavit to the satisfaction of such judge who shall have power to hear and determine such preliminary application, that the judge of the district in which such action, proceeding, motion or application is pending or about to be commenced, is absent from his district, or incapacitated or disqualified to act therein, such application shall be made only to the judge of a district adjoining that in which such action or proceeding is pending, and upon the hearing thereof counter affidavits may be used."

There is no question concerning the right or authority of such district judge so to act prior to July 1, 1919. Prior to such time there existed in this state twelve judicial districts, with one judge in each

district as sole judge thereof. Prior to such time no judicial action in the district court could take place in any one district other than through the acts of such judge thereof, unless a judge of another district was called in by written request of such judge or an application was made as provided in § 7353 to a judge of another district when the judge of the resident district was disqualified or incapacitated.

The legislative assembly of 1919, however, by an act approved January 27, 1919, known as Senate Bill No. 1, provided for calling in a judge of another judicial district through an affidavit of prejudice filed, after issue joined and before the opening of a term of court, and requiring this court to designate the district judge in the place and stead of the judge disqualified. This act was followed by the judicial redistricting bill approved March 3, 1919, known as House Bill No. 124.

This act entirely changes the judicial districts in the state, reducing the number from twelve to six and increasing the number of judges therein from one to two or three. The act also provides that the business of the district court may be divided between the judges and otherwise regulated as this court by order shall direct, and further that this court may adopt uniform rules of procedure for all of the district courts of the state. The act further provides that change of venue may be taken from one judge to another in the same district or in another district, or from one county to another, or from one district to another, as may be provided by law. This act repealed all acts or parts of acts inconsistent therewith. The specific question therefore involved is whether now a district judge may call, upon his written request, a judge of another judicial district, or whether such § 7353 is repealed in terms by said judicial redistricting bill. It is clear that the second subdivision of said § 7353 cannot now remain in force without running contrary to the intent and purpose and provision in the new redistricting bill. Under the provisions of said subdivision 2 of said § 7353 there arises neither an occasion nor a reason for making application to a judge of an adjoining judicial district when one of the judges in the resident judicial district is for any reason disqualified or incapacitated. Plainly in such event there is either one or two judges still available within the district for purposes of considering the instituting or hearing of necessary and proper judicial proceeding. Likewise, under the

provisions of subdivision 1, § 7353, if one judge in a district may call, upon his written request, a judge of another judicial district, upon a matter pending or about to be pending before him, there is no reason why under such provision the other two judges might not likewise make a written request for a judge of another judicial district to be called in for the consideration of the very matter which is then pending or about to be pending before a judge who had not made such written request. Furthermore, if it is now possible for each of the district judges of the state to call in another judge upon his written request at any time, upon a matter pending, or about to be pending, the power of this court, under the new redistricting bill, to arrange the terms of the district court, the chambers of each of the judges, and the business of each of the judges in their respective districts, would be infringed upon and perhaps rendered nugatory. Plainly the intent and purpose of § 7353 was to make it possible for a court to act in a judicial district when the sole judge thereof was for any reason incapacitated or disqualified. The reason for that statutory rule has now ceased. Under the present law each of the judges of the enlarged judicial districts possess all of the authority and power he formerly had in the district in which he was the sole judge. There is neither any occasion nor any reason now of calling in a judge of another judicial district if one judge therein is disqualified; the disqualification of one judge does not disqualify all of them. The others may act and have, under the law, the duty and authority so to do. It is clear that § 7353 referred to a condition or situation under the old law where there was only one judge in each district. Whether if all of the judges in the new judicial districts became disqualified it would be within their powers as judges of the district court or within the power of this court under the new law to call in a judge of another judicial district to act is not presented for decision to this court. The fact that this court by order has continued the old rules of court as they formerly existed in the individual judicial districts, and the terms of court as heretofore, does not thereby re-enact § 7353 as a rule of court or as a statutory provision. It is very evident that the new legislation enacted in 1919 intended to supplant the method by which formerly one district judge when disqualified could call in another judge at his own election, and to provide a means and a method of

securing a district judge for the trial of cases without either the suggestions or the election of the district judge who was disqualified or became so disqualified by application of the parties. In this matter the respondent district judge specifically relies for his authority upon the provisions of § 7353, and contends that the same has not been repealed. It is a familiar principle of law in statutory construction that the latest legislative expression repeals prior repugnant and inconsistent statutory provisions. It is plain indeed that subdivision 2 of said § 7353 is inconsistent and is repealed. It further appears likewise plain that subdivision 1 of such section is likewise inconsistent and repugnant to the objects and purposes sought to be accomplished by the new redistricting bill, and by the specific provision thereof which expressly repeals inconsistent prior acts. It therefore follows that the district judge of the sixth judicial district had no authority or right to issue the order to show cause involved herein. A peremptory writ should therefore issue.

GRACE, J., concurs in the dissent.

JENNIE MORAN, Appellant, v. THE GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF NORTH DAKOTA, Respondent.

(175 N. W. 221.)

Life insurance — effect of suspension for nonpayments of assessments — effect of payment based on false statement — reinstatement as provided in lodge by-laws — death before action taken on reinstatement — reception of such payment does not constitute waiver.

1. In an action on a certificate of life insurance issued by a fraternal organization to the deceased in February, 1918, for $2,000,

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NOTE.—On waiver of conditions of reinstatement of member of benefit society, see note in L.R.A.1917C, 260.

On waiver by officer of subordinate lodge of forfeiture for nonpayment of assessments, see notes in 4 L.R.A.(N.S.) 421; 38 L.R.A.(N.S.) 571; and L.R.A.1915E, 152.

Where it appears that the deceased became suspended as a member by reason of his failure to pay the assessments levied in August and September, 1918, and,

Where it further appears that, on October 11, or 12, 1918, while he was in the hospital through an attack of influenza, his sister paid the fees necessary to secure a reinstatement, signed a certificate that the deceased was in good bodily health, and received a receipt from the local financier, which provided that it was not binding until the member had been reinstated as provided by the lodge by-laws, and,

Where it further appears that, thereafter, on October 13, 1918, the deceased died through the attack of influenza without any action having been taken by the organization to reinstate the deceased pursuant to its by-laws and requirements,—

It is held, that no principles of waiver apply in the reception of such payment so made, and that the trial court did not err in directing a verdict for the defendant.

Opinion filed October 31, 1919.

Action upon a certificate of life insurance from a judgment entered upon a verdict directed for the defendant in the District Court, Burleigh County, *Nuessle*, J., and from a judgment entered on the verdict the plaintiff has appealed.

Affirmed.

Edward T. Burke, for appellant.

It is well settled as a proposition of law, that the local officer of the lodge, similar to the A. O. U. W., can waive the "by-laws" and relieve a member from forfeiture.

While there are a few cases to the contrary, the vast majority support that view. Boyce v. Royal Circle, 99 Mo. App. 349, 73 S. W. 300; Fraternal Union v. Hurlock, 33 Tex. Civ. App. 78, 75 S. W. 539; Field v. National Council, K. L. S. 64 Neb. 226, 89 N. W. 773; Wallace v. Fraternal Mystic Circle, 121 Mich. 263, 80 N. W. 6; Rice v. Grand Lodge, A. O. U. W. 130 Iowa, 643, 72 N. W. 770; Whiteside v. Supreme Conclave, I. O. H. 82 Fed. 275; Biel v. Supreme Lodge, K. H. 80 App. Div. 609, 80 N. Y. Supp. 751; Supreme Tribe v. Hall, 24 Ind. App. 316, 79 Am. St. Rep. 262, 56 N. E. 780; Grand Lodge, A. O. U. W. v. Lachman, 199 Ill. 140, 64 N. E. 1022; Danniher v. Grand Lodge, A. O. U. W. 10 Utah, 110, 37 Pac. 245; Cauveren v. Ancient Order of Pyramids, 98 Mo. App. 433, 72 S. W.

141; Horn v. Supreme Council, C. K. A. 95 Mo. App. 433, 26 S. W. 949; McDonald v. Supreme Council, O. C. F. 79 Cal. 49, 20 Pac. 41; Modern Woodmen v. Jameson, 48 Kan. 718, 30 Pac. 460; O'Connor v. Grand Conclave, K. D. 102 Ga. 143, 66 Am. St. Rep. 159, 28 S. E. 282.

"A suspension for nonpayment of assessments is waived where the local lodge, acting as agent for the order, accepts delinquent assessments pursuant to a custom adopted by it to keep the member in good standing, without requiring compliance with the laws as to reinstatement, although the laws of the society provided that any act of the subordinate officer contrary to or in conflict therewith should be void." Jones v. Supreme Lodge, K. H. 236 Ill. 113, 127 Am. St. Rep. 277, 86 N. W. 191; Catholic Order v. Lynch, 126 Ill. App. 439.

Where a member knowing of the custom of the local lodge of receiving overdue assessments paid dues after maturity, it was held that he did not become suspended, as such custom waived prompt payment of assessments. Trotter v. Grand Lodge, L. H. L. 132 Iowa, 513, 7 L.R.A.(N.S.) 569, 109 N. W. 1099, 11 Ann. Cas. 533; supplementing note in 38 L.R.A.(N.S.) 573; Walker v. American Order F. 162 Ill. App. 30; Drumgold v. Royal Neighbors, 261 Ill. 60, 103 N. E. 584; Jakes v. North American Union, 186 Ill. App. 1.

Carmody & Mulready, for respondent.

It is elementary that a plaintiff cannot show a waiver of performance or a modification of any part of a contract without alleging it, and that the fact showing a waiver of a provision in a contract must be specially pleaded. J. I. Case Threshing Mach. Co. v. Loomis, 31 N. D. 27; 25 Cyc. 726, 727.

The insured Raymond Jones could not have been reinstated except upon signing a certificate of health and by a vote of the local Bismarck Lodge No. 120, of which he was at one time a member.

Royal Highlanders v. Scovill, 66 Neb. 213, 4 L.R.A.(N.S.) 421, 92 N. W. 206; Modern Woodmen v. Tevis, 117 Fed. 369; Supreme Lodge v. Jones, 69 N. W. 718; Borgraefe v. Supreme Lodge, 22 Mo. App. 127; State ex rel. Young v. Temperance Benev. Asso. 42 Mo. App. 485; Grand Lodge, A. O. U. W. v. Jessie, 59 Ill. App. 101; United Modern v. Pike (Tex. Civ. App.) 76 S. W. 774; Brown v. Grand Council, N. W. L. H. 81 Iowa, 400, 46 N. W. 1086; Lavin v. Grand

Lodge, A. O. U. W. 104 Mo. App. 1, 78 S. W. 325; Sovereign Camp v. Rothschild, 15 Tex. Civ. App. 463, 40 S. W. 553; Eaton v. Supreme Lodge, K. H. 22 Cent. L. J. 500, Fed. Cas. No. 4259a; Graves v. Modern Woodmen, 85 Minn. 396, 89 N. W. 6; Supreme Council v. Taylor, 121 Fed. 66; Harvey v. Grand Lodge, A. O. U. W. 50 Mo. App. 472; Fraternal Union v. Hurlock, 33 Tex. Civ. App. 78, 75 S. W. 539; Field v. National Council, 64 Neb. 226, 89 N. W. 773; Rice v. Grand Lodge, A. O. U. W. 103 Iowa, 643, 72 N. W. 770; Best v. Supreme Council, R. A. 87 Minn. 417, 92 N. W. 337; O'Connor v. Supreme Conclave, 102 Ga. 143, 28 S. E. 282; Bixler v. Modern Woodmen, 112 Va. 678, 38 L.R.A.(N.S.) 246, 72 S. E. 704; Kennedy v. Grand Fraternity, 36 Mont. 325, 25 L.R.A.(N.S.) 78, 92 Pac. 971; Marshall v. Grand Lodge, A. O. U. W. 133 Cal. 686, 66 Pac. 25; Coughlin v. K. of C. 79 Conn. 218, 64 Atl. 223; Lyon v. Supreme Assembly, 153 Mass. 83, 26 N. E. 236; Koehler v. Modern Brotherhood, 160 Mich. 180, 125 N. W. 49; Burke v. Grand Lodge, A. O. U. W. 136 Mo. App. 450, 118 S. W. 483; Pete v. Woodmen of World, 26 Ohio C. C. 563; Supreme Lodge v. Kweener, 6 Tex. Civ. App. 267, 25 S. W. 1084; United Order v. Hooser, 160 Ala. 334, 49 So. 354; Elder v. Grand Lodge, A. O. U. W. 79 Minn. 468, 82 N. W. 987; Brown v. Knights of Protected Ark, 43 Colo. 289, 96 Pac. 450; Catholic Order v. Lynch, 126 Ill. App. 439; Bagely v. Grand Lodge, A. O. U. W. 131 Ill. 498, 22 N. E. 487; National Council v. Burch, 126 Ill. App. 15; Dillon v. National Council, 244 Ill. 202, 91 N. E. 417; Hartman v. National Council, K. L. S. L.R.A. 1915E, 152; Day v. Supreme Forest, 174 Mo. App. 260, 156 S. W. 721; Woodmen of World v. Jackson, 80 Ark. 419, 97 S. W. 673; Busta v. Court of Honor, 172 Ill. App. 71; Griffith v. Supreme Council, 182 Mo. App. 644, 166 S. W. 324; Bennett v. Sovereign Camp (Tex. Civ. App.) 168 S. W. 1023; Order of U. C. T. v. Young, 212 Fed. 132; Squire v. Modern Brotherhood, 68 Or. 336, 135 Pac. 774; Societa Unione Fratellanza Italiana v. Leyden, 225 Mass. 540, L.R.A. 1917C, 256, 114 N. W. 738; Supreme Lodge v. Quiwn, 78 Mass. 525, 29 So. 826; Garriston v. Equitable Mut. Life Asso. 93 Iowa, 402, 61 N. W. 952; Adams v. Grand Lodge, A. O. U. W. 66 Neb. 389, 92 N. W. 588; Bowlin v. Sovereign Camp, 82 Minn. 411, 85 N. W. 160; Jenkins v. Ancient Order of United Workmen, 93 Kan. 324, 114

Pac. 223; Grand Lodge, A. O. U. W. v. Crandall, 80 Kan. 332, 102 Pac. 843; Van Woert v. Modern Woodmen, 29 N. D. 441.

Where it was the duty of the subordinate lodge to collect and remit dues and assessments to the supreme lodge, the officer making such collections was not an agent of the grand lodge, and an action upon his part in receiving dues and assessments after maturity would not constitute a waiver of the requirements of payments. To the same effect: Sovereign Camp v. Rothschild; Eaton v. Supreme Lodge, K. H.; Graves v. Modern Woodmen; Harvey v. Grand Lodge, A. O. U. W.; Coughlin v. K. C.; and Lavin v. Grand Lodge, A. O. U. W.—supra.

Subordinate lodges and officers cannot waive forfeitures except in the manner prescribed by the by-laws of the organization. Marshall v. Grand Lodge, A. O. U. W.; Pete v. Woodmen of World; and Supreme Lodge v. Kweener,—supra; Schoeller v. G. L. A. O. U. W. 110 App. Div. 456, 96 N. Y. Supp. 1088.

BRONSON, J. This is an action to recover on a life insurance certificate issued by the Grand Lodge of the A. O. U. W. From a judgment entered upon a verdict directed for the defendant the plaintiff, the beneficiary in such certificate, has appealed. Substantially, the facts are as follows:

Raymond Jones, aged twenty-two years, became a member of the lodge involved, about February 1, 1918. To him was issued a life insurance policy in the sum of $2,000, his mother being named as the beneficiary. The required fees therefor were paid by his mother. The assessments for August and September, 1918, levied pursuant to the lodge requirements, were not paid, by reason whereof under the by-laws and rules of the lodge, Raymond Jones became suspended. On October 5, 1918, having contracted influenza, he was taken to a hospital in Bismarck, North Dakota. While there, on October 11 or 12, 1918, his sister paid the financier of the local lodge in Bismarck $13.02, and received a receipt therefor, the same being for the delinquent assessments and for the dues to December 31, 1918, including a reinstatement fee of 50 cents. There the sister signed the name of Raymond Jones to a reinstatement certificate, showing that at such date Raymond Jones was in sound bodily health. On the receipt issued by such financier it is stated that such receipt so given to a sus-

pended member does not bind the order until the member has been reinstated as provided by the laws of the order, and that if the application for reinstatement is rejected the amount shown therein would be returned to the applicant. The sister so making payment did not inform the financier, and the evidence does not disclose, that he then knew that Raymond Jones was in the hospital. On the next day, October 13, 1918, Raymond Jones died in the hospital as a result of such influenza. Under the by-laws of the lodge it is provided that a suspended member may be reinstated by making payment of the assessments due and in arrears, and a reinstatement fee of 50 cents by a majority vote of the lodge taken at its next stated meeting, and a record thereof made on the minutes. This by-law applies when reinstatement is desired any time within three months of the date of the forfeiture. It is stipulated in the evidence that the regular meetings of the local lodge as stated for the month of October, 1918, were respectively October 1st, and October 15th. The lodge never took any action on the reinstatement, Raymond Jones having died previous to its meeting of October 15, 1918. The claim for benefits under the insurance certificate were rejected by the lodge. It is the contention of the appellant herein that upon principles of waiver the life certificate in question is in force by reason of the receipt of such money from the sister so paid, the issue of the receipt therefor, and the failure to promptly return the same. Many authorities are cited concerning the power of local officers of a fraternal lodge to waive the by-laws or requirements of the lodge concerning insurance. It is contended by the appellant herein that the question of waiver in this case was one for the jury. We are satisfied upon this record that the trial court did not err in directing a verdict for the defendant. There is no question of waiver presented either in the pleadings or the evidence in this case. There is no proof or attempted proof to show any assurance offered or given by the financier of the lodge that Raymond Jones was reinstated by the issue of such receipt. There is no proof at all that the financier in issuing such receipt then knew of the condition of Raymond Jones. There is evidence in the record that the amount of such dues so paid for which the receipt was given, was deposited in a bank in Bismarck to the credit of the plaintiff, she having refused to receive the return of such payment. It follows accordingly that

Raymond Jones was not a member of the defendant lodge at the date of his decease. The judgment is in all things affirmed, with costs to the respondent.

GRACE, J. I dissent.

JOHN F. BEYER, Respondent, v. THE NORTH AMERICAN COAL & MINING COMPANY, a Corporation, Appellant.

(175 N. W. 216.)

In an action brought by a minority stockholder to recover attorney's fees and expenses incurred by him in representing the interests of the corporation in former litigation, where it appeared that through the activity of the plaintiff the officers of the corporation had been prevented from carrying out a fraudulent scheme or schemes designed to sacrifice the assets of the corporation, it is *held:*

Corporations — suit by minority stockholder — attorneys' fees — amount recoverable.

1. The amount of fees and disbursements recoverable is not limited to the amount of a fraudulent mortgage, which the plaintiff succeeded in having canceled, but may be measured according to the value of the assets which, through his activity, were saved to the company.

Corporations — lien on corporate property for services.

2. Where a lien is claimed in specific property of the corporation, and it appears that the particular property was saved to the corporation by the activity of the plaintiff, the recovery may properly be made in equity a specific lien upon the property so saved.

Corporations — attorneys' fees — enjoyment by corporators of benefits of suit — corporation should pay expenses.

3. Where no prejudice is shown to have resulted from the failure to allow to the plaintiff attorney's fees in the suits prosecuted by him on behalf of his corporation, and where the corporation still enjoys the benefits secured to it by the plaintiff, it is still obligated in equity and good conscience to pay such expenses, and they may be allowed in a separate suit brought for the purpose of charging the assets.

Corporations — allowance of claims.

4. It was error to allow certain items of taxes which were paid upon lands not involved in the present action.

Corporations — action for personal benefit of stockholder — special claim for attorneys' fees disallowed.

5. The present action being brought primarily for the personal benefit of the plaintiff, it was not error to disallow a special claim for attorneys' fees incurred therein.

Corporations — money advanced by minority stockholder for benefit of corporation — reimbursement.

6. The plaintiff having advanced money to reimburse a redemptioner whose certificate and sheriff's deed are canceled, thus revesting title in the corporation, is entitled to reimbursement in this suit and to a lien for the amount advanced.

Opinion filed November 1, 1919.

Appeal from the District Court of Stark County, *K. E. Leighton*, J.

Modified and affirmed.

Bangs, Hamilton, & Bangs and *W. G. Mayer*, for defendant and appellant.

When a minority stockholder's suit is brought for the benefit of the corporation which has refused to sue, and the suit is successful, on the principle of benefit in preserving a trust fund, allowance for fees and expenses may be made in proper cases out of the corporate property so benefited. Louisville Bridge Co. v. Dodd, 27 Ky. L. Rep. 454, 85 S. W. 683.

When there is no benefit gained by the corporation the right of the minority stockholder to be reimbursed for expenses and attorney's fees will be denied. Lamar v. Hall & Wimberly, 129 Fed. 79; Burley Tobacco Co. v. West, 165 Ky. 762, 178 S. W. 1102; Forrester v. Boston & M. Consol. Copper & S. Min. Co. 29 Mont. 397, 74 Pac. 1088.

M. A. Hildreth, for respondent.

The North American Coal & Mining Company, so far as this litigation is concerned, and under the decisions of this court so far as its officers, agents, and servants are concerned, stands *in particeps criminis* with the Investors' Syndicate. Investors Syndicate v. N. A. C. & M. Co. 31 N. D. 280; Beyer v. Wolpert, 109 N. W. 1116.

Where the assets of a corporation are being depleted and the officers

are acting, either through negligence or by reason of preconcerted arrangement with others, to deplete the assets of the corporation, then a party holding stock has the right to intervene and take such steps as are proper to protect the assets of the corporation. Miner v. Ice Co. 92 Mich. 97; Torey v. Toledo Cement Co. 150 Mich. 86; 4 Clark & M. Priv. Corp. § 43; Sant v. Perronville Shingle Co. 146 N. W. 214; Grant v. Lookout Mfg. Co. 37 L.R.A. 98, 53 N. W. 218, 135 N. W. 997; Meeker v. Winthrop Iron Co. 17 Fed. 49; William Firth v. Mullen Cotton Mills, 129 Fed. 141.

"One jointly interested in a common fund, who in good faith maintains the necessary litigation to save it from waste and secure its proper application, is entitled in equity to the reimbursement of his costs as between solicitor and client, either out of the fund itself, or by proportionate contributions from those who receive the benefit of the litigation." Trustee v. Greenough, 105 U. S. 527; Central R. & Bkg. Co. v. Pettus, 113 U. S. 116.

Birdzell, J. This is an appeal by the North American Coal & Mining Company from the same judgment that was involved in the appeal of the Investors' Syndicate recently decided by this court. Beyer v. North American Coal & Min. Co. 42 N. D. 483, 173 N. W. 782. In that appeal the question of the effect of an attempted redemption by the Investors' Syndicate was presented. The judgment contained a provision invalidating the redemption and holding that the Investors' Syndicate had no right, title, or interest in the land described, which it had ostensibly acquired by redemption and sheriff's deed, and this portion of the judgment was affirmed. This appeal is by the North American Coal & Mining Company, against whom the judgment stands as a personal judgment. The facts leading up to the entry of the judgment are sufficiently stated in the main opinion upon the appeal of the Investors' Syndicate, and need not be repeated here. The appellant assails the judgment upon four principal grounds: (1) That the expenses recoverable in equity by a stockholder who has incurred them in conducting litigation on behalf of his corporation without the approval of other stockholders is limited to the benefits secured for the corporation; (2) that there is no fund before the court against which the judgment sought can be specifically charged by the

decree; (3) that, in so far as attorneys' fees enter into the judgment appealed from, they are an improper element of recovery, for the reason that they should have been taxed in the original actions where they were incurred; (4) that certain items of expenditure for taxes were improperly allowed.

The appellant does not contend that a minority stockholder may not be reimbursed for expenses and attorneys' fees incurred in a suit brought by him on behalf of the corporation, but it does contend that the recovery or reimbursement must be limited to the benefits resulting. It is argued that the corporation in the instant case is called upon to pay a judgment amounting to approximately $6,000, for which the only benefit received through the efforts of Beyer, the minority stockholder and present judgment creditor, was the release of a fraudulent mortgage amounting to $2,600. If the appellant's proposition is correct as applied to this case, the judgment would necessarily be reduced to conform to the amount of the benefit. But it is apparent to us that the appellant's view as to the benefits resulting to the corporation through Beyer's activities on its behalf is much too narrow. On the face of the records, which contain the history of the litigation conducted by Beyer as the champion of the interests of the North American Coal & Mining Company, the officers and agents of that company and the officers and agents of the Investors' Syndicate have been convicted of a fraudulent conspiracy to loot the coal company of its assets, and they have been frustrated in their efforts only through the activity of Beyer, as a minority stockholder acting on behalf of his corporation. The appeals from the present judgment well illustrate the narrowness of the appellant's conception of benefits. In the appeal of the Investors' Syndicate it was strenuously contended that that corporation had acquired complete title by sheriff's deed to certain land which comprises the principal part of the assets of the coal company, and it is only through the efforts of Beyer in this and other litigation that the Investors' Syndicate has been prevented from acquiring the title to the property of the Coal & Mining Company. We have no doubt that but for the activity of Beyer the North American Coal & Mining Company would have been, ere this, entirely stripped of its assets. This statement finds justification in the history of the litigation previously conducted between these parties. The benefit, there-

fore, to the North American Coal & Mining Company is more properly to be measured by the value of its assets than by the amount of the fraudulent mortgage which Beyer succeeded in having canceled. There is no showing made or attempted that the value of the assets saved to the company through the activity of Beyer does not exceed the judgment in this action.

It is next argued that a court of equity has not the power to impose a lien upon the general assets of the corporation in this action, for the reason that there is no fund or property in court in possession of a trustee or receiver. This argument impresses us as being without merit. The appointment of a receiver or trustee adds nothing whatever to the powers of a court of equity. Those who may be designated to occupy such relationships would only be the instruments through which the court would execute its inherent powers. A court of equity affects the title to property quite as effectively in an action for specific performance or to enforce a vendor's lien as in any other character of action, and yet it customarily does not have the property before it in the possession of a receiver or trustee. The only authority cited by the appellant in support of this proposition is the case of Forrester v. Boston & M. Consol. Copper & S. Min. Co. 29 Mont. 397, 74 Pac. 1088, 76 Pac. 211. The holding in that case does not go to the length of supporting the appellant's contention. The court indicated that the *power* to allow the attorney's fee in no way depended upon the mere possession of a trust fund. It did not have before it the question as to whether or not such allowance as it might deem proper could be made a charge upon specific property of the defendants. In the case at bar it clearly appears from the findings, which are well supported by the evidence, that the property upon which the plaintiff's judgment is made a specific lien is the same property that was saved to the corporation through his efforts. For the purpose of charging this property with the payment of the plaintiff's judgment, it seems to us to be entirely immaterial whether the action be construed as proceeding *in rem* against the property or *in personam* against the defendants. The fact remains that in equity the plaintiff is deemed to have a superior lien upon the specific assets that he has saved to the corporation, and the form of the expression in the judgment which is designed to give effect to the lien is wholly immaterial.

It appears to us that the contention of the appellant to the effect that the attorneys' fees entering into the judgment in this action should have been allowed in the suits in which the liability of the plaintiff therefor was incurred is altogether without merit. No prejudice is shown to have resulted from the fact that the amount of the attorney's fees was not ascertained and allowed at the time of the former litigation. Whatever benefit the defendant received it still enjoys, and it is still obligated in equity and good conscience to pay the expenses properly incurred in the successful efforts to conserve its assets.

It is pointed out by appellants that a portion of the taxes entering into the judgment in the instant case were paid upon the northwest quarter of section 16. In the findings it is stated that the assets (with certain immaterial exceptions) of the North American Coal & Mining Company consist of the southeast quarter of section 16 and the north half of section 21, township 139 north of range 94, west of the 5th P. M. An examination of the record discloses that certain items of taxes which were specifically allowed by the court were upon the northwest quarter of section 16, which is not involved in this judgment. In the former action to determine adverse claims (Beyer v. Investors' Syndicate, 31 N. D. 247, 153 N. W. 476), in which Beyer was subrogated to the public lien for taxes previously paid by him, he was given a judgment for taxes paid subsequent to 1894 upon the same three quarter-sections of land involved in this judgment, and it was specifically held that he was not entitled to a lien for the taxes paid on the northwest quarter of section 16, which was also involved in that action. The latter holding was apparently based upon the conclusive force of the judgment against Beyer in Investors' Syndicate v. Letts, 22 N. D. 452, 134 N. W. 317. This would seem to be an adjudication of Beyer's right to recover taxes paid upon the northwest quarter of section 16 in this action, as well as the one which was then before this court. However, it is clear that the taxes paid upon this quarter-section should not be made a lien upon the three quarters involved in this suit, and that the judgment should be modified accordingly.

The respondent asks that the judgment in his favor be modified in two particulars: (1) That he be allowed a reasonable attorney's fee for litigating this case; and (2) that the judgment be increased by

allowing an item of $320 representing a prior judgment which Beyer holds against the North American Coal & Mining Company. It is quite apparent on this record that this litigation is brought largely for the purpose of protecting the personal interests of Beyer which had not been sufficiently protected in the prior litigation conducted by him on behalf of the corporation. It is true that, incidentally, it became necessary in this litigation for Beyer to again champion the interests of his corporation to the extent of setting aside a redemption made by the Investors' Syndicate, with the result that the redemption is decreed to be for the benefit of the coal company. But Beyer was not altogether free from responsibility for the litigation incident to the redemption, for it was complicated by the fact of his reception of the redemption money. Furthermore, if there had been no redemption he would have had title to the property under the sheriff's sale, instead of either the coal company or the Investors' Syndicate. These facts have a proper bearing upon the equity he seeks as to attorney's fees in this case. His present action cannot be said to be purely in the interests of the corporation, and he is not entitled to a special allowance for attorney's fees in this litigation.

As to the judgment for $320, it became the property of the plaintiff by assignment in 1906. The respondent assigns no equitable reasons for decreeing this judgment to be a specific lien upon the assets involved in this case, and this request for modification is denied.

The judgment appealed from contains a provision to the effect that, upon the acceptance by the Investors' Syndicate of the redemption money hereinbefore referred to, the plaintiff Beyer shall be entitled to receive a sheriff's deed to the lands. This provision of the judgment is clearly erroneous, and is inconsistent with the respondent's own contentions regarding his protection for the money advanced to redeem from the Investors' Syndicate. Respondent, in his brief, states that the attempted redemption leaves the plaintiff with a judgment or certificate of sale on his hands which must be taken into consideration in this case. The legal effect of the redemption has already been determined, the so-called redemptioner, Investors' Syndicate, having been decreed to have redeemed for the North American Coal & Mining Company. The redemption, then, restores the land to the judgment debtor. But the right of the Investors' Syndicate to be reimbursed is also recog-

nized in the judgment as above indicated, and the money to reimburse it has been advanced by Beyer. He is entitled, therefore, to have his judgment in this action increased and made a specific lien upon the property involved herein to the extent that the money advanced by him is applicable to clear the three quarter-sections involved from the sheriff's sale under his original judgment, from which redemption has been made.

With the modifications stated in this opinion, the judgment appealed from is affirmed. The respondent is entitled to costs.

CHARLES F. ELLIS, Respondent, v. C. L. GEORGE, Doing Business under the Firm Name and Style of Pacific Silk Company, and George V. Cunningham, Appellants.

(175 N. W. 623.)

Appeal and error.

In an action to secure specific performance of a contract to sell real property and to determine adverse claims, where the vendor failed to appear and another defendant answered setting forth claims resting upon an alleged prior contract, and where a judgment was entered quieting title in the answering defendant, but later modified by requiring the purchase money on deposit to be turned over to the plaintiff as the successor in interest to the former owner, which order of modification was appealed from, it is *held:*

1. That in so far as the order appealed from amounts to an order for judgment it is not appealable.

Appeal and error — order vacating judgment may be appealed from.

2. That in so far as the order vacates the judgment previously entered it is appealable under § 7841, Compiled Laws of 1913.

Appeal and error — party whose rights have not been disturbed cannot complain of order which does not affect his rights.

3. The order appealed from modifies the original judgment only to the extent of protecting the plaintiffs as successors in interest to the defaulting defendant, and does not disturb the merits of the judgment in favor of the answering defendant; the latter, therefore, is in no position to complain of the order.

Opinion filed November 1, 1919.

Appeal from the District Court of Morton County, *Nuessle,* Special Judge.

Order affirmed.

Statement of the facts by BIRDZELL, J. This is an appeal from an order vacating a judgment and modifying findings of fact and conclusions of law in an action for specific performance of an alleged contract to sell real property and to determine adverse claims thereto. One Mary C. Phelps, prior to June, 1914, was the record owner of lot 12, block 10, in the city of Mandan. She became indebted to a concern doing business as the Pacific Silk Company in Spokane, Washington, and deeded the property in question to such creditor, obtaining at the same time a reconveyance. The deed to the Pacific Silk Company, of which the defendant C. L. George was manager, was recorded. The deed from the Pacific Silk Company back to Mrs. Phelps was not recorded. It seems that while the title stood of record in the name of the Pacific Silk Company, Ellis, the plaintiff in this case, conducted some negotiations by correspondence with the Silk Company or George and an attorney representing the ostensible owner looking toward the purchase of the property. Mrs. Phelps did not participate directly in these negotiations, but as they neared completion, in December, 1916, she came to Bismarck and negotiated a sale of the premises to the defendant Cunningham, for $1,350. He had no notice of Ellis's negotiations or contract, if there was one. A deed which ran from the Pacific Silk Company to Cunningham was executed by Mrs. Phelps as attorney in fact, she having a power of attorney as well, as a reconveyance of the property from the Pacific Silk Company. Cunningham claims that another deed to him was taken at the same time from Mrs. Phelps as grantor. But this deed was never recorded or brought to the notice of Ellis. Cunningham either intrusted her with the deed from the company to him for the purpose of having her record it, or she undertook to record it as one of the conditions in the contract. It seems that the taxes had not been paid, and that when Mrs. Phelps went to Mandan for the purpose of recording the deed it could not be recorded because of this fact. She, however, filed the power of attorney. At this stage of the transaction Mrs. Phelps, on the afternoon of December 19, 1916, called on Ellis, the plaintiff. She knew that Ellis had been

negotiating with the record owner, and, whether or not she called upon him for the purpose of getting him to pay a higher price than Cunningham had agreed to pay, it nevertheless appears that, during the conversation between Ellis and Mrs. Phelps, Ellis obtained some knowledge of the Cunningham deal. Immediately thereafter he instituted this suit to enforce specific performance of an alleged contract based upon his prior negotiations with George, and filed a *lis pendens.* Of this Mrs. Phelps obtained notice next morning when she went to the office of the register of deeds to record the deed. She at once desired to remove the *lis pendens,* as it constituted an obstacle to the completion of the Cunningham transaction. Upon failing in her efforts in this respect, she called upon the plaintiff's attorney at his office and inquired as to how soon she could get the money for the lot if she should sell it to Ellis. Upon this occasion she represented that Cunningham might be satisfied to withdraw from the deal if he were reimbursed for the money which Mrs. Phelps had used to pay taxes. This money she had drawn from the purchase price deposit that had been placed in the City National Bank of Bismarck pending the clearing of the title. She was informed that the money would be forthcoming at once, and immediately arrangements were made whereby the property was conveyed to Ellis for an agreed consideration of $1,500, and Cunningham was to be reimbursed. The plaintiff's attorney advanced $133 by check to Mrs. Phelps to enable her to take up the Cunningham deed, which in the meantime had been recorded and returned to the City National Bank. This check was taken to the bank and attached to Cunningham's purchase price check, and the Cunningham deed redelivered to Mrs. Phelps, who retained possession of it until the trial of this action. In pursuance of the arrangement made upon this same occasion plaintiff's attorney also advanced the remainder of the purchase price by sending his check for $1,000 to the Pacific Silk Company and by providing money with which to satisfy some small liens and an attachment. Mrs. Phelps executed a deed to Ellis under her power of attorney, and gave him an order on Cunningham's attorney, who is counsel for appellant in this case, for the abstract of title. Upon presenting the order for the abstract, plaintiff's attorney ascertained that Cunningham refused to relinquish his claim, and he was thereupon made a party defendant in this action. Upon the trial Cunningham

was the only party defendant who was represented, George having defaulted.

At the conclusion of the trial findings of fact and conclusions of law were made and judgment entered adjudging Cunningham to be the owner in fee simple, having purchased the property in good faith and without notice of any claim by the plaintiff, and further adjudging the plaintiff to have no interest in the property. Notice of the entry of judgment was served October 8, 1917, and early in January, 1918, the plaintiff moved to vacate the judgment and to amend and correct the findings of fact, conclusions of law, and order for judgment. At the hearing upon this motion the defendant appeared, specially objecting to the jurisdiction of the court and to the proposed amendments. The objections were overruled, and the findings, conclusions, and order for judgment were amended, and from this order the appeal is taken. So far as material, the amended findings are to the effect that Ellis, in consideration of the conveyance to him, has paid in all $1,503, this being $3 in excess of the amount he agreed to pay for the property; $1,000 representing a cash payment to C. L. George, $55 a cash payment to Mary C. Phelps, $98 in payment of two judgments, $217 being deposited in a bank at Mandan to secure the release of an attachment, and $133 in the bank at Bismarck as a refund of taxes paid. That Cunningham had deposited in the City National Bank of Bismarck $1,350, as purchase price, with instructions to hold the same until the title should be perfected. That George, by conveying the premises to the plaintiff, had disentitled himself to any portion of the consideration from Cunningham. That Ellis is entitled to have returned to him the consideration he has paid not to exceed $1,350 which Cunningham agreed to pay, and that, as a condition of the entry of a judgment quieting the title in Cunningham, he should be required to pay to Ellis "the consideration agreed to be paid by him to said George, or to the Pacific Silk Company, or such part thereof as remains unpaid and in the City National Bank of Bismarck." And it was further ordered that when the directions contained in the order for judgment as amended were carried out a new judgment should be entered in favor of Cunningham as against all the other parties to the action.

Theodore Koffel, for appellant.

The term of the court in which the judgment had been rendered had

expired, and therefore the same had become final, and the court could not vacate or amend it. Comp. Laws 1913, § 7354; Teller v. Wethercll, 6 Mich. 49; Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Bronson v. Schulten, 104 U. S. 410; Freeman, Judgm. §§ 94, 95.

There was no proof that the Pacific Silk Company was a corporation or an association, and no proof was offered that the summons in the present action had been served upon either of the defendants, C. L. George or the Pacific Silk Company. Keenan v. Daniels, 18 S. D. 102, 99 N. W. 853; Ryan v. Simpson, 28 S. D. 157, 132 N. W. 691; Robert v. Enderlin Invest. Co. 21 N. D. 594, 19 L.R.A. 817, 132 N. W. 145.

The plaintiff cannot recover, having failed to establish the contract alleged and set out in his complaint. Ross v. Ross, 127 N. W. 1035.

The plaintiff, having failed to establish his contract, was not entitled to any decree of the court, and specific performance is not a matter of right, but in the sound discretion of the court, and the court will refuse it and turn the party over to his remedy at law if not satisfied that it embodies the real understanding of the parties even where a binding contract is proven. Hathbone v. Groh, 100 N. W. 588; Cathro v. Gray, 66 N. W. 346; Hambleton v. Jameson, 143 N. W. 1010; Gummett v. Gintross, 43 N. W. 999; Hartman v. Streitz, 23 N. W. 505; Smith v. Bingham, 28 L.R.A.(N.S.) 522 and note; Horgan v. Russell, 43 L.R.A.(N.S.) 1150 and note, 140 N. W. 99; 29 Am. & Eng. Enc. Law, 2d 593.

W. H. Stutsman, for the respondent.

Third parties, having no interest therein, cannot collaterally attack a contract after its performance by the parties thereto, on the ground that it violated the Statute of Frauds. Lavender v. Hall, 60 Ala. 214; Chaffee v. Benoit, 60 Miss. 34.

A parol sale of land is only voidable by the parties to it. A stranger cannot interpose between them and avoid it, against their consent, merely because it is not written. Crawford v. Woods, 69 Ky. 200.

A vendor may, by pleading the Statute of Frauds, avoid a parol sale of land, or waive it and consummate his contract, and cannot be deprived of his right to do so by a stranger. Clary v. Marshall, 44 Ky. 266.

Where a verbal lease for ten years is made, and the lessor subsequently makes a written lease to a third party of the same property, the second lessee cannot recover the premises from the first lessee in forcible detainer proceedings, on the ground that the first lessee was within the Statute of Frauds, since the statute is for the benefit of the parties to a contract, and a third party cannot set it up for the benefit of one of such parties if he chooses to perform the contract. Best v. Davis, 44 Ill. App. 624.

Second. Even if Cunningham had a right to object to Ellis's contract, because within the Statute of Frauds, he has not done so. The Statute of Frauds is not available as a defense unless pleaded. Benjamin v. Matter, 3 Colo. App. 227, 32 Pac. 837; J. A. & M. Canal Co. v. Calhoun, 2 Ill. 521; Kinzie v. Penrose, 3 Ill. 515.

The defense of the Statute of Frauds must be raised by demurrer, plea, or answer, to be available at the hearing of a suit to specifically enforce a parol agreement to convey land. Douglas v. Snow, 17 Mo. 91; Guynu v. McCauley, 32 Ark. 97; Augee v. Simpson, 88 Ala. 53; Tarleton v. Vietes, 6 Ill. 470.

If the deed be found in the hands of the grantor, the presumption arises that no delivery has been made. Hatch v. Haskins, 17 Mo. 351.

The possession of a deed by the grantor, after an alleged delivery of it, may be a very strong circumstance to show that the delivery was not absolute. Withelle v. Bryan, 3 Ohio St. 377; Barr v. Schroeder, 32 Colo. 809.

As to two purchasers without fraud for a valuable consideration, the rule of *"qui prior est tempore, potior est in jure"* applies, and the first in time must prevail. Davall v. Guthrie, 6 Ky. 532.

Although one may purchase land without notice of the equity of others, yet if he takes the deed as a volunteer, or had not paid the purchase money, he is not an innocent purchaser for value, and cannot be protected. Rentenab v. Wilbur, 84 Ill. 297.

A purchaser, to establish that he acted bona fide, must show a consideration actually paid by him. Keys v. Text, 33 Ill. 316; Patten v. Moore, 32 N. H. 382; Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280.

BIRDZELL, J. The defendant Cunningham alone appeals from the

order above referred to, and has made certain specifications of error. The respondent, however, who has not procured the entry of any new judgment and has taken no appeal, suggests to this court a doubt as to whether the order is appealable; but he asks that the case be reviewed and thus obviate the necessity of a second review upon a subsequent appeal from the judgment by the plaintiff. For this reason no objection is made that the order is not appealable. We know of no procedure according to which this court can try a case *de novo* where there is no appeal from the judgment. Section 7846, Compiled Laws of 1913, provides for a trial *de novo* only where there is an appeal from a judgment in the action.

It has long been the settled law of this jurisdiction that a mere order for judgment is not appealable. Persons v. Simons, 1 N. D. 243, 46 N. W. 969; Re Eaton, 7 N. D. 273, 74 N. W. 870. It is not such an order as to both determine the action in effect and to prevent a judgment from which an appeal might be taken, within subdivision 1 of § 7841, Compiled Laws of 1913. In fact, it is but preliminary to the entry of a judgment from which an appeal might be taken. Thus, in so far as the order amounts to an order for judgment, it is not appealable and an appeal from it does not properly bring to this court any matter for review. If the order appealed from amounted to no more than an order for judgment, it would be the duty of this court to decline to consider the appeal even though the respondent should not raise the objection. There would be an absence of jurisdiction to affect the judgment below. See Turner v. Crumpton, 25 N. D. 134, 141 N. W. 209, and cases cited.

The order, however, is more than an order for judgment. It vacates the judgment previously entered as well as fixes the terms of the new judgment to be entered. In so far as the order appealed from vacates the judgment it is clearly appealable. Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201. It is entered pursuant to summary application, and affects the substantial right in an action after judgment within subdivision 2 of § 7841, which specifies the orders reviewable. But being without power or authority to try this case *de novo,* and having no jurisdiction over any judgment previously entered in the district court, this court cannot, on this appeal, direct the entry of any judgment affecting the merits, for the review is necessarily limited to that

portion of the order which vacates the judgment. However, since counsel for the respondent has specifically requested the court to examine the merits of the case, and inasmuch as the consideration of the appeal from that portion of the order which is appealable has necessitated a careful perusal of the record, we feel warranted in saying that the judgment, as modified, gives to the respondent all that he is entitled to receive. It seems to be clear that Cunningham purchased without notice of Ellis's transaction, and that Ellis never, in fact, closed his deal until he knew of Cunningham's purchase.

The appellant has attacked the order appealed from both upon the ground that the court lacked jurisdiction to enter it and upon the further ground that the evidence does not support the modifications made in the findings and conclusions. It will be noted, however, that the modifications in no way affect the substantial rights of Cunningham, the appellant. They only substitute Ellis for George or the Pacific Silk Company as the recipient of the purchase price which Cunningham agreed to pay and which was deposited in the bank to be turned over on completion of the title. The record fails to show wherein Cunningham is in any way prejudiced by the modification designed only to protect the right of Ellis as against the former owners of the property. Clearly they have not the right to be paid twice over for this property,—once by Ellis and then again by Cunningham,—and the fact that no one appeals from the order on behalf of the former owner or owners is a concession by them that the order is just. At any rate, so far as Cunningham is concerned, the modification does not affect the merits of the judgment, as he is given every right that was secured to him by the original judgment. It only affects the method of carrying out that judgment. See Tyler v. Shea, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468; Barnes v. Hulet, 29 N. D. 136, 150 N. W. 562. Being of the opinion that under the facts disclosed by this record the appellant is not adversely affected by the order, is is unnecessary to consider the objections urged. The order appealed from is affirmed.

MORRIS MIKKELSON, Respondent, v. CHARLES SNIDER, Appellant.

(175 N. W. 220.)

Appeal and error — assignments of error occurring before trial.

1. Certain assignments of error based upon matters occurring before the trial examined, and *held* to be without merit for reasons stated in the opinion.

Appeal and error — admission of evidence.

2. Certain assignments of error based upon rulings in the admission and exclusion of evidence, and the sufficiency of the evidence to sustain the verdict, examined, and *held* to be without merit for reasons stated in the opinion.

Appeal and error — damages — punitive damages — harmless error.

3. Where the jury refuses to allow punitive damages the defendant is not prejudiced by instructions given on that question,—the error, if any, in such instructions becomes harmless.

Jurors — new trial — verdict not impeached or discredited by testimony of jurors.

4. A verdict cannot be impeached or discredited by the testimony of the jurors who returned it.

Appeal and error — new trial based on newly discovered evidence at former trial denied.

5. It is *held* that the court committed no error in denying a motion for a new trial based on the ground of newly discovered evidence.

Opinion filed November 1, 1919.

Appeal from the District Court of La Moure County, *Coffey*, J.

Defendant appeals from the judgment and from an order denying a new trial.

Affirmed.

Hutchinson & Lynch, for appellant.

Our court has held that every litigant should have an opportunity to be heard on the merits. Froelich v. Northern P. R. Co. 167 N. W. 368; 38 Cyc. 1316, 1321; Zink v. Lathart, 16 N. D. 56.

Appellant was entitled to an order vacating the default judgment as a matter of right. Cedar Rapids Nat. Bank v. Coffey, 25 N. D. 458.

The court erred in denying a new trial because of newly discovered evidence material to the defendant which he could not with reasonable diligence have discovered and produced before the trial. Fisk v. Fehrs, 32 N. D. 119.

The mere alleging of punitive damages in the complaint would not authorize the court in elaborating and accentuating them in his instructions, and there is certainly nothing in the evidence that warrants them. Selland v. Nelson, 22 N. D. 14; Stockwell v. Brinton, 26 N. D. 14; Harmoning v. Howland, 25 N. D. 38; Shoemaker v. Sonju, 15 N. D. 519.

Doane & Porter, for respondent.

Counsel have not shown that the prejudicial remarks were actually heard and understood by any of the jurors who were sworn to try the issues of this case. Such statements were therefore neither prejudicial nor even improper. Vollmer v. Stregge, 27 N. D. 579, 147 N. W. 797.

"And the failure to object to a selected jury waives all questions improperly excluded from *voir dire* and all matters of irregularity occurring during the impaneling of such jury." State v. Goetz, 131 N. W. 515.

"The record in this case speaks for itself, and by that record the parties and this court must be controlled." State v. Clark, 21 N. D. 517, 131 N. W. 720.

Motions for new trial are clearly within the discretion of the trial court, and the law is so well settled in this respect that we need cite little law. Huber v. Zeiszler, 37 N. D. 556; Skaar v. Eppeland, 35 N. D. 116.

In order to grant a new trial upon the ground of newly discovered evidence, it must be found that the evidence newly discovered is apt to lead to a different result upon a retrial. Fisk v. Fehrs, 32 N. D. 119; Keystone Grain Co. v. Johnson, 38 N. D. 563.

CHRISTIANSON, Ch. J. Plaintiff brought this action to recover of the defendant the value of thirty-four turkeys which he alleges that the defendant unlawfully seized and converted to his own use on or about July 1, 1918. The defendant interposed a general denial to plaintiff's complaint. Upon the issues thus framed the case was tried

to a jury, which returned a verdict in favor of the plaintiff for the sum of $62.50. The defendant moved for a new trial. The motion was denied, and he has appealed from the judgment and from the order denying a new trial.

Some of the assignments of error are predicated upon matters connected with the default judgment and the motion to vacate it. It is contended that the evidence which formed the basis for the default judgment was mostly hearsay, that it was insufficient to support the judgment, and that the damages allowed in the default judgment were excessive.

Manifestly we are not concerned with the default judgment. That was set aside upon defendant's application. It is entirely immaterial whether there was any evidence to support it or not. The judgment before us on this appeal is based upon the verdict of a jury; that verdict was returned upon a trial where defendant and his counsel were present and were afforded full opportunity to be heard.

It is further contended that at the time application to vacate the default judgment was made, the trial court made some remarks with respect to the testimony that had been adduced at the time the default judgment was ordered. It is claimed that the trial court at that time, in the presence of some of the jurors, stated that the matter was one which the state's attorney ought to investigate, and that there was enough evidence (taken at the time the default judgment was ordered) to send the defendant to the penitentiary.

It is a sufficient answer to this contention to say that it appears that whatever remarks the trial court made were made directly to defendant's counsel. Such counsel afterwards examined the jurors. He did not even find it necessary to exhaust his peremptory challenges; and so far as the record shows no objection was made to either the trial judge or the members of the jury. Apparently both the trial court and jury were satisfactory at that time, and it was only after an adverse decision had been rendered that they became unsatisfactory.

Error is also assigned upon rulings made in the admission and exclusion of evidence. The assignments have all been examined and considered, and found to be without merit.

It is also asserted that the verdict is not supported by a prepon-

derance of the evidence. The argument on this feature of the case deals with the credibility of the witnesses and the probability of their stories. It is elementary that these are questions for the jury. There was a square conflict in the evidence in this case, and the jury believed the testimony of the plaintiff and his witnesses and disbelieved the testimony of the defendant.

Other assignments of error are based upon the court's instructions to the jury upon the subject of punitive damages. The assignments are wholly without merit, as the jury allowed compensatory damages only and refused to allow punitive damages.

In support of the motion for a new trial defendant submitted certain written statements of some of the members of the trial jury to the effect that they did not at the time the verdict was rendered believe that defendant had taken and converted the turkeys; that they believe the verdict to be unjust; that certain members of the jury were prejudiced against the defendant, and that the verdict was a compromise. The statements are unverified. It is not claimed that the verdict was a "chance" verdict. The statements are denied by the affidavits of the foremen of the jury and one of the jurors. That a verdict cannot be impeached or discredited by the testimony of the jurors is so well settled that discussion is unnecessary. Anyone interested will find the subject fully considered in Spelling's New Trial & Appellate Practice, § 409.

The defendant also asked for a new trial on the ground of newly discovered evidence. The newly discovered evidence is the proposed testimony of the defendant and his two principal witnesses upon the former trial with respect to certain marks of identification upon the turkeys in controversy. The granting or refusing of a new trial on the ground of newly discovered evidence is a matter which rests within the sound, judicial discretion of the trial court. We are wholly agreed not only that there was no abuse of discretion, but that the ruling was right and proper.

The judgment and order appealed from must be affirmed. It is so ordered.

GRACE, J. I concur in the result.

HANS A. HANSON, Respondent, v. WM. A. HULET, Appellant.

(175 N. W. 205.)

Highways — liability of driver of automobile for injury to horse — negligence of diver of automobile presumed and proven.

In passing on a highway, defendant ran his Ford car against the plaintiff's horse and broke its leg, and he appeals from a judgment for $100, which is affirmed with costs.

Opinion filed November 8, 1919.

Appeal from the County Court of Ransom County, Honorable *F. S. Thomas,* Judge.

Affirmed.

Curtis & Remington, for appellant.

Kvello & Adams, for respondent.

ROBINSON, J. In this case it appears that in November, 1917, in the gloam of twilight, on a country highway, the plaintiff and defendant met. The plaintiff was returning from plowing and was driving five horses, two in the lead and three behind, the same as on the plow. In passing, defendant ran his Ford car against the left hind leg of the lead horse and broke the leg so the animal had to be killed. Defendant appeals from a judgment and verdict for $100.

NOTE.—On duty and liability of operator of automobile with respect to horses encountered on the highway, see notes in 1 L.R.A.(N.S.) 223, 224; 14 L.R.A. (N.S.) 251, and 48 L.R.A.(N.S.) 946, where it is held that the right of the driver of an automobile to pass around horses in the highway, either meeting or following them, must be exercised with that degree of care and prudence in driving the car which is consistent with the safety of others.

The driver of a motor vehicle is too apt to claim the right of way and to run his car so as to demand that horses and pedestrians must clear the road at the peril of their lives.

The negligence of defendant is presumed and clearly proven. A horse nearly always shies from a car and never runs into it, while a car never shies from a horse. A man on a horse has no excuse for running against a man on foot; a man driving a motor car on a country road has no excuse for running against horses. Defendant had no excuse for running his car against the horse and breaking its leg, nor had he any excuse for taking this appeal.

Judgment affirmed, with 10 per cent damages and costs, and case remanded forthwith.

CHRISTIANSON, Ch. J., concurs.

GRACE, J. I concur in the result.

BRONSON, J. (concurring). As against the assignments of error made by the appellant, I am of the opinion that the questions of negligence and contributory negligence were questions of fact for the jury, and that such questions were submitted to the jury without prejudicial error so far as the specifications of error herein are concerned. The judgment accordingly should be affirmed.

BIRDZELL, J., concurs.

L. B. WALL, Respondent, v. GREAT NORTHERN RAILWAY COMPANY, Appellant.

(175 N. W. 705.)

In an action for personal injuries, where it appears that the plaintiff had shipped certain stock from Carbury to St. Paul, and was accompanying the same under a shipper's contract, and was injured in the stockyards of the railway company at Devils Lake, while proceeding in the dark upon an unlighted platform or bulkhead used as an instrumentality of the railway company in the handling of stock, it is *held*, upon the record, *viz.:*

Carriers — injury to shipper in charge of live stock — question of negligence one for jury.

1. That the question of defendant's negligence and of plaintiff's contributory negligence were fairly questions of fact for the jury.

Carriers — duty of carrier to exercise reasonable care — one traveling under shipper's license entitled to safe place and safe instrumentalities.

2. That whether the plaintiff be considered a passenger or a mere licensee under a shipper's contract or drover's pass, it was the duty of the defendant to exercise reasonable care and prudence to provide and keep in a reasonably safe condition instrumentalities provided for use in the transportation and handling of stock.

Instructions — prejudicial error.

3. That no prejudicial error was committed in the rulings or instructions of the trial court.

Opinion filed November 8, 1919.

Action for personal injuries, in District Court, Bottineau County, *Burr*, J.

From a judgment in favor of the plaintiff the defendant has appealed. Affirmed.

Murphy & Toner, for the appellant.

A person riding on a stock contract assumes such risks and inconveniences as are incident to traveling on a freight train with his stock and such inconveniences and risks as he will encounter with the in-

NOTE.—For authorities discussing the question of duty of carrier to care taker accompanying a shipment of live stock, see notes in 22 L.R.A. 794, and 31 L.R.A. (N.S.) 632.

strumentalities used in that connection. Ry. Co. v. Trayer, 103 N. W. 680.

During the interval of a passenger's absence after the departure from the station and before his return to it for the purpose of taking the same or another train, he is not to be regarded as a passenger. Dodge v. Steamship Co. 148 Mass. 207; Peniston v. Ry. Co. 34 La. Ann. 777; Ry. Co. v. Riley, 39 Ind. 568; Parsons v. R. R. Co. 113 N. Y. 355; Dice v. Transportation Co. 8 Or. 60; State v. Ry. Co. 58 Me. 176; King v. Ry. Co. 107 Ga. 754, 33 S. E. 839; Ry. Co. v. Sattler, 90 N. W. 649; Conroy v. Ry. Co. (Wis.) 38 L.R.A. 419; Finnegan v. Ry. Co. (Minn.) 15 L.R.A. 399; Johnson v. Ry. Co. 125 Mass. 75; Dekay v. Ry. Co. 41 Minn. 178, 4 L.R.A. 632; Frost v. Ry. Co. 10 Allen, 387, 87 Am. Dec. 668; State v. Ry. Co. 58 Me. 176, 4 Am. Rep. 258; Ry. Co. v. Carper, 112 Ind. 26; Johnson v. Ry. Co. 125 Mass. 75; Ry. Co. v. Anderson, 28 Can. S. C. 541, affirming 24 Ont. L. Rep. 672.

"The ordinary precaution required on one approaching a railroad crossing when he has no knowledge of the close proximity of the train is that he look and listen, and make a diligent use of his faculties to inform himself and avoid collision." West v. Ry. Co. 13 N. D. 230; Hope v. Great Northern, 19 N. D. 438.

"Where because of physical infirmities, darkness, snow, fog, the inclemency of the weather, buildings, or other obstructions and hindrances, it is more than usually difficult to see or hear, greater precaution must be taken to avoid injury than would otherwise be necessary." Sherlock v. Soo, 24 N. D. 40; Haugo v. Great Northern, 27 N. D. 368; Gast v. Northern Pacific, 28 N. D. 118; Crowson v. Soo, 36 N. D. 100; Ry. Co. v. Terry, 8 Ohio St. 570, 12 Am. Neg. Cas. 467; Johnson v. Ry. Co. 91 Ky. 651; Ry. Co. v. Bowers, 110 Ala. 328, 11 Am. Neg. Cas. 127; Phillips v. Ry. Co. 111 Mich. 274, 12 Am. Neg. Cas. 99; Ormsbee v. Ry. Co. 14 R. I. 102, 12 Am. Neg. Cas. 579; Pearl v. Ry. Co. 72 Mo. 168; Cogswell v. Ry. Co. 6 Or. 417, 12 Am. Neg. Cas. 515; Tyler v. Sykes, 88 Va. 470, 12 Am. Neg. Cas. 634; Artusy v. Ry. Co. 73 Tex. 191, 12 Am. Neg. Cas. 624; Zimmerman v. Ry. Co. 71 Mo. 476, 12 Am. Neg. Cas. 204.

In this case, the premises, not dangerous in themselves, were in the possession of an independent contractor, and the plaintiff received his injuries, leaving other considerations on one side, because

of the method of prosecuting that work by such contractor, and if there is any liability it rests with such contractor, and not with the defendant. Green v. Soule (Cal.) 17 Am. Neg. Rep. 8; Francis v. Johnson (Iowa) 17 Am. Neg. Rep. 507; Keyes v. Second Baptist Church (Me.) 17 Am. Neg. Rep. 526; Vosbeck v. Kellogg (Minn.) 7 Am. Neg. Rep. 86.

This case falls well within the line where the rule relating to independent contractors applies. Powell v. Construction Co. 13 S. W. 691; Miller v. Ry. Co. 39 N. W. 188; Cunningham v. R. Co. 51 Tex. 503; Ry. Co. v. Grant, 46 Ga. 417; Cary v. Ry. Co. 42 Iowa, 246; Jaslin v. Ice Co. 15 N. W. 887; Ry. Co. v. House, 1 Wyo. 27; Ry. Co. v. Fitzsimmons, 18 Kan. 34; Meyer v. Ry. Co. 2 Neb. 319; Ry. Co. v. Chasten, 88 Ala. 591, 7 So. 94.

"Where an independent contractor is employed to construct a building or to perform any other work, and the employer reserves no control as to the manner of performance, the employer is not liable for the contractor's negligence." Citing 21 Iowa, 575; 23 Iowa, 526; 44 Iowa, 27; 13 Allen, 58; 103 Mass. 194; (Neb.) 28 N. W. 284.

J. J. Weeks, for the respondent.

"The plaintiff assumed those risks, and those risks only, reasonably incident to the mode of transportation utilized, but not those risks and dangers produced by unnecessary and unusual occurrences not incident to the proper handling of a freight train." McGregor v. G. N. Ry. Co. 31 N. D. 471; 10 C. J. 636, § 1058.

"The mere fact that a passenger leaves the conveyance during the transit does not in and of itself terminate the relation of the parties, provided he does so for a proper purpose." Fornoff v. Columbia Taxicab Co. 163 S. W. 699; Killmeyer v. Wheeling Traction Co. 77 S. E. 908, 37 Ann. Cas. 1220; 10 C. J. 623, § 1047.

A reckless disregard or indifference to the rights and safety of others is held to preclude the defense of contributory negligence. 29 Cyc. 509; Rawitzer v. St. Paul City R. Co. 100 N. W. 664; Battishill v. Humphreys, 38 N. W. 581.

"If a person, in doing that which it is his right to do in the discharge of his duty, exercised ordinary care and prudence, he is not chargeable with contributory negligence as matter of law, although the result showed that he imperiled his life or personal safety in doing as he did."

29 Cyc. 523, 524; Leary v. Becker, 157 N. W. 359; Liming v. Illinois C. R. Co. 47 N. W. 66.

The question of whether plaintiff's injuries were caused by his own negligence was properly submitted to the jury. Coulter v. Ry. Co. 5 N. D. 568, 67 N. W. 1046, 33 Cyc. 904; Cast v. N. P. R. Co. 28 N. D. 118, 147 N. W. 793.

BRONSON, J. This is an action for personal injuries. The defendant has appealed from a judgment entered upon a verdict of $500 returned for the plaintiff. The facts substantially are as follows:

On October 15, 1918, the plaintiff was injured in the stockyards at Devils Lake, North Dakota, while walking in the dark upon a bulkhead or sort of platform. This bulkhead was constructed for purposes of unloading cattle and live stock. The plaintiff was injured by stepping off the same, occasioning a fractured limb. The plaintiff was accompanying some stock owned and shipped by him upon a shipper's or drover's contract from Carbury to St. Paul. In accordance with the plaintiff's evidence, while he was trying to look after and care for his stock and was seeking to borrow a lantern to find his way, he was so injured. On the other hand, evidence was introduced by the defendants that the stock was being cared for by the railroad; that the plaintiff's presence was unnecessary in such stockyards, and that he was practically a mere volunteer in being at the place where he was injured. There were no lights at this time around or about such platform or bulkhead. The appellant herein principally contends that the evidence does not establish negligence on the part of the defendant, but, on the contrary, the contributory negligence of the plaintiff. That the plaintiff was not a passenger, and at most a mere licensee. The defendant further complains that the trial court erred in granting the motion of the plaintiff to amend the title of the action by adding after the words "the Great Northern Railroad," "W. D. Hines." The record herein has been examined at length, and this court is satisfied that the questions of negligence and contributory negligence were fairly questions of fact for the jury, and that there is no prejudicial error in the rulings or instructions of the court. No prejudicial error was committed by the trial court concerning the motion of the plaintiff. Judgment was rendered only against the defendant. No specific issue is presented to

this court concerning the effect of Federal administration upon the liability of the defendant. In the answer it is admitted that it is a common carrier operating a railroad between the places mentioned in the complaint. It is immaterial whether the plaintiff be considered a passenger or mere licensee at the time he was injured. The plaintiff, in accompanying the stock upon a contract which gave him the privilege of accompanying the stock and riding on the train, presumably had the right to watch and look after this stock, and, while so doing, it was the duty of the defendant to exercise reasonable care and prudence to provide and keep, in a reasonably safe condition, instrumentalities provided for use in the transportation and handling of stock. Atchison, T. & S. F. R. Co. v. Allen (75 Kan. 190) 10 L.R.A.(N.S.) 576, 88 Pac. 960.

The judgment is affirmed, with costs to the respondent.

BIRDZELL, J. I dissent.

J. J. WEEKS, Respondent, v. GREAT NORTHERN RAILWAY COMPANY, Appellant.

(8 A.L.R. 1178, 175 N. W. 726.)

Carriers — damages to passengers for misinformation as to time of departure of trains — carrier liable for actual damage.

1. Where a passenger sustains damages by reason of misinformation as to the time of the departure of trains, given by a carrier's employees, the carrier is liable for the actual damages sustained by the passenger proximately caused by reason of the misinformation.

Carriers — misinformation as to departure of train not proximate cause of suffering incurred while driving across country.

2. Where a passenger who has been misinformed as to the time of the

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NOTE.—Authorities discussing the question of liability of carrier for giving misinformation to passenger as to running of train are collated in a note in 8 A.L.R. 1183, where it is held that where an employee of a railroad company misinforms a passenger as to the time of the departure of a train or of its arrival at destination, the carrier is liable for damages which are the direct result of the misinformation.

departure of a train, and as a result thereof has missed his train, procures an automobile and, equipped with inadequate clothing, drives across country during a cold, stormy night, and as a result suffers discomfort and inconvenience, he is not entitled to recover damages for discomfort and inconvenience endured during such trip, as the negligence or wrongful action of the carrier was not the proximate cause thereof.

Opinion filed November 13, 1919. Petition for rehearing filed December 9, 1919.

From a judgment of the District Court of Bottineau County, *Burr*, J., defendant appeals.

Reversed and remanded for a new trial.

Murphy & Toner, for appellant.

The bulletining of this train on the day in question was not within the scope of the employment of the operator and has no legal effect in so far as the company is concerned. Kinnomen v. Great Northern, 34 N. D. 556.

Plaintiff had no right to rely on such late train not coming in ahead of time, even though so reported and even though he was a passenger, and defendant did not owe him in this case the extraordinary duties a carrier owes a passenger, and under such circumstances no recovery could be had. 59 Ill. App. 620.

"It is only in cases of moral wrong, recklessness, or malice that the exceptional rule of public policy which allows exemplary damages applies." Parker v. Ry. Co. 13 Hun, 319.

"There must be some element of malice, violence, or oppression to justify exemplary damages." Ry. Co. v. Wurl, 62 Ill. App. 381; Ry. Co. v. Carr, 71 Md. 135.

"Evil motive or intention must be shown." Hamilton v. Ry. Co. 53 N. Y. 25.

John E. Martin, for respondent.

A person who goes to the station of a railway company within a reasonable time prior to the hour set for the departure of a train, with the bona fide intention of taking passage thereon, and either by purchasing a ticket or in some other manner indicates such intention to the carrier, he is considered to be a passenger. 10 C. J. 613, § 1040; Dieckmann v. Chicago & N. W. R. Co. 121 N. W. 676.

"A common carrier must start at such time and place as he announces

to the public unless detained by accident or the elements, or in order to connect with carriers on other lines of travel." Comp. Laws 1913, § 6238.

A reasonable sum for loss of time, and a fair compensation for the inconvenience experienced by a passenger, are all proper elements of damages for which he can recover. Lilly v. St. Louis R. Co. 31 Okla. 521, 39 L.R.A.(N.S.) 663; Louisville etc., R. Co. v. Sanders, 61 So. 482; St. Louis etc. R. Co. v. Evans, 126 S. W. 1058.

PER CURIAM. On the morning of October 19, 1917, the plaintiff, who lived at Bottineau, went to Rugby on defendant's passenger train, intending to return to Bottineau on the afternoon train. Bottineau is located on a branch of the defendant's railway which connects with the main line at Rugby, and there is only one passenger train in each direction on each day. On October 19th the regular scheduled time for the departure of the train known as No. 213 from Rugby to Bottineau was at 4:15 P. M. At about 4 P. M., plaintiff, in company with one Thomas Hennessy, sheriff of Bottineau county, went to the defendant's depot at Rugby for the purpose of taking train No. 213 to Bottineau, but on examining a bulletin board in the depot they found that this train was marked to leave at 5:40 P. M. The plaintiff thereupon inquired at the ticket window, of the person in charge, if he was certain that the train would not leave before 5:40 P. M. and was answered in the affirmative. The plaintiff and Hennessy thereupon went up town. They returned to the depot about 5:30 P. M., at which time they were informed that the train had left at 4:50, or about fifty minutes ahead of the time formerly announced. Plaintiff was therefore compelled either to remain in Rugby until the next day, or else drive to Bottineau, —a distance of about 48 miles. The plaintiff and Hennessy engaged an autolivery, and made the trip to Bottineau that evening. They paid the driver $20. The plaintiff and Hennessy each paying one half thereof.

The evidence adduced by the plaintiff tended to show that there had been quite a severe snow storm a day or two before; that as a result the roads were in bad condition, and travel rendered difficult, and the telephone wires between Rugby and Bottineau broken down; that the night was cold, and that snow was falling to such an extent that it was

necessary for the driver to stop at times and clean off the windshield and lamps in order to travel with safety. The plaintiff testified that he had on only a medium weight cloth overcoat, and that he became very cold on the trip to Bottineau. Hennessy testified that the weather was so cold that he would not make the trip until he obtained a fur coat. There is some conflict as to the length of time required to make the trip. The plaintiff testified that it took about three hours, while the driver of the automobile claimed the trip was made in about two hours.

The plaintiff was state's attorney of Bottineau county, and he testified that a preliminary examination had been set for hearing in a justice's court that evening at 7 o'clock, and that he was caused considerable worry on account of his inability to telephone the justice of the peace, and explain the reason of his failure to appear at the time set for the hearing.

The plaintiff claimed that he was damaged in the sum of $100, and made demand upon the defendant for payment. Payment was refused, and plaintiff brought this action, wherein he demanded judgment for $300 compensatory, and $300 exemplary, damages. The defendant denied all liability. The case was tried to a jury, which returned a verdict in plaintiff's favor for $175 compensatory damages; no exemplary damages were allowed. Defendant has appealed from the judgment.

The evidence adduced by the plaintiff shows that plaintiff was misinformed as to the time when train No. 213 would depart; that such misinformation was conveyed both by what was written on the bulletin board and by what was said by the person in charge of the ticket office, and that such misinformation caused plaintiff to miss the train. It is true the testimony does not show that the plaintiff had procured a ticket at the time the information was received by him, but it does show that he came to the depot for the purpose of becoming a passenger upon that train. There is also evidence to the effect that the plaintiff was known to the operator,—the person who wrote the statement on the bulletin board with respect to train No. 213,—and that plaintiff talked with that person on the day in question. We are of the opinion that the evidence considered as a whole justified the jury in finding that at the time the misinformation was given to the plaintiff he was in the position of a passenger. 10 C. J. p. 613, § 1040.

It is well settled that where a passenger sustains damages by reason of misinformation as to trains given by the carrier's employees, the carrier is liable for the actual damages sustained by the passenger by reason of such misdirection. Michie, Carr. §§ 2252, 2253; Robertson v. Louisville & N. R. Co. 142 Ala. 216, 37 So. 831; Louisville & N. R. Co. v. Cannon, 158 Ala. 453, 48 So. 64; Wilcox v. Southern R. Co. 91 S. C. 71, 74 S. E. 122.

The defendant contends that the verdict is excessive. We are of the opinion that this point is well taken. In his complaint, plaintiff avers: "That the defendant on said 19th day of October, 1917, maliciously, unlawfully, and falsely reported that said train No. 213 would leave Rugby at 5:30 P. M., and thereafter caused said train to depart at 4:50 P. M., and that by reason thereof plaintiff was put to great annoyance, worry, and delay, and was compelled to travel by livery from the said city of Rugby to Bottineau during the nighttime, over roads that were almost impassable on account of mud and snow, the said drive occupying about three hours and causing plaintiff considerable suffering on account of exposure to cold and a snow storm prevailing at said time. That on said 9th day of October, 1917, plaintiff as state's attorney of Bottineau county, represented the state of North Dakota in an action then pending in justice court for Bottineau county, in which action hearing was set for 7 o'clock P. M., on the said 19th day of October, 1917, and that plaintiff was unable to communicate with the said justice of the peace by telephone from Rugby on account of the fact that said telephone lines were down and out of service at said time, and that, on account of said action pending and other business, plaintiff was compelled to travel by livery from Rugby to Bottineau in the evening and night of October 19, 1917, but was unable to reach Bottineau in time for said hearing in justice court, and was unable to reach Bottineau in time to attend to other matters of business requiring plaintiff's attention, and that by reason of all these facts, plaintiff has suffered damages in the sum of $100."

This is the only allegation in the complaint alleging either the facts as to, or the amount of, damages. In his testimony the plaintiff admitted his inability to specify any damage by reason of the loss of time. And upon this feature of the case, the trial court expressly instructed the jury as follows: "In finding the actual damages you

cannot allow for loss of time, as there is no proof of the value of any time lost. Find what actual damages the plaintiff suffered in money, actually and necessarily spent, and the amount which would fairly compensate the plaintiff for loss and harm suffered in personal property."

The defendant was liable to the plaintiff for the detriment which was *proximately* caused by the misinformation which its employees gave to him. Comp. Laws 1913, § 7165. So far as the discomfort which plaintiff suffered on the trip from Rugby to Bottineau is concerned, this was, according to his own testimony, due to inadequate clothing. Neither Mr. Hennessy nor the driver of the automobile claimed that they suffered any particular discomfort. Manifestly the defendant cannot be charged with any detriment which plaintiff brought upon himself. In Michie on Carriers, it is said: "In the absence of peculiar circumstances, a passenger is entitled only to reasonable compensation for the damages he has sustained by reason of failure to transport him to his destination promptly. The carrier in such case is liable for the damages actually sustained by the passenger as the direct and necessary result of its negligence. This includes the value of the time lost by the passenger, and the reasonable expenses to which he has been put because of the delay. But the passenger is not entitled to actual damages, unless he shows some pecuniary injury or personal injury, and is not entitled to damages for inconvenience, loss of time, or fatigue, unless some pecuniary damage or personal loss has resulted therefrom. And no damages can be recovered for physical injuries which are not the proximate result of the carrier's negligence." Vol. 3, § 3386. See also International & G. N. R. Co. v. Addison, 100 Tex. 240, 8 L.R.A.(N.S.) 880, 97 S. W. 1037; Ingraham v. Pullman Co. 190 Mass. 33, 2 L.R.A.(N.S.) 1087, 76 N. E. 237, 19 Am. Neg. Rep. 292; Stephens v. Oklahoma City R. Co. 28 Okla. 340, 33 L.R.A.(N.S.) 1007, 114 Pac. 611.

The verdict which the plaintiff recovered in this case was clearly in excess of what he was entitled to recover either under his pleading or his proof. The judgment must therefore be reversed and the cause remanded for a new trial.

In view of a new trial we deem it necessary to say that under the evidence in this case there was no occasion to submit to the jury the question of exemplary damages. Exemplary damages may be allowed

in an action for the breach of an obligation not arising from contract, only "when the defendant has been guilty of oppression, fraud, or malice, actual or presumed." Comp. Laws 1913, § 7145. In the case at bar, the undisputed evidence shows that at the time the plaintiff was informed by the employees of the defendant that train No. 213 would depart at 5:40 P. M. that that information was correct. The departure of the train before the time stated was occasioned by a subsequent change of orders by the train despatcher. It appears that train No. 213 ordinarily made connections with train No. 9 on the main line of the defendant's railway. On the day in question train No. 9 was late, and the departure of train No. 213 was delayed in order to make the proper connection with train No. 9. About 4:50 P. M. train No. 9 was reported much later, and the train despatcher thereupon rescinded the former order relating to the departure of train No. 213, and fixed the time for the departure of that train at 4:50 P. M. After this order was received the defendant's employees in the depot at Rugby endeavored to communicate the change to the various persons intending to take passage on that train. They even went to the extent of telephoning the hotels and poolrooms. Manifestly there is no basis under this evidence for a finding that the defendant was guilty of oppression, fraud, or malice.

Judgment reversed and the cause remanded for a new trial.

CHRISTIANSON, Ch. J., and BRONSON and BIRDZELL, JJ., concur.

ROBINSON, J. I think the action should be dismissed.

GRACE, J. (dissenting). This case was, upon the issues formed, tried to a jury. The jury, under all the facts and circumstances of the case submitted to it, after due deliberation, returned a verdict in favor of the plaintiff for $175. The verdict is not excessive; there is nothing to show passion or prejudice. I dissent from the result arrived at by the majority opinion.

On Petition for Rehearing.

PER CURIAM. In a petition for rehearing it has been suggested that the court in its opinion overlooked § 7165, Comp. Laws 1913, which reads: "For the breach of an obligation not arising from contract

the measure of damages, except when otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." This section was not overlooked. On the contrary it was cited in the former opinion. We were of the opinion then, and are of the opinion now, that the acts of the defendant were not the proximate cause of whatever inconvenience or suffering the plaintiff endured on the automobile trip from Rugby to Bottineau. According to his own testimony such discomfort was due to his own, and not to defendant's acts.

Neither did we overlook §§ 6238, 7145, and 10,360, Comp. Laws 1913, in holding that the case did not present one for the allowance of exemplary damages. Giving full force and effect to these sections, the facts still remain as stated in the former opinion. And they furnish no basis for a finding that defendant was guilty of oppression, fraud, or malice, actual or presumed. And there could be no allowance of exemplary damages unless there is evidence from which reasonable men, in the exercise of judgment and reason, could so find. That is the rule announced in the statute. See § 7145, supra.

Rehearing denied.

THE ALUMINUM COOKING UTENSIL COMPANY, a Corporation, Appellant, v. J. M. ROHE, Respondent.

(175 N. W. 620.)

Guaranty — letter of credit — notice of acceptance by creditor must be pleaded and proved.

1. In an action on a letter of credit wherein the maker agrees to pay for all goods ordered and not paid for by another party when due, it is *held* that such letter constitutes a contract of guaranty, and that it is necessary to plead and prove notice of acceptance thereof by the parties to whom the guaranty was given.

Pleading — motion to amend complaint to conform to proof admitted without objection should be granted.

2. In such action, where the complaint has failed to allege such notice of acceptance given, but, nevertheless where, in the trial of such action, proof is

received, without objection, that such notice of acceptance was given, after the trial court had overruled a motion to dismiss such complaint upon the grounds of its insufficiency, it is *held* to be prejudicial error to dismiss such action, upon the ground that such complaint failed to allege notice of acceptance, without permission granted to the pleader to amend this complaint to conform to the facts proved.

Opinion filed November 15, 1919.

Appeal from judgment of dismissal in District Court, Ward County, *Leighton*, J.

Reversed with directions.

W. H. Sibbald and *M. R. Keith*, for appellant.

"The vital difference between the contract of a surety and that of a guarantor is that a surety is charged as an original promisor while the engagement of the guarantor is a collateral undertaking." 12 R. C. L. 1057; Saint v. Wheeler, 36 Am. St. Rep. 210; 32 Cyc. 20.

L. F. Clausen, for respondent.

The contract of the surety is the joint and several contract of the principal and surety, while the contract of the guarantor is his own separate undertaking in which the principal does not join. Saint v. Wheeler (Ala.) 35 Am. St. Rep. 213.

"A complaint in an action upon a guaranty of payment of debts to be created in the future must allege that notice of acceptance was given to the guarantor." 20 Cyc. 1486; 10 Enc. Proc. 688.

"A complaint in an action on a guaranty must allege the performance of every condition precedent to the liability of the guarantor upon the contract, or an excuse for its nonperformance." 10 Enc. Proc. 685–687; 20 Cyc. 1487.

BRONSON, J. This is an action on a letter of credit. From a judgment of dismissal entered upon the grounds that the complaint failed to state a cause of action, the plaintiff has appealed. On June 23, 1914, the defendant executed the following letter:

To the Aluminum Cooking Utensil Co.,
East St. Louis, Ill.

Kenmare, N. D., June 23, 1914.

Gentlemen:—

In consideration of your taking into or continuing in, your employ

Ivin E. Harris, Kenmare, Ward Co., No. Dak., to be employed from time to time in such portions of the United States as you shall deem proper, I hereby agree to pay you forthwith for all goods ordered of you from time to time and not paid for by him when due. My liability not to exceed two hundred dollars ($200).

Yours truly.

There is evidence in the record that this letter was received and that a letter of acceptance was sent by the plaintiff to the defendant. The plaintiff furnished to one Harris certain aluminum goods of the total value of $268.43. On this account was paid only $85.18. Demands were made from Harris and the defendant for payment of the balance, $183.85, from time to time, and, finally, such amount not being paid, this action was commenced against the defendant to recover on the letter of credit.

The complaint alleges furnishing of the goods to Harris, his employment as salesman, and the execution of the letter of credit. It does not, however, allege that there was given a notice of the acceptance of such letter of credit. It is alleged, however, in the complaint that this plaintiff on the faith of such letter furnished the goods.

At the trial of the action the defendant, at the commencement thereof, moved that the action be dismissed for the reason that the complaint failed to state a cause of action. This motion was overruled by the trial court. At the conclusion of plaintiff's case a like motion was made and was similarly overruled. The evidence introduced by the plaintiff to the effect that the notice of acceptance of the letter of credit was made by letter to the defendant was so introduced and received without objection of the defendant.

The trial court, after final submission of the case as a court case, practically reversed its former ruling and dismissed the action upon the ground that no cause of action was plead in the complaint.

In a memorandum opinion the court based its action upon the ground that a letter of credit constituted a contract of guaranty, and the complaint, in failing to plead any acceptance thereof, was therefore insufficient. The appellant contends that a letter of credit is a contract of suretyship. In this regard we are satisfied that the letter of credit constitutes a contract of guaranty as found by the trial court.

That portion of the letter which agrees to pay for the goods not paid for *when due* clearly shows the letter so to be. Comp. Laws 1913, § 6651. A contract of guaranty must be accepted. Comp. Laws 1913, § 6656. It is necessary to plead acceptance.

This case is practically before this court upon a demurrer to the complaint, after the evidence was all introduced, after the court had twice overruled such demurrer, and after the evidence disclosed in fact an acceptance sufficient to form a question of fact thereupon.

If the trial court had sustained the motions of the defendant, when made, upon the grounds of the insufficiency of the complaint, it is obvious that the appellant would have had the opportunity either of moving to amend the complaint or of requesting the court to amend the complaint to conform to the facts as proved. The action of the trial court, as taken, deprived the appellant of this opportunity. It is well settled that the authority vested in courts to allow amendments of pleadings is for the purpose of promoting the ends of justice; that this authority is a legal, not an arbitrary discretion to be exercised liberally by the court in furtherance of the ends of justice. See Webb v. Wegley, 19 N. D. 606, 610, 125 N. W. 562; Martin v. Luger Furniture Co. 8 N. D. 220, 223, 77 N. W. 103; French v. State Farmers' Mut. Hail Ins. Co. 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7.

Demurrers, or motions in the nature of demurrers to pleadings, should not be made instrumentalities of defeating legal rights, particularly where the appellant has been mislead by the action of the trial court, and where the proof already adduced establishes a cause of action, without permitting the party at fault a chance to amend where the rights of the other party thereby are not prejudiced. Under the circumstances in this case it was an abuse of discretion to so order dismissal of the action.

The judgment of the trial court is reversed and a new trial granted, with permission to the appellant to amend his complaint. The costs of this court to abide the result of the trial.

WESTERN ELECTRIC COMPANY, a Corporation, Appellant, v. THE CITY OF JAMESTOWN, a Municipal Corporation, Respondent.

(175 N. W. 622.)

Municipal corporations — action by public utility company for electric current furnished — complaint alleging current furnished to city, and not paid for, states a cause of action.

In an action by a public utility company against a municipality, where it is alleged that plaintiff has furnished defendant electric current, the value of which, calculated according to a reasonable rate, amounts to $1,402.02, which sum has been demanded and refused, it is *held:*

The complaint states a cause of action.

Opinion filed November 20, 1919.

Appeal from District Court of Fifth Judicial District, Stutsman County, *A. T. Cole,* Special Judge.

Reversed.

S. E. Ellsworth, for appellant.

"The ayes and nays shall be taken upon the passage of all ordinances and on all propositions to create any liability against the city, etc." Comp. Laws 1913, § 3592; Bosard v. Grand Forks, 13 N. D. 587, 102 N. W. 164.

"The present state of the authorities clearly justifies the opinion of Chancellor Kent that corporations may be bound by implied contracts within the scope of their powers to be deduced by inference from authorized corporate acts, without either a vote or deed or writing." 2 Dill. Mun. Corp. 5th ed. § 793.

"Municipal corporations, like individuals and private corporations, may be liable to actions on implied contracts." 28 Cyc. 685.

"It is well settled at common law that municipalities are liable the same as individuals to pay upon implied promise for labor done or material supplied and received, accepted and used, by such municipality." City v. Morgan (Ohio) 62 N. E. 127; San Francisco Gas Co. v. San Francisco, 9 Cal. 470; Argenti v. San Francisco, 16 Cal. 283; Pimental v. San Francisco, 21 Cal. 362; San Francisco Gaslight Co. v. Dunno, 62 Cal. 588.

"The courts have in some cases of peculiar hardship, and where the circumstances seemed to demand it, come to the relief of persons dealing with municipalities." Fountain v. Sacramento (Cal.) 82 Pac. 637.

"Corporations, as much as individuals, are bound to good faith and fair dealing; and the rule is well settled that they cannot, by their acts, representations, or silence, involve others in erroneous engagements, and then turn around and disavow their acts, and defeat the just expectations which their own conduct has superinduced." Railroad Co. v. Howard, 7 Wall. 392, 413; Parkersburg v. Brown, 106 U. S. 487, 503; Sedgw. Stat. & Const. Law, 2d ed. 73; Pittsburg, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 389; Brown v. Atchinson, 39 Kan. 33, 17 Pac. 465; Livingston v. School Dist. (S. D.) 76 N. W. 301.

"Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make but which was void because of being irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received." Lincoln Land Co. v. Grant (Neb.) 77 N. W. 349; Rogers v. Omaha (Neb.) 107 N. W. 214; Central Bitulithic Paving Co. v. Mt. Clemens (Mich.) 106 N. W. 888; Schneider v. Menasha (Wis.) 95 N. W. 94.

"A city must pay for coal furnished to operate its waterworks, even though the board which contracted for the coal had no authority to do so." Martin-Strelau Co. v. Dubuque (Iowa) 107 N. W. 1013; Port Jervis Waterworks Co. v. Port Jervis, 24 N. Y. Supp. 497, affirmed in 45 N. E. 388.

"The power to make the contract for such articles existed, and the city has had the benefit of the articles and is liable for their value." Kramrath v. Albany, 127 N. Y. 581, 28 N. E. 400; Leonard v. Long Island City, 20 N. Y. Supp. 26; Kramrath v. Albany, 6 N. Y. Supp. 54.

F. G. Kneeland and *Thorp & Chase,* for respondent.

A mere volunteer cannot recover upon implied contract, simply because a benefit has been derived by the city for such services. Bosard v. Grand Forks (N. D.) 13 N. D. 587, 27 L.R.A.(N.S.) 1129, note; Board-Harrison Co. v. Bline (Ind.) 72 N. E. 1034; Board v. Seawell (Okla.) 41 Pac. 592.

"A municipal corporation may also, like a private corporation or individual, become liable on implied contract; but it has been held in

a number of cases that a contract will not be implied which is *ultra vires* or forbidden by law, or made by an unauthorized person or in a manner unauthorized." 28 Cyc. 664, 685 and cases cited; 2 Dill. Mun. Corp. § 797; Shattuck v. Smith, 6 N. D. 56.

"The provisions of that section requiring a yea and nay vote to be taken, and entry made in the records of the board, are undoubtedly mandatory, and must be substantially complied with." City v. Surety Co. (S. D.) 111 N. W. 563; Picton v. Fargo, 10 N. D. 469, 88 N. W. 96.

"Where the statute prescribes the only mode by which the power to contract shall be exercised, the mode is the measure of the power. A contract made otherwise than so prescribed is not binding or obligatory as a contract, and the doctrine of implied liability has no application in such cases." Reams v. Cooley (Cal.) 152 Pac. 293, and cases cited; Goode River Bank v. Township, 1 N. D. 26, 44 N. W. 1002; Appleton v. City (Wis.) 113 N. W. 44; City v. Morgan (Ohio) 62 N. E. 127.

BIRDZELL, J. This is an appeal from an order sustaining a demurrer to the complaint. The complaint purports to state three separate causes of action, and the demurrer was directed to only the third cause. The causes are related, and the court, in ruling upon the demurrer to the third cause, indicated that if the action should be brought to trial he would sustain an objection to the introduction of any testimony under the first and second causes of action, thereby expressing an opinion that the proposition of law which was decisive against the plaintiff as to the third cause of action was also applicable to the first and second. There is nothing before this court involving the legal sufficiency of the complaint as applied to the first two causes of action alleged, but it may be proper to refer to them for whatever bearing they may be thought to have upon the allegations concerning the third cause of action. The complaint alleges as a first cause of action that during the period between February 1, 1918, and July 1, 1918, the plaintiff furnished and supplied to the defendant, at its special instance and request, electric current to be used for lighting the streets and public places of the defendant city; that the reasonable, customary, and usual value of the service was $2,784; that payment therefor has been demanded

and the defendant in response has paid the sum of $2,531 and no more. For a second cause of action it is alleged that the plaintiff furnished to defendant power for the operation of a pump used in connection with the waterworks of the defendant, the value of which, calculated according to a reasonable and customary charge for said services, made and published by the plaintiff, and well known to said defendant, amounts to the aggregate sum of $1,377.82; that payment has been demanded and refused.

For a third cause of action it is alleged as follows: "That continuously from the 28th day of December, 1908, to this date, plaintiff has furnished and supplied to said defendant for the purpose of lighting a public library and reading room within the said city of Jamestown electric current of the value of which, calculated according to a reasonable schedule of rates made and published by the plaintiff and known to the defendant at all times during the period aforesaid, with interest at the rate of 6 per cent per annum from the date at which the same was furnished, amounts to the aggregate sum of $1,402.02. That payment of said sum has been demanded and such demand refused. That there is now due the sum of $1,402.02."

Briefs have been filed which exhaustively treat of the contractual and quasi contractual liability of municipalities. Throughout the briefs and throughout the oral argument, however, both counsel have drawn freely from sources of information in applying authorities that may or may not be applicable to the case in hand when the proof is in. For instance, hypothetical situations are assumed, the bearing of which upon the legal questions presented will depend upon the actual condition of the ordinances of the city, the practice thereunder, and the terms of the franchise of the plaintiff company. True, we might take judicial notice of the ordinances, but they alone would not necessarily be decisive. On account of the variety of ways in which the merits of this case may be affected by considerations, the direct bearing of which we cannot know until the proof is in, we do not deem it to be advisable to enter upon a discussion of the law which can be based upon nothing more substantial than assumed hypothetical situations. We rather regret the seeming necessity that precludes us from considering at length the propositions that counsel have so ably and exhaustively treated in their briefs. The fault, however, lies in the practice that permits ap-

peals in all cases from orders sustaining or overruling demurrers. Without meaning any disrespect to counsel, and without intending to minimize the efforts spent in the presentation of exhaustive briefs, we feel called upon to put the briefs to one side for the present and determine the case upon the bare legal proposition presented.

The statement of the third cause of action is legally sufficient. Whether or not the requisite proof to support it may be forthcoming, we cannot, of course, venture to say. The complaint states that the plaintiff furnished to the defendant, for lighting a public library and reading room, electric current which, at a reasonable rate, was worth the aggregate sum of $1,402.02, and that the defendant has not paid therefor. It is not incumbent on the plaintiff to allege all of the circumstances surrounding the furnishing of this current, and it may appear on the trial that it was furnished in such circumstances that no liability on the part of the city would result, or the contrary might appear. But the allegation is that it was furnished to the city, and that it is not paid for. This is sufficient to state a cause of action, and, in our judgment, this is all that can properly be decided at this time.

For the foregoing reasons the order appealed from is reversed.

THOMAS KRACH, Respondent, v. SECURITY STATE BANK OF NEW ENGLAND, NORTH DAKOTA, a Corporation, Appellant.

(175 N. W. 573.)

Chattel mortgages — action on bond given for warrant of seizure — interest may be recovered in excess of amount of bond.

1. In an action upon a statutory bond given for a warrant of seizure, damages may be recovered against the principal therein in excess of the penalty named, to the extent of legal interest upon the penal sum from the date of the breach thereof.

Chattel mortgages — property taken under warrant of seizure — attorneys' fees may be recovered as part of damages.

2. In such action, reasonable attorneys' fees may be recovered as a part of the damages where the same have necessarily been expended or incurred in defending an action instituted to foreclose the lien of certain chattel mortgages

upon property taken under a warrant of seizure, in order to secure a release and restitution of such property.

Chattel mortgages — pleading form of judgment as set-off.

3. In such action, where the defendant has set up in its answer, as an offset, a judgment secured in a former action, it is *held* not erroneous for the jury to deduct the amount of such judgment from the damages awarded the plaintiff, where such deduction does not operate to take from the plaintiff his property exempt by law.

Opinion filed October 3, 1919. Rehearing denied November 25, 1919.

Action on a bond given for a warrant of seizure, in District Court, Hettinger County, *Crawford,* J.

From an order denying a new trial the defendant has appealed.

Reversed and new trial granted.

Harvey J. Miller, for the appellant.

"Where an attachment is wrongfully issued, the attachment defendant cannot in general recover in an action on the defendant bond for attorney's services in defending the main suit." Ames v. Chirurg (Iowa) 132 N. W. 427; 6 C. J. 542, 544; Massina Sav. Bank v. Garside (Iowa) 130 N. W. 918; Ross v. Jordan (Minn.) 36 N. W. 713; St. Louis Clay Product Co. v. Christopher (Wis.) 140 N. W. 351.

"Where the attachment is not controverted but fails because the principal suit failed, counsel fees cannot be recovered." Vanatta v. Vanatta, 55 S. W. 685; Balinsky v. Gross, 128 N. Y. Supp. 1062.

Jacobsen & Murray, for the respondent.

"Proof of actual possession of the property is sufficient evidence of title." See 38 Cyc. 2085.

"On reversal of a judgment or decree, the law raises an obligation on the part of the party who has received benefits from its enforcement to restore those benefits to the adverse party. . . . Irrespective of the merits of the controversy between the parties." 4 C. J. pp. 1235, 1237, 1238, §§ 3293, 3297, 3298.

"Plaintiff's grain was exempt, and consequently no counterclaim could be allowed against it." See 18 Cyc. 1462.

Bronson, J. This is an action to recover damages upon a bond given for a warrant of seizure. In the trial court a verdict was re-

turned for the plaintiff for $1,195, and from the order of the trial court denying a motion for judgment *non obstante,* or for a new trial, the defendant has appealed. The facts substantially are as follows:

In January, 1913, the appellant instituted an action to foreclose the lien of its chattel mortgages upon the grain of the respondent, and to recover judgment upon certain promissory notes for which such chattel mortgages stood as security. The appellant procured a warrant of seizure, having filed a statutory undertaking therefor, signed by itself and two sureties in the sum of $1,000. Pursuant thereto on January 15, 1913, the sheriff of Hettinger county levied upon and took into his possession certain wheat and oats belonging to the respondent. Subsequently, upon trial of such action in the district court, judgment was rendered against the respondent herein upon such notes, for the foreclosure of such chattel mortgages and for the sale of the property taken in the warrant of seizure. From such judgment the respondent herein appealed to this court, and this court finally, on January 12, 1917, reversed the judgment of the trial court and remanded the cause, with directions to enter judgment for the appellant herein upon one of the notes amounting to $255, with interest and costs, and for dismissal of the action in other respects. Security State Bank v. Krach, 36 N. D. 115–119, 161 N. W. 568. Later this action was instituted in August, 1917, upon a cause of action for damages through the conversion of such grain so taken, and the expenses incurred, and also upon the undertaking given by the appellant herein. Upon the trial of the action in the district court the respondent herein elected to stand upon the cause of action for damages predicated upon such undertaking so given, pursuant to a motion made by the appellant therefor. The appellant in its answer sets up as a counterclaim the judgment secured in the former action, which amounted to $404.72, with legal interest thereon since March 7, 1917. In the submission of the case to the jury, the trial court gave instructions that the respondent was entitled to recover the value of the grain plus legal interest thereupon, and in addition his reasonable attorneys' fees in defending the former action, less the amount of the judgment in favor of the defendant. The jury accordingly returned this verdict for $1,195, which means that the respondent must have been awarded damages of approximately $1,600 less the judgment of the appellant. Upon

this record the appellant herein challenges the judgment so entered upon the ground that the verdict as returned exceeded the penalty of the bond, and, further, that the trial court improperly permitted the plaintiff to submit evidence of his attorneys' fees in defending the former action, and the jury to include in its verdict such attorneys' fees for so defending such former action. Upon the latter contention of the appellant, we are of the opinion that no error was committed by the trial court in submitting to the jury the reasonable attorneys' fees of the plaintiff herein expended or incurred by him in defending the former action. The main contention of the appellant in this regard is that it recovered judgment in such action, and that the plaintiff herein should not be awarded attorneys' fees for defending the main action. This contention is without merit for the reason that it was necessary for the plaintiff to defend the entire cause of action of the appellant in such former action in order to secure the release of this property so seized under the warrant of seizure.

However, we are clearly of the opinion that damages could not be awarded upon the cause of action submitted to the jury in excess of the penalty of the undertaking, with legal interest thereupon from the time of the breach of its conditions. The general rule of law, now supported by the weight of authority, and held applicable in this jurisdiction, is that damages may be recovered in excess of the penalty stipulated in such a bond to the extent of the legal interest accruing on such penal sum from the date of the breach of the conditions thereof, as against the principal therein. See 9 C. J. 133; note in 19 L.R.A. (N.S.) 84. This is in harmony with § 7142, Comp. Laws 1913, permitting interest on damages. In accordance with the computations of the parties a total amount of damages that could have been awarded was approximately $1,400. The jury in estimating the damages of the respondent necessarily awarded him, pursuant to the verdict rendered, approximately $1,600. The verdict therefore was excessive. The respondent, however, contends that the judgment of the appellant was not properly to be considered as an offset against the cause of action upon the undertaking, for the reason that the respondent was entitled to a restitution of his property, the same being exempt by law, without any deduction. This contention is without merit. The deduction of such judgment did not serve to take from the respondent

any part of his property exempt by statute. If such judgment had not been deducted in this action it might have been offset *pro tanto* otherwise upon application of the court. Comp. Laws 1913, § 7706; Cleveland v. McCanna, 7 N. D. 455, 41 L.R.A. 852, 66 Am. St. Rep. 670, 75 N. W. 908.

The order of the trial court denying a new trial is reversed, and a new trial granted, with costs to the appellant.

BIRDZELL and GRACE, JJ., concur.

CHRISTIANSON, Ch. J. (concurring in part and dissenting in part). In an action to foreclose a lien upon personal property a warrant may be issued by the clerk of the court in which the action is commenced, before judgment, commanding the sheriff to seize and safely keep the property to abide the final judgment in the action. Comp. Laws 1913, § 8138. "Before issuing the warrant the clerk must require a written undertaking on the part of the plaintiff with sufficient surety, to the effect that, if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of any seizure under the warrant, not exceeding the sum named in the undertaking." Comp. Laws 1913, § 8140.

In this action plaintiff seeks to recover upon a bond given in an action to foreclose chattel mortgages and conditioned as required by § 8140, supra. It will be noted that the undertaking prescribed by § 8140, supra, is conditioned: First, that plaintiff will pay all costs that may be awarded to the defendant in a principal action; and, second, all damages which the defendant may sustain "by reason of any seizure under the warrant." Manifestly the liability under, and the amount recoverable upon, the bond, is controlled by its provisions. In this case, it is undisputed that no proceedings were had, and no services rendered by any attorneys, for the purpose of obtaining a release of the property seized under the warrant of seizure. All services performed by the attorneys retained by the defendant were performed in defining the foreclosure action. The seizure of the property under the warrant neither increased nor decreased the amount or value of such services. Whatever liability plaintiff incurred for attorneys' fees was not occasioned or increased by the seizure of the property

under the warrant. The rule established by the great weight of authority in the analogous cases of attachment bonds is that a party cannot (in absence of statutory provision to that effect) recover "as damages sustained by reason of the attachment," attorneys' fees expended or incurred in defending the principal action. Frost v. Jordan, 37 Minn. 544, 36 N. W. 713; Ames v. Chirurg, 152 Iowa, 278, 38 L.R.A.(N.S.) 120, 132 N. W. 427; Porter v. Knight, 63 Iowa, 365, 19 N. W. 282; McClure v. Renaker, 21 Ky. L. Rep. 360, 51 S. W. 317; Gonzales v. De Funiak Havana Tobacco Co. 41 Fla. 471, 26 So. 1012; McGill v. W. P. Fuller & Co. 45 Wash. 615, 88 Pac. 1038. This has been held to be true even though jurisdiction was obtained solely by attaching the property of a nonresident who subsequently appeared and defended in the action. Frost v. Jordan, supra; Gonzales v. De Funiak Havana Tobacco Co. 41 Fla. 471, 26 So. 1012. In my opinion the attorneys' fees expended by the plaintiff in defending the foreclosure action do not constitute damages sustained "by reason of seizure under the warrant," and such attorneys' fees are not recoverable by the plaintiff in this action.

I therefore concur in so much of the opinion prepared by Mr. Justice Bronson as orders a reversal of the judgment and order appealed from on the ground that the amount awarded to the plaintiff exceeds that stipulated for in the bond. I also concur in that portion which holds that the judgment obtained in the former action might properly be offset in this case. But I dissent from that part of the opinion which holds that the attorneys' fees expended in defending the foreclosure action may be recovered in this action.

ROBINSON, J., concurs.

FIRST INTERNATIONAL BANK OF COLUMBUS, NORTH DAKOTA, Respondent, v. A. N. BEISEKER, Appellant.

(175 N. W. 637.)

Guaranty — surety may counterclaim for release of security to debtor.

1. An answer in a suit brought to enforce a guarantor's liability, which

alleges that the creditor released to the principal debtor for an inadequate consideration a chattel mortgage which had been given as security for the debt, states matter available to the defendant in an action by way of counterclaim.

Guaranty — guarantor not relieved from liability by refusal of creditor to surrender to him obligations upon which he is liable.

2. Where the obligation of a guarantor of payment had become absolute upon the nonpayment by the principal debtor, he is not relieved from liability by the refusal of the creditor to surrender to him, without payment and for collection, the obligations upon which he is liable.

Guaranty — guarantor not relieved from liability by failure of creditor bank to apply money on deposit by debtor to debt.

3. In the circumstances presented in the instant case, it is *held* that the guarantor is not relieved from liability by the failure of the creditor, a bank, to apply in liquidation of the guaranteed debt money which a principal debtor subsequently placed on deposit.

Opinion filed October 29, 1919. Rehearing denied November 25, 1919.

Appeal from District Court of Wells County, *Coffey*, J.

Modified and affirmed.

Hanchett & Johnson, for appellant.

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor without the consent of the guarantor the original obligation of the principal is altered in any respect, or the remedies or rights of the creditors against the principal in respect thereto is in any way impaired or suspended." Secs. 6668, 6672; Leonhardt v. Citizens State Bank, 76 N. W. Rep. 452, 453; Northern State Bank v. Bellamy, supra; Holmes v. Williams, 53 N. E. Rep. 93 (Ill.).

B. L. Wilson, for respondent.

"A guaranty of the payment of an obligation, without word of limitation or condition, is construed as an absolute guaranty." 12 R. C. L. page 1064.

An absolute guaranty is one by which the guarantor is bound immediately upon the principal failing to perform his contract without further condition to be performed. 20 Cyc. page 1398; 149 N. W. 904; Section 6662, Compiled Laws, 1913.

Where a contract is made guaranteeing the payment of an obligation, without any words of limitation or condition that it is an absolute

guaranty, and the legal effect of the obligor becomes absolute upon the failure of the principal to pay. Home Savings Bank of Fremont v. Shallenberger, 146 N. W. 993; Cowine v. Dodd et al. 149 N. W. 904.

The law governing a guaranty of payment and the guarantor's liability thereon has been very clearly established in this state. Citizens Bank of Rugby v. Lockwood et al. 156 N. W. 47; Robert Thorp Co. v. Laughlin, 4 N. D. 167; Fisk v. Stone (6D.) 50 N. W. 125; Greely v. McCoy, 52 N. W. 1050 (S. D.); McConnon & Co. v. Laursen et al, 22 N. D. 604.

Under § 6683, C. L. 1913, there must be explicit notice given that, in case the creditor shall fail to proceed against the principal, the surety will hold himself discharged, to make this defense available. Kennedy v. Flads, 4 Dak. 319 (29 N. W. 667), and cases cited in note at end of case; Bailey Loan Co. v. Seward, 69 N. W. Rep. 58 (S. D.); H. S. Davenport v. State Banking Co. 8 L.R.A.(N.S.) 944, and annotated notes attached thereto.

Birdzell, J. This is an appeal from an order sustaining a demurrer to certain paragraphs in the answer on the ground that the matters alleged do not constitute a defense to the cause of action alleged in the complaint. The cause of action is based upon the breach of a contract whereby the defendant and appellant, upon selling his stock in the First International Bank of Columbus, North Dakota, amounting to a controlling interest, guaranteed the payment of the bills receivable. The portion of the contract which is material upon this appeal is as follows: " . . . and in part consideration for the purchase of any payment of said stock I, the said A. N. Beiseker, hereby guarantee to the said First International Bank of Columbus, North Dakota, the payment at maturity of each and every note or other obligation now owned and held by said bank promptly at the maturity thereof, and do hereby agree to pay the same in case said notes or other obligations are not paid to said bank at the maturity thereof, and I do hereby waive presentment, protest, and notice of nonpayment to the said bank of any and all of such notes and obligations as may not be paid at maturity, with interest at the rate of (8) eight per cent from maturity, I, the said A. N. Beiseker, to have twelve (12) months from the date of maturity of any and every unpaid obligation due to said

bank to make payment thereof, and upon payment thereof by me such note or obligation to be turned over and assigned to me by said bank without recourse."

The complaint alleges the nonpayment of notes aggregating the principal sum of $1,375.61. The date of maturity of each of the notes is set forth, it appearing from the allegations that there are three demand notes, dated in the spring of 1915, and that the remainder, twelve in number, fall due either September 1st, October 1st, October 15th, or November 1st, 1915. The portions of the answer to which the demurrer is directed allege that the bank and the purchasers of the defendant's stock exonerated, released, and discharged the defendant from all liability as guarantor by reason of their failure to avail themselves of their full opportunity to collect the notes from the makers in the fall of 1915 and in the year 1916; that if they had used reasonable diligence in the collection of the same they would have been fully paid by the makers, who were primarily liable; that the defendant in the fall of 1915 demanded of the plaintiff a list of the unpaid notes in order that he might use such efforts as he deemed advisable to force the collection thereof, with which demands the plaintiff neglected and refused to comply. Also that in November, 1915, the defendant sent a collector to the bank to get all of the guaranteed paper remaining unpaid, with instructions to go into the country, see the makers personally, and use his best efforts to secure payment, but that the cashier of the bank refused to allow the defendant's collector to have the notes for collection, which refusal resulted in depriving the defendant of his right to enforce payment of the guaranteed paper in the fall of 1915.

In paragraph 5 the defendant alleges as to two notes given by one Conrad Berg, aggregating $285, that the bank failed to avail itself of its right to apply in payment funds which Conrad Berg had on deposit with the bank subsequent to the maturity of the notes in amount more than sufficient to pay them. Similar allegations are set forth regarding a note of North St. Olaf Church for $16.75; and, as to a note of M. A. Maher for $482.60, it is alleged at the time the stock of the defendant was sold the bank held ample security in the shape of a chattel mortgage upon certain hogs belonging to Maher, in Burke county, which mortgage was released by the bank without the knowl-

edge or consent of the defendant in the fall of 1915 upon the payment of a small amount which was due upon the note, which release operated to deprive the defendant of the benefit of the security previously held by the bank.

The guaranty in the instant case is concededly a guaranty of payment, but the appellant contends that the portions of the answer referred to set forth defenses to the liability sought to be enforced on the ground that the acts alleged discharged the guarantor as a matter of law. It is practically conceded by the appellant that the delay of the plaintiff bank and its failure to take active steps for the collection of the notes when they became due in the fall of 1915 would not amount to a discharge of the guarantor or constitute a defense.

But it is seriously urged that, as to the Maher notes, the waiver and release of the chattel security without the knowledge or consent of the defendant constitute a defense to that part of the cause of action wherein it is sought to recover on the defendant's guaranty of the Maher notes. To sustain this portion of the answer the defendant and appellant relies upon the principle according to which the creditor is required to exercise care in conserving security which he holds for the payment of the debt at the peril of discharging a surety or guarantor to the extent of the damage suffered through the dissipation of the security. (See Scandinavian American Bank v. Westby, 172 N. W. 665.) We are of the opinion that the allegations in this portion of the answer set forth matter which is properly available to the defendant in this action. It is true that the damage which the defendant has sustained, if any, by reason of the facts alleged, might more properly be set forth as a counterclaim, but we are not concerned here with the formality of the pleading,—only with its substance. Under well-recognized principles of law it is the right of the surety or guarantor to demand that the creditor shall carefully utilize or preserve any security he may hold from the principal debtor for the payment of the debt. If the creditor fails to fulfil his obligation in this respect, the surety is relieved to the extent of the damages suffered.

It is also contended that the allegations in paragraph 4, to the effect that the bank refused to furnish the defendant with the list of unpaid notes which he required for his protection, constituted a matter of defense. There is no merit in this contention. Neither was the bank

required to deliver the notes to the defendant's collector. Under the contract the bank was not obliged to transfer the notes, either to the guarantor or the principal debtor, until they were paid. While the guarantor was granted a year's time in which to meet his obligation to the creditor, the obligation was nevertheless fixed and became absolute upon the failure of any debtor to pay his obligation at maturity. Had the guarantor required possession of the notes for his own protection, he could readily have discharged them by making payment to the bank and could then have demanded their transfer under the contract.

With respect to the allegations concerning the failure of the bank to assert what is termed its banker's lien upon the funds of some of the makers of the notes who were alleged to have had money on deposit after the maturity of the notes sufficient to meet them, we are of the opinion that these allegations do not constitute a good defense. The contract contemplates that the purchasers of the stock will continue to operate the bank, and that they would consequently be interested in maintaining the good will of their patrons. To require the bank, therefore, to apply money subsequently deposited by those debtors, subject to general checking, at the peril of discharging an absolute liability which the guarantor had voluntarily assumed and which it was to his own advantage to assume, would tend to deprive the bank of a portion of the benefit contemplated. It is a doubtful proposition in any case whether a surety or guarantor is relieved by the failure of a bank to apply in liquidation of the guaranteed debt money which the principal debtor places on general deposit. (See 1 Brandt on Suretyship, 3d ed. § 487.) But we are satisfied that the guarantor is not relieved by such failure, where the effect would be as above stated.

While upon this appeal it is found necessary to modify the order appealed from, there is no occasion for costs being imposed upon the respondent. That portion of the pleading which is found to state matters of defense should have been separately pleaded as counterclaim. For the above reasons the order appealed from is modified to the extent of overruling the demurrer as to the matters alleged concerning the Maher notes. As so modified, the order appealed from is affirmed. Neither party is entitled to costs upon this appeal.

GRACE, J. (concurring in part and dissenting in part). I concur in the opinion of Justice Birdzell in the holding that the release by plaintiff of certain chattel security, to M. A. Maher's notes, without the knowledge or consent of the defendant, constitutes a defense or counterclaim to that part of the cause of action wherein it is sought to recover on the defendant's guaranty on the Maher notes, thus reaffirming the principle in this regard, announced by this court in the case of Scandinavian American Bank v. Westby, 172 N. W. 665.

I further concur that the bank was not required to deliver the notes in question in this case to the defendant's collector for the purpose of collection. From the remainder of the opinion, I dissent. The defendant sold the plaintiff the notes in question and guaranteed payment of the same at the maturity thereof. His guaranty was not placed upon the notes, but was contained in a separate contract. It is immaterial, however, whether the guaranty is on the note or in a separate contract, the legal effect is the same.

The liability of the defendant, under his contract of guaranty, was a secondary one. The principal debtors were those who owed the notes which defendant guaranteed, and they were the primary debtors.

After the defendant had guaranteed the notes and turned them over to the plaintiff, it became the owner of the notes, and the debtors were primarily liable to the bank. After the maturity of the notes some of the makers of the notes had money on deposit in the plaintiff's bank which, if applied to the discharge of such notes by the bank, which notes were in the bank at the time when such debtors had deposits therein, as above indicated, would have been sufficient to discharge or partially discharge those notes.

The defendant claims it was the duty of the bank towards him as guarantor to apply the deposits thus in its bank, belonging to any of the debtors, to the discharge of their notes then past maturity. The plaintiff claims it had no duty in this regard. It is only fair to say there is, among the decided cases, a minority and majority rule in this regard. Pennsylvania, Maryland, Kentucky, Wisconsin, and some other states recognize the minority rule, holding that it is the duty of the bank to apply the deposits to the discharge of the note or obligation upon which the surety or guarantor is liable if the debt is directly

due to the bank by the maker of the note upon which the guaranty or surety contract obtains.

The majority rule, it may be conceded, is the reverse. It must be remembered, however, that the reasoning in both the majority and minority rule is not based upon a statutory lien by the bank upon the deposits, but, in either case, is based upon no actual or statutory lien whatever, but upon the right usually claimed by banks to offset any debts which the bank owned and held against the depositor against money or debts which it owed the depositor. In other words, the relation between the depositor and the bank is considered one of debtor and creditor, in which the bank is the debtor, thus owing the depositor the money which is deposited in the bank, and possessing or having obligations of the depositor in the form, for instance, of a promissory note, which is past due and which is owing to the bank. Banks have generally claimed the right to charge such notes, etc., against the deposits of the depositor in the way of an offset; but the majority rule holds that while the bank has this right, it is not required to charge up to the depositor a note owing by him to the bank upon which there is a surety or guarantor on penalty of releasing the surety or guarantor. The rule is a harsh one and is devoid of equity or justice. The minority rule is much the better rule and is based upon justice and equity. It impairs no right of the bank; it compels the debtor to pay a just debt which he alone actually and primarily owed, and thus relieves those whose liability is a secondary one.

It will be seen, from what has above been said, that the majority and minority rule are each based upon the right or duty of the bank to apply the deposits in the manner above indicated, or not to apply it, as the case may be. In other words the rule, either majority or minority, is not based upon a statutory lien.

In this state banks by statute are given a general lien, dependent on possession. Section 6868, C. L. 1913, reads thus: "A bank has a general lien, dependent on possession upon all property in its hands, belonging to a customer for the balance due to him from such customer in the course of the business." Hence, the majority rule above referred to does not apply in this case where there is a statutory lien.

In those cases, there was no statutory lien, nor any lien at all but the mere right claimed by reason of the relation of debtor and credi-

tor of the bank to offset the debt owing from the depositor to it, against the debt owing by the bank to the depositor on account of the debtor's deposit, then in the bank.

The majority rule is also that the creditor shall present the note to the maker at maturity, and, if dishonored, to use due diligence in giving notice to surety; that there shall be no extension of time given without the consent of the surety; that the creditor will apply, in payment of the debt or hold in trust for the benefit of the surety, all securities which he may procure for that purpose by contract or operation of law, and use due care in the protection and care of such securities, so that if compelled to discharge the debt the surety may be subrogated to them.

The majority rule also recognizes that a mortgage, pledge, or lien constitutes security. In this case, the bank had a lien upon the deposits of its depositors by operation of law.

In the case at bar, the plaintiff had security by reason of such lien. It could have charged up against several of the makers of the notes which were guaranteed by the defendant, the amount due upon such notes, having in its banks deposits sufficient for that purpose belonging to them.

Equity and justice required that it should have done so. It was the absolute owner of the notes. The makers of the notes were primarily liable; the defendant was secondarily liable. The plaintiff had a legal right, having the notes in its bank, in its possession, and the deposits by the makers thereof, in its bank in its possession, and the statutory lien thereupon, to charge such notes against the respective deposits, and it was its duty to do so, and defendant should be released from his obligation as guarantor to the extent that the respective deposits were not so applied by the plaintiff, when any of the debtors herein had a deposit in the bank after the maturity of his note, it appearing that plaintiff, at all times in question, was the owner of the notes and had possession thereof.

In view of the statutory lien afforded banks in this state, such lien must be considered a security, and, as such, the defendant was entitled to the benefit of a mortgage or other security of any of the notes which he sold the bank, the payment of which he guaranteed. In this regard, the reasoning and rule applied in the cases which hold to the majority

rule above mentioned sustains this position. The statutory lien of the bank on the deposits of the primary debtors, in the circumstances of this case, amounts to an actual security and enforceable lien. It is made so by operation of law, and is just as much a lien as if it were created by the contract of the parties in pursuance of law. It thus became the duty of the plaintiff to protect such security. This, under the principle laid down in the majority rule above stated. The bank should be held to the same degree of care in the protection of this class of security as any other.

The majority opinion, in part, excuses the negligence of the plaintiff in this regard on the theory that the bank might impair the good will of its patrons if it were required, in the circumstances of this case, to charge, against the deposits, any notes owing by the depositors. Such contention has no merit whatever. The question in this case is not whether the plaintiff's business may or may not be benefited. The main question in this case is: What are the legal rights of the parties as defined by the statutes of this state or principles of law which are based upon justice and equity? The question presented is not one of policy, but of law. It should be decided in accordance with law, justice, and equity.

An extended discussion of the entire subject is contained in a note to 8 L.R.A. New Series, p. 945.

A. L. GULBRO, Appellant, v. VAL ROBERTS, Respondent.

(175 N. W. 616.)

Appeal and error — appeal does not lie from order denying jury trial until after trial of equitable issue.

This case presents an appeal from an order denying plaintiff a jury trial only after the trial of equitable issue presented by the answer.

Held that the order does not in any way determine the merit of the action or prevent a judgment from which an appeal might be taken.

Appeal dismissed.

Opinion filed November 3, 1919. Rehearing denied November 25, 1919.

Appeal from District Court of Nelson County, *Robinson*, J.

Flynn & Traynor, for appellant.

When the plaintiff in the case at bar conceded the equitable issue involved, if there was an equitable issue involved, the plaintiff was then entitled to a jury trial. Lehman v. Coulter (N. D.) 168 N. W. 724; Tinker v. Farmers State Bank (Iowa) 160 N. W. 349; N. D. Comp. Laws 1913, § 7608; N. D. Const. § 7.

R. J. Roberts (*Engerud, Divet, Holt, & Frame* of counsel), for respondent.

This is an interlocutory order, and consequently is not appealable unless an appeal is provided for by the statute either expressly or by necessary implication. Patterson v. Ward, 6 N. D. 359; Bolton v. Donovan, 9 N. D. 575; Stimson v. Stimson, 30 N. D. 78.

The final order for judgment in an action is not appealable. Re Weber, 4 N. D. 132; Persons v. Himmons, 1 N. D. 244; Strecker v. Railson, 19 N. D. 677.

The same kind of an order in a special proceeding is appealable. Oliver v. Wilson, 8 N. D. 593; State ex rel. v. Meyers, 19 N. D. 805; Dow v. Lillie, 26 N. D. 512; Strecker v. Railson, 19 N. D. 677; Whitney v. Ritz, 24 N. D. 576.

When an equitable defense is presented it is to be decided by the court as if it were an equitable proceeding, before other issues are determined, because the determining of the equitable issues in favor of the defendant would put an end to the litigation, and obviate the necessity of trying the legal issues involved. Arnett v. Smith, 11 N. D. 55; Cotton v. Butterfield, 14 N. D. 465; Thayer v. White, 3 Cal. 228; Argnello v. Edinger, 10 Cal. 160; Estrada v. Murphy, 19 Cal. 272; Weber v. Marshall, 19 Cal. 457; Martin v. Zellenbach, 38 Cal. 310 (see opinion on rehearing at p. 319); Fish v. Benson (Cal.) 2 Pac. 457; Kimball v. McIntyre (Utah) 1 Pac. 168; Hotaling v. Bank (Neb.) 75 N. W. 243; Dupont v. Davis, 35 Wis. 639; So. End Min. Co. v. Finney (Nev.) 35 Pac. 89; Petty v. Malier, 54 Ky. 591; Sheeful v. Murty, 30 Ohio St. 50; Martin v. Turnbaugh (Mo.) 54 S. W. 515.

In some states the rule is established by statute. Deloy v. Chapmen, 2 Or. 245; Thomas v. Bronx Realty Co. 70 N. Y. Supp. 206.

In some states the order of trial is in the discretion of the court. Crosby v. Lumber Co. (Minn.) 101 N. W. 610; McCreery & Co. v. Myers

(S. C.) 49 S. E. 848; Tinker v. Bank (Iowa) 160 N. W. 349; Thatcher v. Stickney Bros. (Iowa) 55 N. W. 488.

The right to an attachment or the ground for it or the validity of the levy or the right to the property levied on are not involved in the trial of the action in any way. Sobolisk v. Jacobsen, 6 N. D. 175; Jewett Bros. v. Hoffman, 14 N. D. 115.

ROBINSON, J. This is an appeal from an order of the district court denying plaintiff a jury trial without first trying the equitable issues presented by the counterclaim. The statute gives the right to appeal from an order affecting a substantial right made in an action when such order in effect determines the action and prevents a judgment from which an appeal might be taken. Comp. Laws, § 7841, subd. 1. Manifestly the order in question does not in any way determine the action or prevent a judgment from which an appeal might be taken. If the order was erroneous the proper course was for the plaintiff to submit to it,—reserving an objection,—and then to appeal from a judgment, if it should be against him. Were it permissible to appeal from orders regarding the procedure, there would be no end to litigation.

Appeal dismissed, with costs.

GRACE, J. (dissenting). Majority opinion states that this is an appeal from an order of the district court denying plaintiff a jury trial without first trying the equitable issues presented by the counterclaim.

As we view the matter, this statement is not in accord with the record. The plaintiff, in his complaint, claims that the defendant purchased from him a certain Delco light plant for $409.20; that the expense of installing the same was $65, which the defendant agreed to pay, and demands judgment for $474.20.

The defendant, in his answer, maintains that he made a contract with the plaintiff whereby the defendant should act as agent or factor of the plaintiff, whereby he was authorized to sell for the plaintiff, within certain territory, Delco light plants. By way of counterclaim, defendant further alleges that he did sell to divers persons, naming them, Delco light plants; that, by the terms of the contract, he was to receive 10 per cent of the selling price of each of said plants as a commission for making sale thereof, and 25 per cent of the amount received

for wiring and installing such plants, and claims commission in the sum of $477.28, and claims a factor's lien for that amount upon the Delco light system sold by the plaintiff to the defendant, to recover the purchase price of which this action was brought.

The defendant, at the time the case was called for trial, claimed that the case presented both legal and equitable issues, and asked that the equitable issues be first determined. Thereupon, the plaintiff conceded that, if the defendant recovered in the action, he was entitled to a lien upon the lighting system, which is the subject of this suit. This disposed of the equitable issue. The plaintiff demanded a jury trial, which was refused, and the court ordered, notwithstanding the plaintiff conceded the defendant a lien upon the property in question in event he had any recovery, that the equitable issues be first determined and the right to a jury trial be denied until the next term.

The concession made by the plaintiff that the defendant should have a lien in case of recovery disposed of every equitable issue in the case. Nothing remained to be done except to determine the amount, if anything, which the defendant had promised to pay for the lighting system, the amount, if anything, due the defendant by reason of his counterclaims, all of which could result only in a money judgment, all of which was a question of fact exclusively for the jury.

The order appealed from contains the following language:

The above-entitled action having been duly and regularly placed upon the calendar of the above court for trial at the regular July, 1919, term thereof, and having been regularly reached for trial at such term while a jury was in attendance upon said term on the 11th day of July, 1919, the same being a regular jury term of said court, the Honorable Chas. N. Cooley, judge of said district, presiding, the plaintiff appearing by his attorneys Flynn & Traynor of Devils Lake, North Dakota, and the defendant by his attorneys R. J. Roberts of Lakota, North Dakota, and Honorable Edward Engerud of Fargo, the plaintiff and the defendant being also present at said time in court, and upon the said case having been called for trial, the defendant having objected to the trial of the said cause to a jury until the issues raised by the defendant's counterclaim should first be determined in a trial to the court without a jury, it being contended by the defendant that the counterclaim is an equitable cause of action and that the same must

be tried to the court without a jury as an equitable action, and such equitable issues determined before the issues set forth in the complaint can be determined and before any trial to a jury thereof can be had, and the plaintiff having opposed the said objection and demanded a jury trial of said action and that the same at once proceed to trial, and having conceded for the purposes of the action that in the event of any recovery on the part of the defendant on his counterclaim that the same might be considered as a lien upon the personal property mentioned in said counterclaim as prayed for in said counterclaim, and having demanded an immediate jury trial of all of the issues involved other than the issues conceded as above; and the court, having heard the arguments of the counsel for the parties and being duly advised in the premises, thereupon ruled that the said action be tried to the court without a jury upon the equitable issues raised in the counterclaim, and that the plaintiff be denied a jury trial of the action set forth in the complaint at the present term of this court and until after the trial to the court on the counterclaim, now therefore, It is hereby ordered that the objection of the defendant is hereby sustained, and it is further ordered that the issues presented by the counterclaim herein be tried to the court without a jury as an equitable action, and that the plaintiff be and is hereby denied a jury trial of the issues set forth in the complaint at this term of court and until a trial of the issues of the counterclaim have been tried to the court.

Dated July 23, 1919.

Chas. M. Cooley.

The order is an appealable one. Under subdivision 4, § 7841, Comp. Laws 1913, it involves the merits of the action. Such an order is appealable.

When the plaintiff conceded the defendant should have a lien on the property in question, if he recovered anything in the action upon his counterclaim for commissions, there remained no equitable matters for the court to try. All of such were disposed of. If the order is allowed to stand, the plaintiff would be entirely, by such procedure, defeated of his constitutional right of trial by jury.

The question of the sale of the lighting system by the plaintiff to defendant, the purchase price thereof, the sales of lighting systems by defendant, if any, the price received for them, the commissions due

thereon,—are all exclusively questions of fact for the jury, which, when determined by it, could result in a money judgment only, in favor of one of the parties.

The effect of the order appealed from is to require all such questions to be determined by the court, and this, though the only equitable issue in the case, had been disposed of by the plaintiff, conceding that defendant had a lien upon the lighting plant purchased by him from the plaintiff for any recovery he might obtain in the trial of the action to a jury.

The order appealed from is erroneous. It is not a procedural order. Every question of procedure was disposed of when the plaintiff conceded the defendant a lien for any amount he might recover. The order operates to force the plaintiff to try questions of fact to the court only, which he has a legitimate and constitutional right to try to a jury. For the effect of the order inevitably is that every issue will be tried and determined before the court, for after the concession of the defendant's right to a lien, this disposed of the equitable issue. Nothing remains to be tried excepting the question of the amount of money which defendant is indebted to plaintiff on plaintiff's cause of action, or how much money plaintiff is indebted to defendant by reason of defendant's counterclaim. Hence, the effect of the order is to deny plaintiff his constitutional right to a jury trial in an action for the recovery of money only.

The counterclaim of defendant against the plaintiff, exclusive of the question which is conceded, is but an action against plaintiff for the recovery of money only.

The order should be reversed, and the matter should be allowed to be presented to a jury upon the plain questions of fact above indicated.

HERMAN STEINMUELLER, Respondent, v. DOROTHEA LIEBOLD, Appellant.

(175 N. W. 729.)

Judgments — vacating and setting aside judgment where the court was deceived as to certain material facts — may be vacated even after the expiration of one year.

1. Where the trial court makes an order or judgment, and judgment is

entered upon such order, and it is afterward made to appear to it that it was deceived as to certain material facts, at the time of the making of such order, and which affected the making thereof, as between the parties, it may vacate and set aside such judgment and order at any time, even after the expiration of one year.

Judgments — order for judgment — where order is filed contrary to facts in the case, court may change judgment to conform to facts on own motion.

2. Where a trial court made a mistake in signing an order for judgment, which was contrary to the facts in the case, it could, upon the mistake being called to its attention, correct its records so as to conform to the facts, and this, upon its own motion, under and by virtue of its inherent powers.

Opinion filed November 29, 1919.

This is an appeal from an order of the District Court of La Moure County, *J. A. Coffey,* J.

Order affirmed.

Hutchinson & Lynch, for respondent.

G. G. Lasell and *M. C. Lasell,* for appellant.

GRACE, J. This appeal involves the question of $19 costs in a certain lawsuit brought by the plaintiff against the defendant, and which was in open court at the February, 1918, term at La Moure, dismissed by the parties without costs to either party, though the defendant claims she was to be awarded costs.

The minutes of the court of February 4, 1918, show that the action was dismissed without prejudice and without taxable costs on motion of plaintiff and order of the court. The defendant procured an order of the court to be signed on February 5, 1918, dismissing the action, in which it was stated that the matter came on regularly to be heard at the February term of court at La Moure, North Dakota, the plaintiff being represented by his attorneys, Hutchinson & Lynch, who were present in court, and the defendant was represented by her attorneys, G. G. Lasell and M. C. Lasell, who were present in court.

The order further shows that the motion for dismissal was made by plaintiff's attorneys. It further stated that the action was ordered dismissed without prejudice, but with costs to be taxed in favor of the defendant.

On the 22d day of April, 1918, the defendant in pursuance of that order procured a judgment to be entered for $19. The defendant thereafter caused an execution to be issued on the judgment. On the 22d day of April, 1918, the court made the following order:

"The above-entitled case having been on the calendar at the last term of court, and the plaintiff by his attorneys, Hutchinson & Lynch, having moved a dismissal, without prejudice and without costs, and the clerk having entered a dismissal on the minutes without prejudice and without costs, and the defendant by her attorneys, Lasell & Lasell, having subsequent thereto presented an order to the court allowing costs to be taxed for the defendant, and the defendant by her attorneys having noticed the taxation of costs for April 15, 1918, and the plaintiff having filed written objections to such taxation, and it appearing to the court that there is a misunderstanding and an honest dispute as to the right to tax costs, now on motion of Hutchinson & Lynch, it is ordered that the matter be referred to and be presented to the court at the next term thereto, at La Moure, when both sides may be heard. Dated this 22d day of April, 1918. By the Court, J. A. Coffey, Judge."

In June, 1919, a motion was made by the plaintiff, supported by affidavit, for the vacation of the judgment and the order upon which such judgment was based. The court did vacate the order and the judgment, and in his order vacating them in substance stated that the order was entered erroneously by the court, and further provided that the judgment docketed on the order and the execution issued out of the district court be vacated, set aside, and declared to be null and void and of no force or effect, said order for judgment having been signed by the court on a belief that its contents were known to the plaintiff. The court also based its dismissal on the minutes of the court. This order was procured *ex parte* by the plaintiff's attorneys, and not served upon the defendant.

The order of the court made on the 22d day of April, 1918, was, by mail, sent to the attorneys for the defendant, who admitted service on the order, and sent it, by mail, to plaintiff's attorneys, accompanied by the following letter:—

"I herewith hand you the order with service admitted, as of this date. I surely shall not violate the order; however, the order does not state facts as they are, and I do not believe the court has any right to

make any such order. When will the court have a *next* term at La Moure?"

The judgment was entered on the 22d day of April, which is the date of the order revoking the order of February 5, which became first effective; it does not appear from the record in this case. It does appear, however, that the court signed the order of February 5, under the belief that its contents were known to the plaintiff. It also appears that the court believed the case was dismissed without prejudice and without costs, and the entry in its minutes so shows.

The tenor of the order of April 22 is to the effect that the court was deceived as to the true status of matters at the time he signed the order of February 5th.

Most of the judges of the district court of this state are usually very busy. Their entire time is occupied in the discharge of their duties. Many important matters are constantly occupying their attention. The order of February 5th is a matter of little significance. The probabilities are very great that the court did not refer to its minutes, and relied, as is often the case, upon the attorneys presenting their order, to have it in proper condition and rightfully and properly drawn in accordance with the established facts. If the court is at any time deceived in the making of an order, it can as a general rule, of its own motion, rectify the matter.

It does appear the court was deceived at the time it made the order of February 5th, and it no doubt would not have made the order if its minutes which refer to this matter had been called to its attention. There was no intentional deception of the court by anyone. This, however, would be immaterial if the court was deceived. The procuring and entering of the judgment, under such circumstances, as between the parties, could be vacated and set aside at any time when called to the attention of the court, even after the expiration of one year from the entry thereof. Williams v. Fairmount School Dist. 21 N. D. 198, 129 N. W. 1027; Mougey v. Miller, 41 N. D. 81, 169 N. W. 735.

There is another principle that also applies in this case. The court having made a mistake of fact, it had the inherent right, upon its own motion, to correct its records to make them conformable to the facts, and could thus vacate the judgment in this case, even after the expiration of one year.

The defendant cannot be heard to say that the action was dismissed without notice, for the order of April 5th, presumably presented by her attorneys, shows that both parties were present in court by their attorneys at the time of the dismissal of the action; thus, both parties had full and complete notice of the dismissal thereof.

The order appealed from is affirmed. Respondent is entitled to statutory costs of appeal.

ROBINSON, J., concurs.

BRONSON, J. I concur in the result.

ROBINSON, J. (concurring). This is an appeal from an order vacating a pretended judgment in favor of defendant Dorothea for costs amounting to $19. The judgment was entered in February, 1917; the order vacating it in June, 1918. It was made on the ground that the judgment was entered by mistake, contrary to the minutes of the clerk showing that the action was to be dismissed without costs or prejudice. Time does not run against the right of a court to vacate a pretended judgment entered by mistake, deception, or fraud, because it is in fact no judgment at all. Such an appeal merits no consideration or serious discussion. It should be dismissed and thrown out of court in a summary manner. Counsel should have more respect for themselves and the court than to appeal such a petty matter.

Affirmed.

CHRISTIANSON, Ch. J. (concurring). On February 4, 1918, the trial court made an entry in its minutes to the effect that said action "was dismissed without prejudice and without taxable costs on motion of attorney for plaintiff and order of the court." On the day following, to wit, February 5, 1918, the trial court signed an order for judgment in said action wherein it "ordered that said action be and the same is hereby dismissed, without prejudice to the starting of another action, but with costs to be taxed in favor of the defendant." Thereafter the defendant's attorney prepared and served statement of costs and disbursements, and notice of taxation. The matter was noticed to be heard before the clerk of said

district court on April 15, 1918. The plaintiff appeared before the clerk and objected to the taxation of costs "on the ground that the action was dismissed without prejudice and without costs, and that at all times that was the understanding upon which the action was to be dismissed and was dismissed." On April 22, 1918, the clerk of the district court entered judgment, in accordance with the order for judgment, for a dismissal of the action, and taxed costs in favor of the defendant in the sum of $19. On the same day the trial court entered an order, upon the application of plaintiff's attorney, to the effect "that the matter (of taxation of costs) be referred to and be presented to the court at the next term thereof at La Moure, when both sides may be heard." The matter was never brought on for hearing. On June 13, 1919, plaintiff's attorney presented to the court an *ex parte* application, supported by the affidavit of one of plaintiff's attorneys, that the order of judgment and judgment formerly made and entered be vacated and set aside, and that a new order for judgment be entered or that the former "order be reformed to the effect that said action be dismissed without prejudice and without costs to either party." The trial court, without any notice whatever to the defendant, made an order to the effect "that the order heretofore entered by this court dismissing without prejudice and with costs to the defendant, and the judgment entered and docketed on said order, and the execution issued out of the district court in said La Moure county, be and the same hereby are vacated and set aside and declared to be null and void and of no force and effect." The defendant has appealed from such order.

While there seems to be grave doubt as to the power of the district court to amend the judgment upon an *ex parte* application in the manner, and under the circumstances, in which it was ordered in this case (Black, Judg. 2d ed. § 164; 23 Cyc. 878; 15 R. C. L. p. 674, § 126), that question is not—nor is any question as to the correctness or validity of the order—before this court. For, by the plain words of our statute, "orders made by the district court or the judge thereof without notice are not appealable." Comp. Laws 1913, subd. 5, § 7841. *Hence, the appeal should be dismissed.*

BIRDZELL, J., concurs.

ABE CROSSON, Appellant, v. H. F. KARTOWITZ, C. R. Stranahan, and American Surety Company, of New York, a Corporation, Respondents.

(175 N. W. 868.)

Mortgages — mortgage may be reformed while title of land remains with the mortgagor.

1. A mortgage which contains an erroneous description, the result of the mutual mistake of the parties thereto, may be reformed so as to comply with the intentions of the parties, if such reformation is made while the title of the land remains in the mortgagor.

Mortgages — rights of holder of unrecorded mortgage under attachment proceedings against land.

2. Under § 5594, Comp. Laws 1913, which provides that every conveyance by deed, mortgage, or otherwise of real estate shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any part or portion thereof whose conveyance, whether in the form of a warranty deed or deed of bargain and sale, etc., is first duly recorded; or as against any attachment levied thereon, or any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record, prior to the recording of such conveyance. It is *held* that the attachment proceedings referred to means one against the person in whose name the land appears of record, and that the attachment proceedings must be against such person in order for the lien acquired by such attachment to come within the provisions of the recording act.

Mortgages — necessity of recording mortgage.

3. The lien acquired by attachment herein was subsequent in point of time to the execution and delivery of a prior unrecorded mortgage. The attachment was against a person other than the one in whose name the title of the land appeared of record at the time of the attachment. The recording act having no application, it is *held* the lien by attachment is inferior to the lien of the mortgage, and that the equity acquired by the attachment lien is inferior to the equity acquired in the land by the mortgage.

Attachment — attaching creditor's lien attaches only to the interest of the defendant at time of attachment.

4. In view of the provisions of the recording act, where the record title to the premises attached is vested in a party other than the defendant in the attachment, the attaching creditor's lien attaches only to the interest of the defendant in the land at the time of the attachment.

Execution sale — purchaser who buys with notice of unrecorded conveyance not good faith purchaser.

5. Where the attachment lien or the judgment is one which comes within the protection of the recording act, a purchaser at the execution sale is a good-faith purchaser for a valuable consideration. Where, however, the attachment lien or judgment is not such as to come within the provisions of the recording act, a purchaser who, prior to or at the time of the execution sale, has notice of a prior unrecorded conveyance, is not a good-faith purchaser for value, and his equity acquired by his purchase is inferior to that acquired by the prior unrecorded mortgage.

Opinion filed November 8, 1919. Rehearing denied November 25, 1919.

Appeal from a judgment of the District Court of Renville County, *K. E. Leighton,* J.

Judgment reversed.

Geo. I. Rodsater, for appellant.

Section 5594 of Compiled Laws of 1913, the statute on which this action hinges, has been before and considered by this court in a number of cases. We cite Investment Co. v. Nordhagen, 123 N. W. 390; Nordhagen v. Investment Co. 129 N. W. 1024; Mott v. Holbrook, 148 N. W. 1061; McCoy v. Davis, 164 N. W. 951; Ildvedsen v. Bank, 139 N. W. 105.

In the absence of statute the holdings are practically all one way. Leonard v. Fleming (N. D.) 102 N. W. 308, before enactment of present statutes.

"A purchaser of real property at a sheriff's sale under attachment acquires no title as against a deed delivered before levy of the attachment, but recorded after attachment and before judgment, under Comp. Laws, 3294, the attachment creditor not being a purchaser for value." Robin v. Palmer (S. D.) 67 N. W. 949.

"Title acquired by an unrecorded deed is superior to that obtained by a purchaser at an execution sale under attachment levied after the deed was made and delivered." Chicago, B. & Q. R. Co. v. First Nat. Bank (Neb.) 78 N. W. 1064.

"An attachment lien on land binds only the actual interest of the attachment debtor therein." Harroll v. Gray (Neb.) 2 N. W. 1040.

"A prior unrecorded deed made in good faith for a valuable consideration so as to pass the legal title will take precedence of an attach-

ment, provided such deed is recorded before any deed is recorded which is based upon such attachment." Franz v. Vincent (Iowa) 133 N. W. 121.

"In the absence of fraud, the rights of an attaching creditor can be no greater than those of the debtor in the property attached." Moorman v. Gibbs (Iowa) 39 N. W. 832.

"A lien by attachment is not good against a prior unrecorded deed although the attachment creditor had no notice." Bush v. Bush (Kan.) 6 Pac. 794.

Trust deed contained erroneous description of the property intended to be conveyed. Before correction a creditor of the grantor attached the land intended to be conveyed. After attachment correction was made by a new trust deed. Action to reform instituted. It was held that the action would lie, and that the attachment lien was subsequent and inferior to the deed. Carver v. Lassellute (Wis.) 15 N. W. 162.

In this case the transfer with the erroneous description was made prior to the attachment of the judgment lien. The court held that the conveyance could be reformed, and that the judgment lien would be subsequent to the lien created by the instrument containing the erroneous description. Daley v. Tomberlake, 94 Ala. 221.

"A judgment creditor is not protected by a statute requiring record of conveyances from the reformation by equity of a mistake in a description in a recorded mortgage." Coats v. Smith, 160 Pac. 517.

An attaching or judgment creditor is in much the same position as a trustee in bankruptcy. Zartmen v. Bank, 216 U. S. 134; McCall v. Knight Invest. Co. (Kan.) 94 Pac. 126; 6 Pom. Eq. Jur. § 681. 2 Pom. Eq. Jur. 3d ed. §§ 721–724 and especially note (d) to § 721.

In many jurisdictions where, by the express terms of the statute, these liens are superior to prior unrecorded conveyances and mortgages, the equity arising from a mistake, being an unrecordable interest, is held, notwithstanding the statute, to be superior to the subsequent recorded lien. In general, see Ft. Smith Mill. Co. v. Mikles, 61 Ark. 123, 32 S. W. 493; Kerschner v. Fracier, 106 Ga. 437, 32 S. E. 351; Rea v. Wilson, 112 Iowa, 517, 84 N. W. 539; 34 Cyc. 954.

We refer, without citing, to notes and text in 16 L.R.A. 668, and 21 L.R.A. 33.

John H. Lewis, for respondent.

"Every conveyance by deed, mortgage, or otherwise . . . not so recorded shall be void . . . against any attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance." Comp. Laws 1913, § 5594; Investment Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390; Nordhagen v. Investment Co. 21 N. D. 25, 129 N. W. 1024; Ildvedsen v. Bank, 24 N. D. 227, 139 N. W. 105; Mott v. Holbrook, 148 N. W. 1061; McCoy v. Davis, 164 N. W. 951; Cummings v. Duncan, 22 N. D. 534, 134 N. W. 712; Hallett v. Alexander (Colo.) 34 L.R.A.(N.S.) 337; 2 Pom. Eq. Jur. note to § 721.

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GRACE, J. This is an appeal from a judgment of the district court of Renville county. The action is one wherein the plaintiff seeks to have a certain real estate mortgage reformed. A statement of the material facts are as follows: Wilhelmina Kartowitz, at the time of her death, was the record owner of the southeast quarter of section 33, township 163 north, range 87, west of the 5th principle meridian, Renville county, North Dakota. As near as we can ascertain from the record and the statement in open court at the time of the argument of the case, she died intestate about May 9, or June 9, 1916; the record would seem to show that her death occurred on June 9th. At the argument before this court, counsel for the plaintiff stated, he had examined the records in the probate office, and that her death occurred on May 9th. If her death were conclusively shown to have occurred on either date, it would not necessarily affect the validity of the mortgage which was dated June 9th, and could have been executed on that day after the time of her death. No real stress has been placed upon this point in the briefs, and we will assume, so far as the date of her death is concerned, that the validity of the mortgage is not affected thereby.

H. F. Kartowitz, one of the defendants, is one of her three heirs. The final decree in distribution of her estate has not been made, and the records in the office of the register of deeds of Renville county show, and at all times during the pendency of this action have shown that she was the record owner of the land above described.

On the 9th day of June, 1916, the defendants H. F. Kartowitz and C. R. Stranahan executed and delivered to the plaintiff a certain real estate mortgage whereby it was intended to mortgage the above-described land. The consideration stated in the mortgage was $2,000. The mortgage was filed for record in the register of deeds' office of Renville county on June 20, 1916. The mortgage, however, instead of containing the description of the land above described, contained the following description of land: The southeast quarter of section 33, township 164, range 87. On July 5, 1916, the American Surety Company of New York brought an action against H. F. Kartowitz, and attached the southeast quarter of section 33, township 163, range 87. In September, 1916, a new mortgage was taken by the mortgagee and on the same day filed and recorded in the office of the register of deeds of Renville county. This mortgage was taken to correct the error in the description of the mortgage first given. Judgment in the attachment action was rendered in favor of the plaintiff against H. F. Kartowitz, on February 9, 1917. An execution in the attachment action was issued March 27, 1917.

On May 1, 1917, this action was commenced, and a notice of *lis pendens* filed and recorded, in which was described the land intended to be conveyed in the mortgage of June 2, 1916.

On May 1, 1917, the date of the commencement of this action, the plaintiff had actual and constructive notice of the mistake in the description of the mortgage dated June 9, 1916, which is the mortgage sought to be reformed.

On May 2, 1917, the southeast quarter of section 33, township 163, range 87, was sold under the execution above mentioned which was issued in the attachment action, and was purchased by the American Surety Company.

The defendants H. F. Kartowitz and C. R. Stranahan have never been the record owners of the southeast quarter of section 33, township 163. The plaintiff claims it to be a fact that, before the levy of the attachment, defendant had actual notice of the existence of plaintiff's

mortgage on the land in section 33, township 163. This, however, is denied by the defendant. We will further advert to this contention later in the opinion.

The plaintiff's complaint is in proper form and substantially sets forth the facts above mentioned. The defendants answer in substance to a denial of all the facts alleged in the complaint, with the exception that it admits that at the time of the attachment and levy thereof by the defendants, the records in the office of the register of deeds of Renville county, North Dakota, did not show that any of the defendants in that action had any interest in said described land, and further admits that the interest of H. F. Kartowitz in said premises is based on heirship.

The appellant desires a review of the entire case in this court. It does not appear that there was any other specification of error made or served in the appeal. The questions presented for decision in this case are not many. They may be stated as follows:

(1) May a mortgage which contains an erroneous description, the result of the mutual mistake of the parties thereto, be reformed so as to be in compliance with the intentions of the parties?

(2) If such mortgage is reformed, does it become a superior and prior lien to the lien of the attaching creditor, where the record title to the premises attached is in the name of one who is neither mortgagor nor defendant in the attachment case?

(3) The record title to the premises attached being vested in a party other than the defendant in attachment, does the attaching creditor's lien attach to anything but the actual interest of the defendant in attachment?

(4) Where a purchaser at the sale under execution has actual and constructive notice of a mortgage intended to cover the land sold, does he acquire an interest superior or subject to the mortgage?

As to the first of these questions there is no need of discussion. That a court of equity has the right and power to reform an instrument that when reformed it will comply with the intention of the parties, there is not the least doubt, if such reformation is made while the title of the land remains in the mortgagor.

The second question is one which is much more difficult to answer. The answer thereto depends upon the construction of our recording act

which is § 5594, Comp. Laws 1913, which in so far as it is material to this controversy reads thus: "Every conveyance by deed, mortgage or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, whether in the form of a warranty deed or deed of bargain and sale, deed of quitclaim and release, of the form in common use or otherwise, is first duly recorded; *or as against any attachment levied thereon, or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance.*

"Every conveyance aforesaid, heretofore executed, and not so recorded, and which shall not be so recorded within three months from the taking effect of this article, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any portion thereof, claiming under or through a deed of quitclaim and release, of the form in common use, heretofore so recorded, or which may be recorded before such prior conveyance."

The words of the statute above set forth which we are required to construe is that which is underscored. The person, in whose name title to the land appears at the time the attachment was levied on such land, was Wilhelmina Kartowitz. She was not a party to nor a defendant in the attachment proceedings. Neither was any judgment obtained against her, nor was she a defendant in the action.

The action was brought by the American Surety Company, against Herman Kartowitz. In the course of that action, the plaintiff therein caused a warranty of attachment to be issued and served, and by virtue of said writ of attachment a levy was made upon the southeast quarter of section 33, township 163, the record title of which land at the time of the levy was in the name of Wilhelmina Kartowitz.

As we construe the statute, the levy of the attachment upon land creates a superior lien only as against outstanding, unrecorded mortgages, deeds, conveyances, liens, etc., theretofore executed and delivered to the holders thereof by the person in whose name the title to such land appears of record, unless the party maintaining the attachment proceedings has actual notice of such outstanding conveyances.

The defendant in the attachment proceedings did not have record title to the land. Hence, the attaching creditor has not brought himself within the terms of the statute so as to invoke the same in its behalf.

For the purpose of illustration and analysis let it be assumed that the suit of the American Surety Company instead of being against Herman Kartowitz, had been against Wilhelmina Kartowitz, in whose name the record title appears, and it had proceeded by attachment and levied the same upon the land, which the record shows to be in her name; and assuming, further, that she had theretofore executed and delivered conveyances which were outstanding and unrecorded of which the American Surety Company had no actual notice or knowledge,—it is clear that the lien so acquired by attachment would, under the recording act, be a prior lien to such outstanding, unrecorded conveyances.

Such a case as we have assumed would clearly come within the provisions of the statute. In the case before us, however, the American Surety Company has not brought itself within the terms of the statute.

The party whom it sued did not have record title to the land in question, nor was the record title of the land attached, in his name; and, for it to be entitled to the priority claim under the recording act, it would appear from the language of that act that the suit and the attachment proceedings must be against one in whom the record title appears at the time of the suit and the levy of the attachment.

Let us assume that part of the recording act under consideration read as follows: "Or as against any attachment levied thereon, or any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears, or at the suit of any party against a person having any interest in the land whether such interest appears of record or not."

If the recording act did so read, the American Surety Company's present legal status would be in agreement therewith. If the construction is given to the statute for which it contends, the statute would have to be construed to mean that which the above assumed language sets forth. "Should the language of the recording act be added to by judicial construction so as to include interest in land, the title of which is not of record?" To give such a construction, it would appear that much would have to be read into the recording act.

While the recording act should receive a liberal construction to effect

its purposes, it should not be extended to include matters and conditions which are contrary to its plain terms.

A writ of attachment is issued in connection with an action which has been commenced. A proceeding in attachment cannot stand alone. When properly issued upon a statutory ground, the purpose of the same is to attach and safely keep so much of the defendant's property not exempt from execution as may be sufficient to satisfy the plaintiff's demand, etc.

As an attachment can be levied only in connection with a suit commenced, the attachment referred to in the section which we are discussing must be connected with a suit. Then with what suit is it connected, and what is the intention of the statute in this regard? It is our opinion that the attachment is permitted to be levied at the suit of any party against the person in whose name the title to such land appears of record, a suit having been commenced to recover a demand from such person.

The alleged lien of attachment by the American Surety Company was not procured in an action against the party in whose name the title to such land appeared of record. If it procured a lien at all, it is not one within the contemplation of § 5594.

If the American Surety Company acquired knowledge that H. F. Kartowitz had an interest in the land in question by reason of his being one of the heirs of Wilhelmina Kartowitz, it could not have acquired such knowledge from an examination of the record title of the land. There was nothing of record showing that he had any interest in the land. Hence, if such knowledge was acquired by the American Surety Company, it was not from the record title, but from some other source. If this be true, no reliance was placed upon any knowledge acquired from the record title, and the American Surety Company has not brought itself within the protection of the recording act. The recording act refers to instruments which appear of record, and one seeking the protection of it must rely upon the record.

The American Surety Company, however, claims that H. F. Kartowitz being an heir of Wilhelmina Kartowitz, whose death had previously occurred, that within the contemplation of the recording act his interest did appear of record, and cite as authority for this position the Colorado case entitled Hallett v. Alexander, 50 Colo. 37, 34 L.R.A. (N.S.) 328, 114 Pac. 490, Ann. Cas. 1912B, 1277.

We do not, however, regard this case as authority, for the reason that the Colorado statute which such decision construes is materially different from the statute of North Dakota. The statute of Colorado, being § 836 of Mills's Annotated Statutes of the state of Colorado for the year of 1912, reads thus: "All deeds, conveyances, agreements in writing of, or affecting title of real estate or any interest therein, and powers of attorney for a conveyance of any real estate or any interest therein, may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such office, and not before such deeds, bonds and agreements in writing shall take effect as to subsequent bona fide purchasers, and encumbrances by mortgage, judgment or otherwise not having notice thereof."

It will be noticed that this statute does not contain similar words to our statute which are the very subject of the contention between the parties to this suit, that is, the words of our statute above set forth which are underscored.

Having arrived at the opinion that the American Surety Company did not bring itself within the provisions of the recording act, the next matter for consideration is to determine, exclusive of the recording act, the relative priority of the mortgage in question and the alleged attachment lien. It thus becomes necessary to analyze the circumstances surrounding the execution and delivery of the mortgage. We think it is conceded, and if not so it must be conceded, that H. F. Kartowitz and Stranahan executed and delivered the mortgage to the plaintiff in this action in which they intended to mortgage to him their interest in the southeast quarter of section 33, township 163, for the purpose of securing a certain $2,000 promissory note. By the mutual mistake of the parties, the wrong township was described in the mortgage; in other words, township 164, instead of the proper township 163. This mistake did not invalidate the mortgage as between the parties; it still remained a valid equitable mortgage upon the land intended to be conveyed; and, upon such mutual mistake being proven in a court of equity, such mortgage would be reformed so as to comply with the intentions of the parties at the time of executing the same.

In point of time, the mortgage was prior to the date of the levy of the attachment. Such mortgage gave to the plaintiff herein an equitable interest in the land, prior to any interest acquired by reason of the lien claimed by attachment.

The lien, if any, acquired by attachment gave to the American Surety Company an equitable interest in the land, which was acquired subsequent to the equitable interest acquired in the land by plaintiff.

The recording act having no application, which of such equities should be deemed the superior? It would seem that the equitable interest which was prior in point of time would constitute a superior equitable interest in such land. In point of time, the plaintiff by his mortgage acquired a superior equitable interest, which must be considered to be, and is prior to, the equitable interest, if any, acquired by the American Surety Company.

The American Surety Company, however, contend that the Minnesota case of Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 19 Am. St. Rep. 259, 45 N. W. 1136, is decisive in its favor of the equities involved in the case at bar. That case, however, presents an entirely different state of facts to this. In that case, one A. G. and W. F. Wilcox, each owned an undivided half of 640 acres of land, which constituted one farm.

On the 23d of February, 1886, A. G. Wilcox and his wife executed a deed to one Thornburgh, by which it was intended to convey the entire farm. Then Thornburgh executed a deed to the wife of A. G. Wilcox. By mistake the scrivener who drew the deeds failed to insert the description of the land. Several months thereafter the mistake was discovered, and new conveyances were executed which contain correct descriptions, which deeds were recorded February 28, 1888. In the meantime, however, and just prior to the time of recording the new deed, a judgment in favor of one Leominster was docketed in the county in which the land was situated.

The plaintiff in that case, the wife of A. G. Wilcox, claimed that her equity to have the deed reformed gave her a superior position; that she was entitled to have her deed reformed, and that it should have precedence over the judgment in question. The court denied her any relief, and very properly so; for in that case the title to the land remained of record in the name of A. G. Wilcox, the person against whom the judgment was obtained.

At the time the judgment was docketed against him in the county in which the land was situated, he was the record owner of the title thereto; and land appeared in his name. The judgment creditor had no notice of the outstanding deed. That case came squarely within the

provisions of the Minnesota recording act, and, under the same state of facts, the case would come squarely within the provisions of our recording act; for the land at all times remained in the name of the record owner until the docketing of the judgment. The case is entirely different from the one at bar. In this case, the land sought to be subjected to the lien of the attachment never appeared of record in the name of H. F. Kartowitz.

It is, therefore, our opinion that the plaintiff's mortgage constituted a prior lien to that of the American Surety Company so far as the question of priority is decisive of the issues involved herein.

The American Surety Company, however, claims there was no consideration for the mortgage, and in effect claims that it was fraudulent. The pleadings form no issue upon either of these matters. No consideration is a defense which must be pleaded, and the same is true of fraud. The answer contains no allegations relative to no consideration or fraud. Conceding, however, that there may be some evidence in the record tending to question the consideration, and assuming that the proper motion was made to amend the pleading to correspond with the proof, we are still of the opinion that the American Surety Company must fail in this action.

The plea of no consideration is an affirmative defense, and he who pleads it or relies upon it has the burden of proving it by preponderance of the evidence. In this respect, we are of the opinion the American Surety Company has wholly failed. The promissory note which the mortgage secures imports a consideration as does the mortgage. In addition to this, the plaintiff has adduced considerable testimony of a positive character which tends to show a valid consideration for the mortgage. Such negative testimony as the American Surety Company elicited on cross-examination of plaintiff's witnesses does not overcome the presumptions of a good and valuable consideration for the mortgage, and the positive testimony relative to the consideration thereof.

Fraud is not pleaded, and there is no competent evidence to establish it.

If the attachment lien had been secured and an equity thus acquired in the land prior to the time of the execution and delivery of the mortgage by which an equitable interest was acquired in the land, then such attachment lien would be prior to the mortgage. Such attachment lien

was not so secured; it was secured subsequent in point of time to the lien of the mortgage, and the equity in the land acquired by the attachment lien is subject, and inferior, to the equity acquired by the mortgage.

Respondent cites in support of its contentions the following cases: Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390; McCoy v. Davis, 38 N. D. 328, 164 N. W. 951; Ildvedsen v. First State Bank, 24 N. D. 227, 139 N. W. 105; Mott v. Holbrook, 28 N. D. 251, 148 N. W. 1061.

These are all decisions by the supreme court of this state. They, however, in no manner, support the contentions of the respondent. In each of the cases, the judgment or attachment lien was against the record owner of the title, and were properly held to be good as against an unrecorded conveyance of which they had no notice.

In those cases and the circumstances and facts contained in them, a purchaser at an execution sale on a judgment or an attachment lien would be a subsequent purchaser in good faith and for value. This for the reason that the execution sale was upon a judgment or a lien that was a prior lien under the recording act. The facts and circumstances are quite different in the case at bar.

It has been determined in this case that the land attached, and against which the attachment lien is claimed, at the time of the attachment, was not in the name of the party against whom the attachment proceedings were brought. The attachment proceedings in this case are not as contemplated by the statute, as they are not against the party in whose name the land appears of record. Hence, our recording act does not apply, and the lien acquired by such attachment was one acquired otherwise than by the provisions of the recording act.

It has also been determined that the attachment lien was subsequent in point of time to the lien of the mortgage; the recording act having no application to this state of fact, it must follow that a purchaser of such land at the execution sale of such attached land who had actual notice of the prior existing lien of the mortgage acquired an interest in such land inferior to that conveyed by such outstanding prior unrecorded conveyance, of which he had actual notice at the time of such sale.

The attachment lien in this case bound only the actual interest of the attachment debtor in the land at the time the attachment was levied.

His only actual interest in the land at the time of the attachment was the residue remaining after the execution and delivery of the mortgage conveying an interest in the land as evidenced by the mortgage. Chicago, B. & Q. R. Co. v. First Nat. Bank, 58 Neb. 548, 78 N. W. 1064; Frantz v. Vincent, 152 Iowa, 680, 133 N. W. 121; Bush v. Bush, 33 Kan. 556, 6 Pac. 794.

The judgment of the District Court is reversed, and the case is remanded to it for further proceedings not inconsistent with this opinion.

The appellant is entitled to statutory costs of appeal.

BIRDZELL and BRONSON, JJ., concur.

ROBINSON, J. I dissent.

CHRISTIANSON, Ch. J. (dissenting). Under our statute every conveyance of real estate in this state, by deed, mortgage, or otherwise, unless recorded in the office of the register of deeds of the county where such real property is situated, is "void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any part or portion thereof, whose conveyance, whether in the form of a warranty deed or deed of bargain and sale, deed of quitclaim and release, of the form in common use or otherwise, is first duly recorded; or as against any attachment levied thereon, or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance." Comp. Laws 1913, § 5594. The provision extending the benefit of the recording act to attaching creditors was incorporated into our laws in 1903. See Laws 1903, chap. 152. It was borrowed from Minnesota. See Ildvedsen v. First State Bank, 24 N. D. 233, 139 N. W. 105; Minn. Stat. 1894, § 4180.

At the time of her death, Wilhelmina Kartowitz was the actual and record owner of certain real estate. Upon her death her heir or heirs became the apparent owner or owners of the legal record title, and the public might deal with such heir or heirs in the same manner and with the same effect, so far as the recording acts are concerned, as they might have dealt with the deceased during her lifetime with respect to the same property. 23 R. C. L. p. 249, § 116; Welch v. Ketchum (1892)

48 Minn. 241, 51 N. W. 113. "Following the record as a guide the title seems to be in the heir at the moment of the ancestor's death." Wade, Notice, § 222. See also 23 R. C. L. p. 249, § 116; Hallett v. Alexander, 50 Colo. 37, 34 L.R.A.(N.S.) 328, 114 Pac. 490, Ann. Cas. 1912B, 1277. And "a purchaser from an heir for valuable consideration and without notice will be protected to the same extent as though he had purchased from the ancestor himself." Webb, Record of Title, § 184. In other words, for all purposes contemplated by the recording act an heir will be deemed the owner and holder of the record title, and an instrument of conveyance by him will be deemed an instrument properly in the chain of title. I am, therefore, of the opinion that the attachment levied by the American Surety Company in its action against H. F. Kartowitz falls within the provisions of § 5594, supra. At the time the attachment was levied and notice of levy filed against the real estate involved in this controversy, there was no mortgage of record against the premises. In fact the plaintiff had no mortgage which could be so recorded. There is also a strong probability that there was no consideration for the mortgage, and that it was executed as part of a fraudulent scheme to enable H. F. Kartowitz to prevent the American Surety Company from collecting its claim against him.

ABRAHAM GOLDMAN, Appellant, v. FARGO IRON & METAL COMPANY, a Corporation, Respondent.

(175 N. W. 728.)

Bankruptcy — effect of promise to pay debt regardless of discharge in bankruptcy — promise is sustained by the evidence.

In this case the verdict is well sustained by the evidence, the facts and the probability.

Opinion filed December 3, 1919.

Appeal from the District Court of Cass County, Honorable *A. T. Cole*, J.

From a verdict in favor of defendant on its counterclaim, plaintiff appeals.

Affirmed.

Harry Lashkowitz, for appellant.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." Comp. Laws 1913, § 5903; Deacon v. Mattision, 11 N. D. 190.

A custom or usage which is repugnant to the terms of an express contract is not permissible to operate against it, and evidence of it is inadmissible; for while such evidence may be admissible to operate what is doubtful, it is never admissible to operate what is clear. 12 Cyc. 1091; Kees v. Christensen, 144 N. W. 766; Cavers Elevator Co. v. Dodge Elevator Co. 171 N. W. 696; Lasshore etc. v. Richards (Ill.) 18 N. E. 794; Ryan v. Dubuke, 83 N. W. 1073; Melcoke v. Chicago etc. R. Co. 74 N. W. 301; Kearey v. Thuett, 50 N. W. 126; Apking v. Hoffer, 104 N. W. 177; McDuffee v. Caldwell, 173 N. W. 355; Young v. Metcalf Land Co. 18 N. D. 441; Washabough v. Hall, 4 S. D. 160, 56 N. W. 82; Robert v. Minn. Thresh. Mach. Co. (S. D.) 67 N. W. 607.

While by a discharge in bankruptcy the debts of the bankrupt are extinguished through the expression of the law, a subsequent promise, together with the moral obligation, may revive or recreate the debt. Bartlett v. Peck, 5 La. Ann. 669; Jacobs v. Carpenter, 151 Mass. 16, 36 N. E. 676; Coo v. Rosene, 38 L.R.A.(N.S.) 577; Mattheson v. Needham, 122 N. Y. 408; Brewer v. Boynton, 39 N. W. 49; Scheper v. Briggs, 28 App. Div. 115, N. Y. Supp. 869.

There must be an unconditional promise to pay the debt, an acknowledgment of the debt for which a promise to pay is to be implied. 25 Cyc. 1325.

Barnett & Richardson, for respondent.

ROBINSON, J. This is an appeal from a verdict and a judgment against the plaintiff for $395.07 and interest. The complaint avers that in July, 1916, by telegrams and letters, the plaintiff agreed to purchase, and the defendants to sell to him, 300 tons of scrap iron, to be shipped to the plaintiff f. o. b. at Steelton, Minnesota, during the months of August, September, October, November, and December, 1916. The defendants did not ship or deliver the scrap iron, though plaintiff avers that he was ready and willing to receive and pay for same, to his damage, $1,881. On the trial it appeared that during the months of August, September, and October there was an embargo on shipments,

and during that time Goldman forbade the defendants to make shipments and thereby released defendants from the terms of the contract. They had not agreed to make all the shipments in November and December. On this cause of action the jury found in favor of the defendants, and the verdict is well sustained by the testimony.

The second part of the verdict and the judgment is on a counterclaim, which avers that prior to July 1, 1916, the plaintiff was indebted to the defendants in the sum of $5,000 for goods, wares, and merchandise sold and delivered to him at his request; that after receiving such goods and merchandise, to wit, in February, 1915, the plaintiff was adjudged bankrupt and discharged from his debts, and that afterwards, in 1916, the plaintiff did promise and agree with the defendants to pay the sum due to them regardless of the bankruptcy proceedings. He admits that the sum due was $395.07 and interest. For that sum, as it appears, on December 11, 1911, Goldman made to defendants a promissory note, and thereby, for value received, promised in four months' time from date to pay defendants $395.07, with interest at 7 per cent. The verdict was for the sum due on that note, and Goldman admits that it had not been paid. He had owed the defendants several thousand dollars on other notes and acceptances, but it seems the same had been transferred to the bank, so that when Goldman went into bankruptcy, there was due to the defendants the sum of $395.07 and interest. On this counterclaim there was no dispute, only in regard to the subsequent promise of Goldman. He flatly denied the promise. William Andrew, secretary of the defendant company, testified that at Fargo in 1916, in the presence of himself and Sam Paper, the president of the company, Goldman said that as soon as he got through the bankruptcy proceeding, "you boys won't suffer any loss from me; you won't lose a cent." Sam Paper testifies: "I said to Mr. Goldman, 'What are you going to do in the bankruptcy proceeding; what is going to happen to us?' He said: 'You boys don't worry. As soon as I get through with my bankruptcy I will pay you every cent.'" Then there are other facts and circumstances pointing strongly in the same direction. The parties were entering upon a new deal, and Goldman wanted to give assurances of his honesty, and of course the bankruptcy proceeding did not pay the debt nor in any way discharge the moral obligation to pay it.

On the record we assume, as did the jury, that Mr. Goldman is as honest as gold; that the moral obligation to pay the debt weighed heavily on his conscience; that he was anxious to continue on friendly and good business relations with the defendants. Hence, it was but natural that he should promise to pay every cent, and, also, he was advancing in years and doubtless contemplated on pride and satisfaction in going with a good conscience to the better land, there to meet his illustrious and honest ancestors, Abraham, Isaac, and Jacob.

Judgment affirmed.

CHRISTIANSON, Ch. J., and BIRDZELL, J., concur.

BRONSON and GRACE, JJ., concur in the result.

FRED STEVENS, Respondent, v. MRS. FRANK BARNES and Mrs. Ed. Wrede, Doing Business Under the Firm Name and Style of Barnes & Wrede, Appellants.

(175 N. W. 709.)

Negotiable instruments — promissory note — no execution nor delivery when procured by fraud.

1. Where a promissory note is procured by fraud and misrepresentation, there is no legal execution nor delivery of it, and it is of no legal force or effect.

Negotiable instruments — fraud in securing signature — detaching note from other instrument a material alteration.

2. Where one, through himself or agent, falsely and fraudulently procures another to sign a paper, purporting to be an order for goods, to which is attached a promissory note, the two instruments being separated only by a perforation, and the note is, after the delivery of the order, detached from it, such detachment constitutes a material alteration of the note, and destroys its legality if any it had.

This is true, even if in the order there are words authorizing said note to be detached; for they only show more clearly the fraudulent purpose of the combination of the two instruments.

Negotiable instruments — when fraud shown burden of proof shifts.

3. Fraud, at the inception of the alleged contract and note, having been estab-

tablished, the burden shifted to the indorsee to prove by fair preponderance of the evidence, that he was a good-faith purchaser, for value, before maturity, without notice. This he has failed to do.

Opinion filed November 8, 1919.

Appeal from the judgment of the District Court of Ransom County, *Frank P. Allen,* J.

Judgment reversed.

Bangert & Nollman, for appellants.

"A written instrument has no valid existence until delivered in accordance with the intention of the parties." Guild v. More, 32 N. D. 432.

Nothing will excuse culpable misrepresentations, if you find any were made, short of proof that they were not relied on, either because the other party knew the truth, or because he relied wholly on his own investigation. Stevens v. Venema (Mich.) 168 N. W. 531; Stevens v. Pearson (Minn.) 163 N. W. 769; Pom. Eq. Jur. § 891.

There is no proof that plaintiff was a holder in due course or establishing his good faith. Sweet v. Anderson (N. D.) 170 N. W. 869; Pratt v. Duncan, 171 N. W. 337; Guild v. More, 32 N. D. 432.

Kvello & Adams, for respondent.

Where a holder takes from a bona fide holder he occupies the same position as his transferrer, notwithstanding he may have actual notice of defenses, was a purchaser after maturity or not a purchaser for value. 8 C. J. 466, § 685; Comp. Laws 1913, § 6943.

Fraud not having been established, it is presumed as a matter of law, that appellants, having signed the contract and note, had previously read them and knew the contents thereof; and, having affixed their signatures, they will not be heard to deny knowledge of the contents of the contract. Standard Mfg. Co. v. Slot (Wis.) 98 N. W. 926; David Bradley Co. v. Banta (Neb.) 98 N. W. 697; Fulton v. Sword Medicine Co. (Ala.) 40 So. 393; Slaughters v. Gerson, 13 Wall. 379; Andrews v. St. Louis Smelting Co. 130 U. S. 463; Kimmell v. Skelly, 62 Pac. 1067.

A negotiable instrument is not avoided where the maker has made, authorized, or consented to the alteration. Comp. Laws, 1913, § 7009.

When the maker expressly consents to the detachment of a contract from a note he is absolutely liable on the note both to the payee and a bona fide holder. Price v. Cochran, 1 Bibb (Ky.) 570; Weinstein v. Citizens Bank, 69 So. 972; Pratt v. Rounds, 169 S. W. 848.

The better holding is that a promise or order to pay a definite sum, plus or minus a definite sum of discount, is negotiable. 8 C. J. 146, note 93; Loring v. Anderson (Minn.) 103 N. W. 723; Farmers Loan & T. Co. v. Planok (Neb.) 152 N. W. 390, L.R.A.1915E, 564.

GRACE, J. This action is one which was brought in the county court of Ransom county on a purported promissory note. By stipulation between the parties, the action was tried in the district court of that county. It was tried to a jury, but, at the close of the testimony, counsel for each of the parties made a motion for a directed verdict. Thus, under the former decisions of this court, the case became a court case.

The complaint states a cause of action upon the promissory note. Before stating the contents of the answer, it may be well to state the substantial facts of the case.

On September 18, 1914, one Edwin Acker, a salesman for Donald-Richards Company, secured an order from the defendant for a certain bill of goods which was signed by Mrs. Frank Barnes. To the order for the goods was attached the promissory note. The order and the note were one piece of paper, the note being separated from the order by perforation.

At the time of the trial, Mrs. Frank Barnes, was not present, it being claimed that she was out of the state. The following stipulation was agreed to, by and between the counsel for the respective parties:

"It is stipulated and agreed, by and between counsel, that prior to the execution of the instrument in suit in controversy, the Donald-Richards Company, through one of its agents, had sold J. I. Rue, a merchant in Enderlin, North Dakota, goods, wares, and merchandise of the same nature and composition as the articles sold to the defendants for which the instrument in controversy was given in part payment. It is further stipulated and agreed that the witness, Mrs. E. W. Wrede, will testify that at the time of the taking of the order attached to the deposition taken on the part of the plaintiff, and marked exhibit 'C,' and herewith offered in evidence, together with the instrument sued upon in this ac-

tion, the said Acker, agent of said Donald-Richards Company, stated to this witness and her partner, Mrs. Frank Barnes, that the said instrument taken together constituted an order for goods, and did not constitute a note, but that the second portion of said instrument, now marked exhibit 'A,' which was attached to exhibit 'B' was to represent merely the manner in which the goods, or payment for the goods should mature; it is further stipulated that said instrument, exhibit 'A,' was signed by Mrs. Frank Barnes for the firm of Barnes & Wrede after said representations had been made in the presence and hearing of both the witness and signer of exhibit 'A,' to each of said parties said agent addressing the witness and Mrs. Barnes jointly."

The contract and note were sent to Donald-Richards Company, and the testimony by deposition shows that the note was detached from the contract, and afterward delivered to the Iowa State Bank as part of the collateral security for a loan upon $1,000, which testimony shows to have been on or about the 7th of September 1914. Deposition testimony further shows that the note by the bank was indorsed to Fred L. Stevens on March 5, 1915, who claims that the consideration he paid for the indorsement and delivery of the note was the taking up by him of the $1,000 loan made by the Iowa State Bank to Donald-Richards Company, Stevens now claims to be the owner of the note, and claims there is nothing paid upon the same.

The answer of the defendants is a general denial, and, in addition thereto, a further and separate defense, which is in substance as follows: That on or about the 18th day of September, 1914, at Enderlin, North Dakota, one Edwin Acker, the salesman and agent of the Donald-Richards Company, through fraud and misrepresentations, induced the defendants to execute an order for certain goods sold by the Donald-Richards Company; that in order to induce these defendants to make and execute said order for said goods, the agent, Acker, stated and represented to these defendants that said company sold goods to but one customer or firm in each city, and that the defendants would have the exclusive sale of said line of goods in the city of Enderlin; that said statements and representations were false, fraudulent, and untrue, and made for the sole and only purpose of inducing these defendants to sign said order; that the defendants believed in and relied upon said statements and representations, and by reason thereof, and not otherwise, and

without knowledge of the falsity thereof, executed said order and parted with the possession to said Donald-Richards Company, or its agent aforesaid; that such statements and representations were fraudulent and untrue, and were known to be false and untrue at the time they were made. As a further defense, the defendants denied execution of the note, and alleged that attached to, and forming a part of the order so given, and made by these defendants by reason of the false, fraudulent representations as aforesaid, was a certain printed form, in substance, as alleged in the complaint, and which plaintiff alleges to be a certain note in the sum of $94.50, due in instalments, but that said form was attached to and formed a part of said order so obtained, and was for the sole and only purpose of indicating the time within which said goods would be paid for, and was not delivered by the defendants, and was not received by Donald-Richards Company, and never became the note of the defendants; that at the time of delivery of said order and said alleged note, they constituted but one instrument, and the defendants allege that said note was never delivered and never became an obligation of the defendants, and that the defendants are not liable thereon.

The defendants further allege that since the execution of said order, as aforesaid, the defendants learned that the agent for Donald-Richards Company, did sell the same line of goods to others in the city of Enderlin, and that immediately upon learning this condition, they notified the said Donald-Richards Company; that they would not accept the goods, and did then and there offer to restore the goods to the Donald-Richards Company, in case it had parted with possession, and did then and there offer to rescind the contract, but alleges that Donald-Richards Company, was not then in position to restore to the defendants their said order and alleged note, and did then and there positively refuse to do so.

The defendants further alleged that they never received the goods, and allege that they have never been tendered to them at Enderlin, North Dakota, or any other place, and that they have received nothing for said alleged note.

The principal defense is that the contract and alleged note were procured by a fraud, they never attained any legal existence or standing, and thus never became a contract or promissory note. If this be true, there could be no delivery of the same.

Section 5849, Comp. Laws 1913, defines actual fraud; it reads thus: "Actual fraud within the meaning of this chapter consists in any of the following acts committed by a party to the contract, or with his connivance with intent to deceive another party thereto or to induce him to enter into the contract:

"(1) The suggestion as a fact of that which is not true by one who does not believe it to be true.

"(2) The positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true.

"(3) The suppression of that which is true by one having knowledge or belief of the fact.

"(4) A promise made without any intention of performing it; or

"(5) Any other act fitted to deceive."

Mrs. Wrede, one of the defendants in the action, was sworn as a witness in the case. After she had been asked by her counsel several preliminary questions, the plaintiff objected to the introduction of the answers to any of them under the allegations of the answer, which tended to show fraud or misrepresentation, material alteration, lack of consideration, or any other defense alleged in the answer, upon the ground that the answer did not state facts sufficient to constitute a defense upon any of the grounds stated; and upon the further ground that it fails to allege that the plaintiff had any knowledge whatsoever of any defect in the title to the instrument in suit in the action, and fails to allege any notice of said defect was ever brought home to him as required by the negotiable instrument act in force in North Dakota; and upon the further ground that the burden is upon the maker of the note to first prove that the plaintiff is not indorsee in good faith, and that before he can prove any defense, he must first show that plaintiff was not the holder in due course, as due course is defined by the statute of North Dakota; and upon the further ground that there is no allegation and support of the defense of fraud in the inception of the instrument in dispute, and no allegation that any representation was made that the instrument in suit was not a note.

This motion the court denied. The stipulation above referred to was then made, which includes the testimony of Mrs. Wrede. She was a witness in the case, and was apparently testifying when the stipulation was made which set forth what she would testify to.

While this method of procuring testimony may not be entirely improper, it is a practice not to be encouraged where the witness is present in court and ready to testify. Assuming the testimony of Mrs. Wrede as contained in the stipulation as binding under the stipulation upon the parties, we will examine the evidence which it is stipulated she would give, and determine therefrom if it proves or tends to prove actual fraud. Her evidence in this regard is wholly undisputed and must be accepted as true. According to her testimony as stipulated, Acker, the agent of the plaintiff, stated to this witness and her partner that said instruments taken together constituted an order for goods, *and did not constitute a note,* but that the second proof of said instrument, now marked exhibit "A," which was attached to exhibit "B," was to represent merely the manner in which the goods or payment for the goods should mature.

If those statements and representations were made by Acker as the testimony of Mrs. Wrede as stipulated shows, such statements were under the statute false and fraudulent representations. Acker must have known that exhibit "A," which was attached to exhibit "B," was not merely to represent the manner or maturity of payment. He knew that exhibit "A" constituted a note; he knew that the instruments taken together did not constitute an order for goods only, but did constitute an order for goods plus a note. His representations were such, then, as to induce the defendants to believe that the instrument or instruments did not constitute a note, and that there was no note involved in the transaction; his conduct was such as was well fitted to deceive the defendants; his representations were of such character as to amount to the suggestion of a fact of that which is not true. He could not himself have believed it to be true. In other words, he must have had full knowledge of the intent and purpose of the whole contract, both exhibit "A" and "B;" and in view of the representations to which it is stipulated Mrs. Wrede would testify, he must have suppressed the true condition and intent and purpose of both exhibits "A" and "B."

It appears from the stipulation above set forth, that prior to the execution of the instrument in suit, the Donald-Richards Company, through one of its agents, had sold to J. I. Rue, a merchant in Enderlin, North Dakota, goods, wares, and merchandise of the same nature and composition as the articles sold defendants.

This evidence as stipulated supports the allegation of the answer

which, in substance, avers that Acker, the agent of the Donald-Richards Company, represented to the defendants that said company sold goods to but one customer or firm in each city, and that defendants would have the exclusive sale of said line of goods in the city of Enderlin; that said representations were false, fraudulent, and untrue, and relied upon by the defendants, and that they were induced thereby to execute the order for said goods, etc.

The copy of exhibits "A" and "B" is in evidence. The copy is in the original form. In other words, in the same condition it was before exhibit "A" was detached from exhibit "B."

When the instrument as a whole is considered in connection with all the circumstances of the case, the false and fraudulent representations pleaded, of which there is competent proof, it may well be considered an object of suspicion. Its arrangement is such as to facilitate the very fraud claimed by defendants. It is such an instrument as could easily be used to deceive the defendants and cause them to sign what was represented to them to be an order, when as a matter of fact the same was a note; part of the instrument when detached became a note. Certainly such an instrument is not one the use of which prevails to any great extent in commercial transactions, and as a whole and considered in connection with all the other evidence, facts, and circumstances, as well as the pleadings in the case, it is some evidence in support of the fraud, and the false and fraudulent representations claimed by the defendants.

Premises and representations such as made by Acker, the agent of the Donald-Richards Company, with the intent to deceive and without intention to fulfil, are fraud. Tamlyn v. Peterson, 15 N. D. 490, 107 N. W. 1081. A statement in the absence of positive knowledge, with intent to deceive, may be fraud. Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550. The stipulated evidence in the case at bar clearly shows that false and fraudulent representations were made prior to the time of the execution of the alleged contract and note. This being true, neither the alleged contract nor note ever attained a legal existence. They were, therefore, as a matter of law, neither executed nor delivered. As stated in the case of Knowlton v. Schultz, "The note having been obtained by fraud, the fraud tainted the whole instrument, and destroyed it entirely."

The plaintiff herein, however, seeks shelter under the protecting

mantle of the Negotiable Instrument Act. He has neither pleaded nor proved, nor offered any testimony, that he is a purchaser for value, before maturity, without notice, and in good faith. If he were such, it would have been a simple matter to have pleaded it, and equally as simple to have proved it.

The principle was clearly stated in the Tamlyn v. Peterson Case, above cited, that "when fraud in the inception of a negotiable instrument is alleged and proved, the burden is upon the indorsee to prove that he is a purchaser for value, before maturity, without notice and in good faith."

This principle was first laid down in case Vickery v. Burton, 6 N. D. 245, 69 N. W. 193, and again in the case of Knowlton v. Schultz, above cited. Fraud at the inception of the alleged contract and note having been established, the burden shifted to the indorsee, the plaintiff in this case, to prove by fair proponderance of the evidence that he was a good-faith purchaser for value, before maturity, without notice. If he could prove each of these elements, the proof was peculiarly within his power. He had an opportunity to plead and prove the same, and has done neither. It was incumbent upon him in this case to prove his good faith; he did not even testify that he had purchased it in good faith; as was said in the case of Knowlton v. Schultz. "It may be true in this case that the plaintiff bought before maturity, for value, and without notice of any defense; and yet, he may not be a purchaser in good faith. He may, when he bought, have had knowledge of facts which excited in his mind such suspicions as to the paper, that he feared to make an investigation lest it would disclose a defense, and therefore he carefully shut his eyes and bought in the dark. In such a case he would not be a purchaser in good faith."

This principle was again followed by this court in a very recent case. (Sweet v. Anderson, 41 N. D. 375, 170 N. W. 869), in that case in an opinion written by Mr. Justice Bronson, the following language was used: "A holder, in due course, of a promissory note, must establish his good faith as a matter of law, either by direct and uncontradicted testimony, or by circumstances which show consistently the good faith of his purchase so that no fair-minded person can draw any other inference therefrom."

It is further contended by the defendants and assigned by them as

error, that the order and purported note together constituted but one instrument, and that detaching the purported note is a material alteration of the instrument and rendered it void.

It would seem clear that the two instruments should be construed together. Exhibit "B" was that part of the whole instrument which contained the order for the goods. Exhibit "A" was, at the time of the procuring of the order in the manner before stated, attached to and formed a part of the whole contract. It showed the maturity of the payments; in other words, it was an instalment note attached to the sales contract, was subject to certain conditions or contingencies which appeared in the contract, prominently among which is a special agreement to buy back at the purchase price all the goods in the order remaining on hand at the termination of the agreement if the purchaser so desires, and, if net profits are less than 50 per cent each year for two years, will pay the difference in cash, provided purchaser has kept the goods tastefully displayed for sale in his store, using the advertising system as provided on the reverse side hereof, made payments as agreed, and used reasonable diligence in promoting the sale of goods. There also appeared a warranty as to quality, and the condition under which goods might be exchanged, and the agreement to furnish a bond to protect the purchaser in all the conditions of the sale.

The detaching of the note thereby making it a negotiable note, and giving to it a new and added value, is a material alteration of the contract, the legal result of which is to avoid the entire contract. It is contended, however, that the Donald-Richards Company, was authorized to detach the note by reason of the following words appearing in the contract, which are as follows, to wit: "That the company is authorized to detach the same when this order is approved and shipped." In the case of Stevens v. Venema, 202 Mich. 232, L.R.A.1918F, 1145, 168 N. W. 534, a Michigan case construing the identical words in practically an identical contract, the court used the following language: "This sentence appears in the order just above the perforation for detaching the note and below the signature in the order. Such expedient only emphasizes the sinister purpose of the combination."

In Toledo Scale Co. v. Gogo, 186 Mich. 442, 152 N. W. 1046, Ann. Cas. 1917E, 601, it appears from an original record that an unsuccessful attempt was made to validate the note for detachment by two provisions

in separate places,—one stating, you are authorized to date above-mentioned note at such time as you may elect to insert such date, either prior to or after the execution of such note; and the other, near the close of the instrument, that the signing or delivering of instalment note shall not be deemed or considered a payment or waiver of any term, provision, or condition of this contract. That opinion then further states: "We regard the decision in that case as well in point and controlling here." We are satisfied that the detaching of the alleged note from the contract was a material alteration of the contract, and the following abundantly sustained that conclusion: Ibid. Stevens v. Venema, above cited, as well as the following cases: Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769; Bank of Evansville v. Kurth, 167 Wis. 43, 166 N. W. 658; Harrison v. Grier, 198 Mich. 672, 165 N. W. 854; Loveland v. Bump, 198 Mich. 564, 165 N. W. 855.

The plaintiff claims that fraud has not been shown, and that it is not shown that the note in question was executed and delivered at the time of the false and fraudulent representations. In this claim, there is no merit. So far as the testimony is concerned, there is no showing that Edwin Acker, the agent of the Donald-Richards Company, ever had any negotiations with the defendant except the time when the contract and note were procured. The only inference from the testimony that can be drawn is that the contract and note in question were signed at about the time and after the false and fraudulent representations were made. If they were made at any other time, the burden was upon the plaintiff to so show, and he has not done so.

The question of the delivery of the goods or articles to the defendants is not, by any means, in this case, a controlling one; it is not really an issue in the case. It is only material, if at all, to show the good faith of the indorsee. He has wholly failed to show by a preponderance of evidence his good faith.

The principal questions in this case are:

(1) Was the contract and note procured by false and fraudulent representations? We think it was, and, being so procured, there was no legal execution or delivery of them.

(2) Was the indorsee a purchaser in good faith, for value, without notice? We think he was not; at least the proof does not so show; he has failed to prove it by a preponderance of the evidence.

(3) Was the contract altered? The evidence is ample and sufficient to show that the alleged contract and note were procured by false and fraudulent representations, and thereafter were materially altered, and for that reason are of no legal effect.

The judgment appealed from is reversed. The plaintiff's action should be dismissed and the District Court should enter an order to that effect. The case is remanded to the District Court for further proceedings not inconsistent with this opinion.

The defendants are entitled to statutory costs on appeal.

ROBINSON and BRONSON, JJ., concur.

BIRDZELL, J. (dissenting). The deposition of G. S. Krouth, of Iowa City, shows that he is cashier of the Iowa City State Bank, that on behalf the bank he took the note in question before maturity as collateral security for a loan made to the Donald-Richard Company, and that at the time he took it he had no knowledge whatever of the transaction between the Donald-Richards Company and the defendants, and no knowledge of any defenses. Stevens, the plaintiff, who also testified by deposition, stated that he took up the loan of the Donald-Richard Company at the bank, paying the full cash consideration; also that he obtained the note in suit as collateral and became the owner of both notes. M. H. Taylor, the assistant manager of the Donald-Richard Company, in his deposition testified that the goods for which the note was given were shipped to the defendants, and that the defendants have never returned them or any portion thereof, nor offered to do so. No evidence was offered on the part of the defendants to dispute the testimony of Taylor with reference to the goods; nor was there any testimony given or offered with reference to any damages incident to any alleged fraudulent representations; nor did the defendants attempt to make any showing that a rescission had either been made or attempted. In this state of the record it seems to us that no defense was made out which would defeat the right of the plaintiff, if he be considered merely the assignee of the purchase-price obligation signed by the defendants; and that it is immaterial whether the instrument in suit be regarded as negotiable or not.

The testimony for the plaintiff is nearly all in the shape of deposi-

tions, which accounts for the fact that it embraces questions and answers going to establish good faith out of the regular order of proof. The evidence for the defendant, with the exception of five preliminary questions and answers in connection with the examination of the witness, Mrs. Wrede, consists of a stipulation as to what Mrs. Wrede would testify to. Accepting as facts all that it is stipulated she would testify to, there would, in our opinion, be lacking proof of facts sufficient to constitute a defense as hereinbefore indicated.

CHRISTIANSON, Ch. J., concurs.

LENA MYLI, Respondent, v. AMERICAN LIFE INSURANCE COMPANY OF DES MOINES, IOWA, a Corporation, Appellant.

(175 N. W. 631.)

Insurance — provision as to military service does not apply where death not occasioned by extra hazard.

In an action upon an insurance policy where it appeared that the insured had enlisted in the Navy Department during the recent war, and had been assigned to Dunwoody Institute, in Minneapolis, for instruction and training, and while so assigned had contracted influenza, from which he died after a brief illness in the city hospital at Minneapolis, the insurance company defended on the ground that the insured had not obtained a permit under the following clause of the policy: "If, within five years from date hereof, the death of the insured shall occur while engaged in military or naval service in time of war without previously having obtained from the company a permit therefor, the company's liability shall be limited to the cash premiums paid hereon for the three years from date of issuance, and thereafter to the legal reserve on this policy."

It is *held:*

1. In view of the other provisions of the policy with respect to double indemnity for accidental death and disability benefits, the above quoted provision does not exempt from liability for the face of the policy where the death of the insured was not occasioned by extra hazard incident to military or naval service.

NOTE.—On validity, construction, and effect of provisions in life or accident policy in relation to military service, see notes in 4 A.L.R. 848, and 7 A.L.R. 382.

Insurance — conflict between different clauses of policy — how construed.

2. Where a repugnancy exists between different clauses of an insurance policy, the whole should, if possible, be construed so as to conform to an evident, consistent purpose.

Insurance — where status or occupation not clearly basis for exemption — forfeiture avoided where no extra hazard shown.

3. Where status or occupation are not clearly made the basis for exemption from liability under an insurance policy, and where the language employed indicates a desire to provide only against extra hazard, to avoid forfeiture of the insurance, the policy will be construed to the latter effect.

Opinion filed November 17, 1919. Rehearing denied December 8, 1919.

Appeal from District Court, Cass County, *A. T. Cole,* J.

Affirmed.

E. B. Evans and *Carmody, Louden, & Mulready,* for appellant.

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. Comp. Laws, § 5896; Young v. Metcalf Land Co. 18 N. D. 441, 122 N. W. 1101; Miller v. St. Paul F. & M. Ins. Co. 26 S. D. 454, 128 N. W. 609; Fletcher v. Arnett, 4 S. D. 615, 57 N. W. 915; Frost v. Williams, 2 S. D. 457, 50 N. W. 964.

Language must be followed when clear and explicit. Strunk v. Smith, 8 S. D. 407, 66 N. W. 926; Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82.

Written contract to be interpreted from its own language if possible. Roberts v. Minn. Thresh. Mach. Co. 8 S. D. 579, 67 N. W. 607; Comp. Laws 1913, §§ 5898, 5899, 5901, 5903, 5905.

"To determine the intention of the parties, if the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, and the objects which they had in view, for which purpose parol evidence is admissible." 9 Cyc. 587, 588; Moore v. Beiseker, 147 Fed. 367.

The insured, Hiram I. O. Myli, while at the Dunwoody Institute, was in the naval service of the United States. Miller v. Ill. Bankers Life Asso. 212 S. W. 310; United States v. Grinley, 137 U. S. 147, 11 Sup. Ct. Rep. 54; Ex parte Reed, 100 U. S. 538; United States v. Nagler, 252 Fed. 217.

Harry Lashkowitz and *Barnett & Richardson,* for respondent.

"If there is anything uncertain it is the right of the insured to enjoy the most favorable rule of construction." Welts v. Company, 48 N. Y. 34; Union Co. v. Hughes (Ky.) 60 S. W. 850.

Stipulations and conditions in the policy are to be so construed, if possible, as to avoid forfeiture and afford indemnity.—Forfeitures are not favored in the law, and the courts are always prompt in seizing hold of any circumstances that will indicate an election to waive. Beauchamp v. Ins. Co. (N. D.) 165 N. W. 545; Schwinderman v. Co. (N. D.) 165 N. W. 982; Pulaski v. Woodman, 174 N. Y. Supp. 298; Donahue v. Company (N. D.) 164 N. W. 50.

The insurance company, through its agent Stark, had full knowledge of the fact that the deceased was at Dunwoody Institute. This fact being known to Stark, his knowledge would be held to be the knowledge of the company. Teutonia Co. v. Howell (Ky.) 54 S. W. 852; Germania Co. v. Keeller (Ill.) 48 N. E. 297; Harding v. Society (S. D.) 71 N. W. 755; Fosmark v. Association (S. D.) 120 N. W. 777; Thomas v. Brotherhood (S. D.) 127 N. W. 572.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff and from an order denying a motion to vacate and to order judgment in favor of the plaintiff for a lesser amount. The action is one to recover the face of a life insurance policy. The defense is that by reason of a provision in the policy the liability of the defendant was limited to $68.30, the amount of premiums previously paid by the insured.

On October 30, 1917, a policy of insurance in the sum of $2,000 was issued by the defendant company to Hiram I. O. Myli, in which Lena Myli, his mother, the plaintiff in this action, was sole beneficiary. On or about June 19, 1918, the insured enlisted in the United States Navy and was required to attend Dunwoody Institute, in Minneapolis, for training. The institute was at the time under the control of the United States Naval Department, and it furnished technical and other instruction to enlisted men after the fashion of ordinary colleges. There were also some requirements as to drill and physical culture. After a brief illness of influenza, the insured died on October 7, 1918, in the city hospital at Minneapolis. At the trial of the action the court directed a verdict for the plaintiff, and the defendant appeals.

Upon this appeal the principal contention of the defendant and appellant concerns its liability under the policy. It contests liability for the face of the policy, on the ground that by express provision it was stipulated that its liability should not exceed the cash premium paid if the death of the insured should occur while he was engaged in naval service. The language of the policy upon which this contention is based is as follows: "If, within five years from date hereof, the death of the insured shall occur while engaged in military or naval service in time of war without previously having obtained from the company a permit therefor, the company's liability shall be limited to the cash premiums paid hereon for the three years from date of issuance, and thereafter to the legal reserve on this policy."

The argument is that the above provision reduces liability to a return of the premium in this case, by reason of the fact that the insured was at the time of his death an enlisted man in the naval service. It is contended that the effect of the provision is to automatically cancel the life insurance stipulated in the policy the moment the policy holder becomes enlisted or inducted into the military or naval service without having previously obtained a permit therefor, and without complying with whatever provisions (not named in the policy) the company might wish to require concerning additional premiums, as against this contention the respondent asserts that it is the evident purpose of the stipulation to provide only against the consequences of extra hazard incident to actual service in connection with hostilities.

Before the harsh construction in the direction of forfeiture can be supported, it must be found to result necessarily from the provisions of the policy. The policy must be read in the light of the obvious purpose of the particular provision, and it must be found that the exemption falls clearly and directly within its terms. It seems clear to us, upon a view of the whole policy and the evident purpose underlying the particular stipulation, that the circumstances of this case do not bring the defendant within the exemption contracted for.

This policy is more than the usual life insurance policy. It provides for the payment of $2,000 upon the death of the insured "or $4,000 in the event of the death of the insured . . . while this policy is in full force, by bodily injury effected exclusively by external, violent, and accidental means, not including death by self-destruction, sane or

insane, *nor resulting from military or naval service in time of war,* and occurring within ninety days after such bodily injury."

The policy also provides, under the head of "Risks Not Assumed," that it is issued without restrictions as to residence, travel, or occupation, "except military or naval service in time of war as provided herein," and that, subject to the restriction for military or naval service in time of war, the face value shall be incontestable after two years; also that "the double indemnity benefit contained in this policy shall be contestable after two years from the date of issuance only for military or naval service in time of war," etc.

Besides the double indemnity feature, the policy also contains a disability feature; and in the paragraph defining the disability protection it is stated that after the payment of one annual premium, and while the policy is in full force, the company, upon receipt of proofs of disability, will pay certain stipulated benefits. The injuries excepted, for which benefits will not be paid, are stated as follows: "Excluding intentional, self-inflicted injuries, or injuries *resulting from military or naval service in time of war.*" There are further stipulations for a reduction of the annual premiums to the extent of $1.40 per thousand dollars if the insured shall elect to cancel the disability protection, and $2 on each thousand if the insured shall elect to cancel the double indemnity protection.

From the foregoing provisions it is apparent that the insurance company did not stipulate for nonliability, under either the double indemnity or disability clauses of the policy, for injuries to the insured or for accidental death while his status was that of an enlisted man. For these clauses specifically provide for nonliability for the double indemnity, and the disability benefit only in case the injury or death *results from* military or naval service in time of war. If the appellant's contentions are correct with respect to the meaning of the clause particularly relied upon, the situation would be this: If an enlisted man should die from some cause not attributable to war, the insurance would not be collectable. But if, while walking down the street, he should meet with an accident not attributable to the extra hazard of war, he would be entitled to his disability benefits, or if he should meet accidental death the beneficiary would be entitled to double indemnity.

It will be seen that if the construction of the appellant be followed

there is a repugnancy on the face of the policy between the provision relied upon and the provision concerning double indemnity in case death results from accidental means not "resulting from" military or naval service. The repugnancy is this: A double indemnity is provided for in case of accidental death, provided that such death does not *result from military or naval service* in time of war; and in the clause relied upon by appellant, as construed by it, no insurance is provided in case death *shall occur while* the insured is "engaged in military or naval service in time of war." If an enlisted man should meet death by accidental means not attributable to military or naval service, the double indemnity would be payable under the double indemnity clause, but under the clause relied upon it would also be true that his death occurred while his status was that of an enlisted man in time of war, and the death loss would not be payable.

The other provisions of the policy respecting the extra hazard of war service appear to be based upon the same foundation as the total indemnity provision. They except from liability for injury or accident only where occasioned by the extra hazard. The whole policy should be read together so that its provisions may be reconciled to a consistent purpose. Especially should this be done where the main purpose is evident and is one which accords with reason. It would indeed be a peculiar situation under which a person who has *life insurance* has double indemnity in case of death by accident and no indemnity in case of death from natural causes. This situation is rendered none the less peculiar by reason of the fact that, upon obtaining the permit, the exception provided in the double indemnity and disability clauses would still obtain, because a repugnancy arises and does exist, as explained above, upon the failure to obtain a permit.

Reading the whole policy, we deem the intention of its various provisions with regard to the restrictions concerning military or naval service to be clear. The express intention does, in reality, conform to the purpose of the provision as stated in the deposition of an officer of the company, namely, to except the policy from applying where the insured has come to his death from a hazard connected with military or naval service. In short, the status of the insured is not made the test, but the character, of the service. The important words in the clause relied upon, and these which signify its correlation with the other provisions here-

inbefore referred to, are "while engaged in military or naval service." These words are descriptive of two forms of hazardous service that are not intended to be covered, and it is only while the insured is engaged in such service that the exemption is applicable. It is idle to say that because one's status is such that he must respond to orders from military or naval authority, he is in military or naval service within such a provision, when in fact there is nothing about his daily activities that suggest the least physical danger that would enhance an insurance risk.

It would be highly unreasonable to assume that it was intended to exempt from liability on the mere ground of status. In the first place, if status were to be made the test, language should have been employed to make it apparent that it was to be the test. For instance, it might well have been stated: "If within five years from date the insured shall enlist or become inducted into the military or naval service without having obtained a permit therefor," etc., then status would clearly have been the test. In the late war we know that many men were inducted into the service and assigned to special duties for which they were fitted by training, and which involved no hazard peculiar to military or naval service. Also that many who were capable of receiving special technical training were assigned to institutions capable of giving that training, so that they might later on be better equipped for more highly specialized service in conducting actual hostile operations; and that, while receiving that training, they were not subjected to the hazards of war. There would be no reason for such persons to assume that by so enlisting they rendered themselves liable to pay extra premiums on life insurance policies of this sort, or, failing to do so, to lose the benefit of their insurance.

On the question of the proof that the insured came to his death while subjected to the hazard of naval service, it is clear that such is not the case. He was in an inland city, and not subject to any risks not common to civilians with whom he was constantly associated. Neither do we deem the exclusion of the testimony of defendant's agents, with reference to the construction of the contract at the time the application was made, to be erroneous. By express stipulation the company refused to be bound by any construction placed upon the policy by its agent or agents, and from this it results that the conversations taking place between the insured and the agents of the defendant could not, as a matter of law, amount to a mutual construction of the contract by the parties,

and the provisions are not so doubtful that a court would be justified in following any construction the insured alone might have placed upon it.

For the foregoing reasons the judgment and order appealed from are affirmed.

On Petition for Rehearing.

BIRDZELL, J. Appellant has filed a petition for rehearing in which emphasis is laid upon a portion of those provisions of the policy relating to double indemnity and disability. It is stated that these provisions are expressly made applicable only "while the policy is in full force and effect," and that in the instant case, if appellant's contention as to the meaning of the principal clause in controversy is correct, the policy would not be in full force and effect while a man was in military or naval service without a permit. *Ergo,* says the petitioner, the discussion in which the repugnancy is pointed out begs the question; for it first assumes that the policy "is in full force and effect." The learned counsel for the petitioner are apparently unmindful of the argument advanced by them in the brief in answer to the respondent's contention that the company had waived the benefit of the clause in question. The respondent argued that by the acceptance of the premium from the insured after his enlistment in the naval service, the company had waived the provision respecting limited liability during such service. Appellant's counsel asserted in the brief and strenuously argued (and we think correctly) that this did not constitute a waiver, for the insured had the right to pay the premiums "and continue the policy in force while he was in the naval service of the United States, notwithstanding the exemption of the company from liability," etc. It is our view that the policy was in force as the counsel for appellant originally argued, and that the repugnancy does exist as pointed out in the original opinion. It may be added that the petitioner's argument is clearly founded upon a misconception of the stipulation relied upon. The stipulation does not cancel the policy. It only provides what the *liability* shall be in case of the *death* of the insured while engaged in military or naval service without a permit. It does not purport to limit or create any exemption from liability for disability following accidents sustained by one in the military or naval service not resulting from such service. Then, to ac-

centuate the repugnancy previously pointed out, the policy says: "If the death of the insured shall occur during the period of total and permanent disability, then *the full amount of this policy, less the value of any indebtedness, shall be paid to the beneficiary.*" It is clear that the disability benefit attaches before the exemption from liability for a death loss becomes operative.

If the disability and double indemnity provisions were not intended to be operative while the insured was in the military or naval service without a permit, it would seem that the policy, which expressly stipulates for stated reductions in the premium where the insured elects to cancel these benefits, would also be extended to cancelations automatically effected through entry into the military or naval service without a permit. The insurance company itself has apportioned the premiums to these risks, and why would it collect those portions of the premiums applicable to such risks from a man in military or naval service without a permit if it was not assuming the risks exactly as stated in the policy? And, as stated, the exemptions under these clauses are based upon death or injuries *resulting from* military or naval service in time of war.

The petition is denied.

BANK OF VALLEY CITY, a Corporation, Respondent, v. HENRY T. LEE, Appellant.

(175 N. W. 575.)

Negotiable instruments — defense based on false and fraudulent representations — representations must have been false.

1. In an action upon a non-negotiable note, a defense based upon false and fraudulent representations inducing its execution is not established in the absence of proof that the representations were false.

Corporations — statements of solicitors as expressions of opinion.

2. Statements of a solicitor engaged in selling stock, with reference to the future prospects of the business, are *held* to be expressions of an opinion, and not misrepresentations of fact.

Corporations — negotiable instruments — lack of consideration not established.

3. A defense of lack of consideration is not established where it is shown that

the defendant received stock for which the note in suit was given, and that he had enjoyed the rights of a stockholder.

Corporations — failure of corporate venture not failure of consideration for subscription note.

4. Mere failure of a corporate venture, resulting in disappointment to the stockholders, is not failure of consideration for a note given in exchange for stock.

Corporations — evidence — conclusions and hearsay evidence properly excluded.

5. It is *held* that certain evidence offered was properly excluded as amounting either to a conclusion or hearsay evidence.

Opinion filed October 20, 1919. Rehearing denied December 9, 1919.

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

Judgment affirmed.

M. J. Englert, for appellant.

It is elementary that a non-negotiable instrument is subject to all defenses in the hands of an assignee that could have been interposed by the party bound as against the original payee. Clow v. Sweeney (N. D.) 172 N. W. 66.

And contracts to take stock in a corporation stand upon the same footing as all other conventional obligations. If induced by fraud, that create no obligation, and the injured party has a right to have them abrogated. The rule is universal, whatever fraud creates, justice will destroy. Citing authorities; Raich v. Lindebeck, 36 N. D. 133, 161 N. W. 1026.

Manifestly there is no consideration for the stock subscriptions, and the law will not enforce a promise to pay good money for nothing. 13 C. J. 368; Shellburg v. Wilton Bank, 167 N. W. 723; Virginia Land Co. v. Haut, 90 Va. 533, 44 Am. St. Rep. 939; Zang v. Adams, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509; 10 Cyc. 427 (2) and authorities there cited.

The stock being absolutely worthless, though delivered, constituted no consideration; and the project having failed, a failure of consideration resulted. 10 Cyc. 394 (e) and authorities there cited; Taft v. Myerscough (Ill.) 64 N. E. 711; State Bank v. Cook (Iowa) 100 N. W. 72; Zang v. Adams, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

The consideration need not be returned or tendered when it is of no

value. Freeman v. Reagan, 26 Ark. 373; Adams v. Reed, 11 Utah, 480, 40 Pac. 720; Thurston v. Blanchard, 22 Pick. 18; Cook v. Gilman, 34 N. H. 556; Frost v. Lowry, 15 Ohio, 200; Duval v. Mowry, 6 R. I. 479.

There is a distinction between an action brought for the benefit of creditors generally and one brought by the corporation itself, or its assignee, for its or their personal benefit, and where no equities in favor of creditors are involved. Marion Trust Co. v. Blish (Ind.) 84 N. E. 814, 18 L.R.A.(N.S.) 347, and valuable note; Gress v. Knight (Ga.) 68 S. E. 834, 31 L.R.A.(N.S.) 900; Raich v. Lindebeck, 36 N. D. 133, 161 N. W. 1026; Pence v. Langdon, 25 L. ed. (U. S.) 420.

The fact that the defendant was elected a director, and was present at the meeting at which he was elected director and took some part therein, in no way effects an estoppel, or otherwise prevents him from setting up the defense of fraud or failure of consideration in this case. Maine v. Midland Invest. Co. (Iowa) 109 N. W. 801; Fargo Gas & Coke Co. v. Fargo Gas & E. Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; Guild v. More, 32 N. D. 432, 155 N. W. 55; Tacoma v. Tacoma Light & Water Co. 17 Wash. 471, 50 Pac. 55; Roberts v. Holliday, 10 S. D. 581, 74 N. W. 1034; Speed v. Hollingsworth, 54 Kan. 440, 38 Pac. 496.

Winterer, Combs, & Ritchie, for plaintiff.

A mere prophesy, an expressed opinion or belief concerning future events or conditions furnished no ground of defense on the theory of fraudulent representation. Farwell v. Colonial Trust Co. 147 Fed. 480.

To sustain an action for deceit based on fraud, there must not only have been false representations, but, contrary to the rule in suits for rescission, they must have been made fraudulently and intentionally. Pittsburgh Life & T. Co. v. Northern Cent. L. Ins. Co. 140 Fed. 888; Bell v. Morely, 223 Fed. 628; Hedin v. M. M. & S. Inst. 35 L.R.A. 417 and note; Heyrock v. Surerus, 9 N. D. 28, 81 N. W. 36.

In case of alleged fraud or misrepresentation in procuring a subscription to stock, the subscriber may be estopped to rescind because of his own conduct since making the subscription, and an act done after discovery of the fraud, inconsistent with its disaffirmance, will be held to be a waiver of it, at least in favor of the rights of creditors. 10 R. C. L. § 50. See note to Franklin Glass Co. v. Alexander, 9 Am. Dec. 102, under Estoppel, also case note found in 33 L.R.A. 722.

It is elementary that it is incumbent upon the party offering such proof to first show, by competent evidence, the official character and authority of the officer charged with having made admissions or statements claimed to be admissible as evidence in the controversy involved. Browning v. Hinckle, 48 Minn. 544, 51 N. W. 605; Bangs Mill. Co. v. Burns, 152 Mo. 350, 53 S. W. 923.

Admissions or declarations, in order to be received as evidence, must not relate to past events; they must have been made in the course of the transaction so as to constitute a part of the *res gestæ*. 3 Enc. Ev. 643; Jackson v. Mutual Ben. L. Ins. Co. 79 Minn. 43, 81 N. W. 545.

The power of a president of a corporation to make admissions or declarations which will be binding on the corporation, as to past events, cannot be inferred as incidental to the duties of an officer superintending the current dealings and business of the corporation. Smith v. North Carolina R. R. Co. 68 N. C. 107.

BIRDZELL, J. This is an appeal from a judgment entered upon a verdict which the court directed in favor of the plaintiff. The action was brought to recover upon a note for $1,000, which the defendant gave for stock in the Valley City Brick & Tile Company. The note was delivered on October 14, 1913, bearing interest at 8 per cent per annum. It is non-negotiable for the lack of words of negotiability; and at the time it was given the stock was delivered to the maker. The note became the property of the plaintiff bank by assignment. It appears that the Valley City Brick & Tile Company was a corporation organized for the purpose of manufacturing brick and tile, and that it was financed through the sale of stock to various persons in the community. Some work was done preparatory to carrying out the corporate purposes. This consisted of laying foundations for a plant building, erecting or partially erecting the superstructure, and building a spur track connecting with the tracks of the railway company. After considerable work had been done and money expended, the project was either deemed not to be feasible or lacked sufficient financial support. At any rate it was abandoned. It appears that at the time the defendant gave the note in question the construction work above referred to had been begun. As defense to the note the defendant has pleaded: (1) Fraud in the inception consisting of alleged false and fraudulent

representations inducing the execution; (2) failure of consideration, in that the corporation became defunct and the project abandoned; and (3) that the note, being non-negotiable, is subject to all defenses. This is admitted.

In support of the defense of fraud the defendant testified that one S. L. Davidson, the president of the Valley City Brick & Tile Company, came to his place and delivered verbally a glowing prospectus of the company, stating, among other things, that the leading business men in Valley City and a few farmers had taken stock, and naming some of the former. He also exhibited samples of brick supposed to have been made from the clay which it was proposed to use. On cross-examination the defendant Lee admitted that so far as he knew Davidson had told him the truth concerning the men in Valley City who were stockholders in the company. No evidence whatever was adduced to establish the falsity of the claim that the bricks were not made from the clay the company proposed to use for manufacture. On the contrary, the defendant Lee states in his testimony that the bricks exhibited were made from that clay, although the source of this knowledge is neither apparent nor material. So the falsity of these misrepresentations is not established.

In so far as the defendant relies upon misrepresentation concerning the prospect that the business of the company would be a success, it is clear from the testimony of the defendant himself that Davidson's statements amounted to no more than prophecy or the mere expression of an opinion. The substance of what he said was that if the plant was constructed and put in operation it would be a good thing for the city, and a paying investment. This could not be reasonably construed otherwise than as the expression of an opinion merely. It clearly did not amount to a misrepresentation of fact.

As to the defense of lack of consideration, it is undisputed that the defendant got the stock for which the note was given, and that he participated in stockholders' meetings and that the corporation perfected its organization as a corporation. The most that can be said is that the venture was a failure and that the stockholders were disappointed. Failure and disappointment alone, however, do not amount to a showing of lack of consideration. In the absence of fraud there is no reason why a stockholder who has given a note for his stock, and who has

enjoyed the rights of a stockholder, should be relieved of liability upon his note, and thus be placed in a position superior to those who had paid for their stock in case and were similarly disappointed. The corporation was not a guarantor of its own success, and since the defendant has failed to prove that the contract was induced by the fraudulent representations alleged, he is in no better position to resist payment than another stockholder would be to obtain a return of money expended for stock. They were participating in the venture on equal terms as stockholders, and must shoulder the obligations that are incidental to that relationship, and be permitted to share in such rights as may be available upon a liquidation of the affairs of the corporation. No defense to the obligation has been established.

The appellant has also argued some assignments of error based upon the exclusion of evidence. It appears that after the defendant had rested and the plaintiff had moved for a directed verdict, the motion was argued to the court, and then an adjournment was taken to a subsequent day. Upon reconvening, the defendant's counsel moved that the case be reopened to enable him to supply testimony covering some omissions. The witness Lee was placed upon the stand, and was asked concerning his knowledge as to whether the clay contemplated to be used would make brick such as the sample shown by Davidson when he sold the stock. This testimony was properly excluded as being a mere conclusion of the witness. Following this an attempt was made to prove by the same witness that he had been told by one Ramsett, an officer of the corporation, after he had given the note but before the note in suit was due, that the clay would not make brick; that Ramsett had ascertained this fact by making an investigation and having the ground tested. Before ruling on the offer of proof, the court ascertained that Ramsett had taken samples to three different chemists, and had made his statement to Lee apparently upon the basis of the reports of the chemists. This evidence was clearly incompetent on the issue of fraud, as it had no tendency to prove knowledge on the part of the solicitor. It related to facts learned subsequent to the sale of the stock to Lee. Even if the ultimate fact of the unfitness of the clay for the purpose had a bearing upon any other issue in the case, the evidence offered was still incompetent because it was clearly hearsay as to that fact. It does not appear that any statement made by

Ramsett to Lee had a bearing on any business which was then being transacted between Lee and the corporation, so the statement is not competent as an admission. The exclusion was therefore proper.

An attempt was also made to have the secretary of the company testify to the results of the investigation conducted by the president of the company, but inasmuch as the previous testimony had disclosed that the results of that investigation were contained in reports which were not offered, the objection was properly sustained.

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

CHRISTIANSON, Ch. J., and BRONSON, J., concur.

GRACE, J. I dissent.

ROBINSON, J. I dissent for the reason that the record clearly shows a partial and material failure of consideration. There does not appear to be either justice or equity in compelling defendant to pay the full amount of the promissory note.

THEODORE PRIEWE, Administrator with the Will Annexed, Petitioner in Probate Court below and Respondent in Supreme Court, v. ALBERT G. PRIEWE, Respondent in Probate Court below, and Appellant in Supreme Court, and RICHARD PRIEWE, Emil G. Priewe, and Melvina Mergner, Respondents, and MAX MERGNER, a Creditor, Respondent.

(175 N. W. 732.)

Appeal and error — trial de novo cannot be had in supreme court where all evidence offered is received.

1. In an action triable under the Newman Act as formerly existing, where all of the evidence offered is not received, the supreme court, upon appeal, cannot try and determine such action *de novo*.

Executors and administrators — annual accounts duly allowed and approved by county court final.

2. Where an administrator has rendered nine different annual accounts which have been duly allowed and approved by the county court without objection and without any appeal being taken therefrom, the same are deemed conclusive, and not subject to review upon an appeal taken from an order allowing the final account.

Executors and administrators — commissions to administrators based on original appraised values.

3. In determining the value of property not sold in an estate for the purpose of fixing the commissions to be paid an administrator, where the administrator for a period of twenty-three years has received and accounted for the rents and profits of the realty, the appraised value of such realty as contained in the original inventory and appraisement should be taken, and not the actual present value of such realty.

Wills — devise of future executory interest in real estate rendered void by reason of a specific devise to first taker with power of disposition.

4. Under the statutes of this state, § 5298, Comp. Laws 1913, a future executory interest in real estate may be devised which will not be rendered void by a specific devise to the first taker of such realty with a power of disposition.

Wills — devise of life estate with power of disposition with limitation over in fee of the residue and remainderman takes subject to payment of special bequest.

5. Where a will contained the following bequest: "I give, devise, and bequeath all the rest, residue, and remainder of my estate, both real and personal, to my beloved wife Elisabt Priewe, and after her ded, all the real estate and personal property to Albert G. Priewe, his heirs and assigns forever," with special bequests to be paid by his son Albert Priewe, it is *held*, upon the application of legal rules of construction and statutory provisions to ascertain the intent of the testator, that such will devised a life estate to the widow, with the power of disposition if necessary for her maintenance and support, with a limitation over in fee of the residue of the property remaining after her death to the son, subject to the payment of the special bequests, made a personal charge upon the son.

Opinion filed November 10, 1919. Petition for Rehearing filed December 15, 1919.

Appeal from judgment of District Court, *Cole*, J., in favor of the administrator, construing a will and settling a final account of an administrator, upon an appeal had from the County Court of Cass County.

Judgment modified; case remanded for further proceedings in county court.

Pollock & Pollock, for appellant.

So far as the interests of the children of a testator not mentioned in the will are concerned, it has been held that the validity and construction of the will may be discussed and adjudicated within a year from the probating of the will or at any time before the distribution of the estate. Lowery v. Hawker, 22 N. D. 318, 37 L.R.A.(N.S.) 1143; Schultz v. Schultz, 19 N. D. 688.

The intention of the testator must be found from the will itself, and such intention shall be given effect to its full extent if possible, and, if not, to its full extent so far as possible. Comp. Laws 1913, §§ 5685, 5686, 5690.

The natural interpretation of the language in the will used is that the testator gave all his property to his wife so long as she lived, "until her ded," and then gave the same property in remainder in fee to Albert G. Priewe, with a charge to pay the specific legacies. Boekemier v. Boekemier, 157 Iowa, 372, 138 N. W. 493; Crandall v. Nichols (Iowa) 139 N. W. 719; Re James, 146 N. Y. 100, 40 N. E. 876; Balls v. Dampman (Md.) 1 L.R.A. 545.

When a life tenant pays off an entire mortgage indebtedness he becomes a creditor of the remainderman or reversioner for the share which should be contributed by such remainderman or reversioner, and the remainderman shall pay the amount of the encumbrance less the amount of the interest which the life tenant would have paid during such life tenant's expectancy. Comp. Laws 1913, § 5357, 29 L.R.A. (N. S.) 153; Draper v. Clayton (Neb.) 127 N. W. 369; Tindall v. Paterson (Neb.) 99 N. W. 659; Tideman, Real Prop. § 66; Bowen v. Brogan (Mich.) 77 N. W. 942; Whitney v. Satter (Minn.) 30 N. W. 755; 1 Washb. Real Prop. § 96, pp. 123 et seq.; 4 Kent Pom. 75; 1 Story, Eq. § 487.

The appraised value of an estate is not always conclusive in determining the administrators' fees, and if it is questioned the court may institute an inquiry into the actual value. 1 Ross, Probate Law & Pr. 753; Horton v. Barto, 17 Wash. 675, 50 Pac. 587; Wilbur v. Wilbur, 17 Wash. 683, 50 Pac. 589; Coursen's Estate (Cal.) 65 Pac. 965.

Augustus Roberts, for respondent.

The leading principle which the courts of both countries respect is that the testator's intent shall be followed, it being the pole star by which the courts shall be guided. Such a rule, to be sure, leads into various courses, since every will must be steered by its own luminary. Yet, uniform justice is better than strict consistency. 1 Schouler, Wills, 5th ed. §§ 559, 579; vol. 2, § 1474.

Extrinsic evidence of attending facts and circumstances as to one's family relations, his property, his affairs, and the like—indeed whatever was likely to have influenced the disposition as it appears is always admissible for placing the court at the testator's point of view when he made the will, and thereby aiding a right interpretation of the instrument. Schouler, Wills, §§ 466, 475–477 and 479; Clark v. Boorman, 18 Wall 493, 502; Niell v. St. Aubin (Tex.) 209 S. W. 781; Weeks v. Cornwell 104 N. Y. 325; Lee v. Simpson, 134 U. S. 572, 33 L. ed. 1038.

Decrees and judgments of country courts not appealed from are final. N. D. Comp. Laws 1913, §§ 8533, 8537, 8579.

Allowance is a preferred claim. Comp. Laws, § 8728; Re Whitney, 154 Pac. 856.

Taylor Crum, for Emil G. Priewe, Melvina Mergner, and Max Mergner.

If a life estate only is given, a devise over of the remainder is good. But when by the terms of the devise an estate in fee simple is given, the addition of a devise over of a remainder is void, because the whole estate having already been disposed of, there is nothing left for it to act upon. Mitchell v. Morse (Me.) 52 Am. Rep. 781; 1 Jarman, Wills, 5th ed. (Bigelow) 873; Jackson v. Bull, 10 Johns, 19, decided in 1813 by Chancellor Kent; Stimson v. Routree, 78 N. E. 332; Ross v. Ross, 35 N. E. 10; Harring v. Flowers, 45 So. 571; Stewart v. Walker, 39 Am. Rep. 311; McKenzie's Appeal, 19 Am. Rep. 525; Jones v. Bacon, 28 Am. Rep. 1, Campbell v. Beaumont, 91 N. Y. 465; Bills v. Bills, 8 L.R.A. 696, 45 N. W. 748; Mitchell v. Morse, 52 Am. Rep. 781; Moore v. Sanders, 40 Am. Rep. 703; Jackson v. Littell, 112 S. W. 53; Bernstein v. Bramble, 99 S. W. 682; Hume v. McHaffie, 81 N. E. 117; Fowler v. Duhme, 42 N. E. 623; Mulvane v. Rude, 45 N. E. 659; Perry v. Hockney, 55 S. E. 289; Walker v. Taylor, 56 S. E. 877; Scott v. Scott, 105 S. W. 896; Blackwell v.

Blackwell, 32 S. E. 676; Ross v. Ayrhart 115 N. W. 906; Lamb v. Medsker, 74 N. E. 1012; Tullenwider v. Watson, 14 N. E. 571; Lewman v. Owncs, 64 S. E. 544; Ault v. Karch, 69 Atl. 857; Robinson v. Jones, 70 Atl. 948; Pritchell v. Jackson, 63 Atl. 965.

Any testimony by the scrivener tending to throw further light upon the surrounding circumstances under which the will was made should be submitted. N. D. Comp. Laws 1913, § 5686; Schultz v. Schultz, 19 N. D. 689; 1 Schouler, Wills, 5th ed. § 467; Cowan v. Shaver (Mo.) 95 S. W. 202; Re Dominici (Cal.) 90 Pac. 451; Dougherty v. Rogers (Ind.) 20 N. E. 783; Re Strik (Pa.) 81 Atl. 187.

BRONSON, J. This is an action involving the construction of a will and the final settlement and distribution of an estate. The defendant Albert G. Priewe has appealed from the judgment entered in the district court, and demands a trial *de novo*. The facts substantially are as follows:—

Carl W. Priewe died testate about June 3, 1895, a resident of Cass County, leaving surviving him his wife, Elizabeth Priewe, now deceased, and five children, including Albert G. Priewe, the appellant, named as respondents herein. The will of the deceased, as to the body thereof, reads as follows:—

"First. All my just debts and funeral expenses shall be first paid.

"Second. I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, to my belove wife Elisabt Priewe and after her ded all the real estate and personal property to Albert G. Priewe, his heirs and assigns forever. But he is to pay ($200) two hundred dollars to Teodor Priewe, ($200) two hundred dollars to Malviene Mergner ($100) one hundred dollars to Richard Priewe and ($5) five dollars to Emil Priewe, being all of my sons and daters living."

"Third. I nominate and appoint my said son Albert G. Priewe to be the executor of this my last will and testament hereby revoking all former wills made."

This will was admitted to probate January 30, 1896, in the county court of Cass county. The executor declining to act, and administrator with the will annexed, the plaintiff, herein, was appointed and qualified.

The estate consisted of 160 acres of land in Cass county subject to a mortgage of $700 bearing interest at 8 per cent and certain miscellaneous personal property consisting of some farm machinery, two horses, a cow, and some household goods, appraised at a total value of $234.50. For the first five years, 1896 to 1900, the widow occupied or, partly occupied, the land and received the rents and profits therefrom.

From 1901 to 1916 inclusive, the land was looked after by the administrator, who received the rents and profits therefrom, for which he has made an accounting. For some five or six years, commencing with the year 1903, the appellant, Albert Priewe, rented the land from the administrator. While the land was in the possession of the widow, she paid $400 on the principal of the mortgage, and the interest thereupon amounting to $138 up to 1901. During the course of the administration, which extended over a period of twenty-three years, the administrator in 1910 sold and conveyed a right of way over such land to the G. N. Railway Company, comprising some 5 acres, pursuant to condemnation proceedings first instituted, and thereafter upon proceedings in the county court through a petition, order, and license to sell such right of way. Out of the proceeds, the administrator paid the balance of the mortgage, with interest, and used the remainder for expenses of administration. It also appears that a few articles of the personal property were sold by the administrator, and the proceeds used or accounted for in the course of the administration. The appellant, Albert Priewe, either had, or has taken and kept, most of the remaining personal property. The administrator has made accountings from time to time covering his administration from the year 1901 up to and including the year 1916. This is represented by nine different accountings, to which the parties stipulate and which have been allowed by the county court as reported by the administrator. In April, 1909, the administrator made an agreement for the care of the widow with the daughter, Melvina Mergner and her husband, for a consideration of $10 per month. The widow resided with, and was supported by such daughter and her husband, from April 1, 1909 up to the time of her death, in December 1916. In 1917 the appellant herein took possession of the land and farmed the same under an arrangement made with the sons of the administrator, such sons doing

the work of cropping the land; the proceeds of the land during such year have not been distributed excepting the share due such sons for their work. In April, 1917, the administrator made his final accounting. Therein was presented the bill of Max Mergner for $420 for care of the widow pursuant to the agreement; the claim of the administrator amounting to $77 for expenses paid out during the last sickness of the widow; the claim of Theodore Priewe for $285 paid for funeral expenses of the deceased widow. The appellant herein filed exceptions and objections to the report concerning the construction of the will, the fees of the administrator, and the allowance of such and other claims.

In June, 1917, the county court construed the will and corrected and amended the final account. The administrator was allowed fees only upon the actual property that came into his possession. The will was construed to devise to the widow the use only of the real and personal property for life, with remainder in fee, to Albert Priewe subject to the special bequests. The administrator was directed to account to the appellant herein for that portion of the proceeds received for the sale of the right of way. The claims of Emil Priewe and of Melvina and Max Mergner were disallowed. Final decree was entered accordingly in the county court. From such order upon the final accounting and from the final decree entered, the administrator and the contending creditors separately appealed and demanded a trial *de novo* in the district court. The action came on for trial in the district court in February, 1918.

The records of the county court were before the district court; all of the evidence offered was not received, the trial judge ruling upon the evidence throughout the course of the trial. During the course of this trial the respondents Melvina and Max Mergner presented a new claim theretofore not presented to the county court against the estate, amounting to $982.50 for washing, mending, sewing, and general care of the deceased widow. In the findings of the trial court the will was construed to devise to the widow all life estate, with full power to mortgage and encumber the real estate, if necessary, with the remainder in fee to the appellant herein subject to the special devises. The trial court in such construction determined that it was the intent of the testator to provide for the widow in every manner until, includ-

ing, and after her death, so as to include her funeral expenses. The trial court further found that the account rendered by the administrator during the various years above stated were not subject to review, for the reason that no objections were made thereto or appeals taken therefrom; that the claim of Emil Priewe for funeral expenses paid was a valid charge against the estate; that the claim of Max Mergner for care should be disallowed; that the claim for $982.50, not having been presented to the county court should likewise be disallowed; that the fees of the administrator should be computed upon the total amount of the value of all property accounted for by the administrator; that the appellant as residuary legatee was entitled to the remaining property after payment of the expenses and claims as well as payment of the specific bequests, with interest thereon commencing one year after the death of the deceased widow. Judgment was entered accordingly, pursuant to such findings in March, 1919.

Appeal has been taken from such judgment by the appellant Albert Priewe alone, and demand is made in this court for a trial *de novo*. The creditors whose claims have been disallowed contend that it was unnecessary for them to appeal; since this action being tried *de novo* in this court, their rights can be determined without a separate appeal by them.

This action is not triable *de novo* in this court where all of the testimony has not been taken and preserved in the trial court. The record of the trial court, however, is reviewable upon the specifications of the appellant, and in view of the determination of this court the procedural questions involved are not deemed material. It is evident that the rights of the parties involved essentially depend upon the legal construction to be placed upon the will. The appellant maintains that the will simply devises a life estate to the widow, with the remainder in fee to the appellant; that this simply gave to the widow right to the use of the realty and personalty during her life. The claimant creditors maintain that the will devised absolutely the personalty and the realty in fee to the widow. That the limitation over to the appellant is simply a precatory wish, void as a devise for the reason that the whole estate had previously been granted to the widow.

The administrator defends the construction adopted by the trial court.

In the construction of wills it is manifestly the first duty of the court to ascertain the intent of the testator from the language used in the will upon the subject-matter devised, taking into consideration the circumstances under which the will was made. Comp. Laws 1913, §§ 5685, 5687. Furthermore in so applying rules of construction an interpretation is to be given, if possible, which will give every expression some effect. Comp. Laws 1913, § 5693.

All of the property that was devised was practically exempt property. The personalty was exempt; it could have been claimed and set aside to the widow absolutely under the statute. Comp. Laws 1913, § 8725. The real property was the homestead, and could have been selected by the widow and set aside by her as her homestead under the statute. Comp. Laws 1913, § 8793. Furthermore, out of such property the widow could have received maintenance from the county court pursuant to statute during the course of administration. Comp. Laws 1913, § 8727. The testator did not intend to grant an absolute fee to the widow, for the residuary devise to the appellant negatives such intent. The special bequests were made charges upon the person of the appellant, and not upon the estate, which evinces an intent that the appellant should receive some of the property of the deceased. On the other hand, the intent is fairly clear, considering the circumstances of the parties and the property involved, that the testator intended to give the widow more than a mere use of the personalty and the realty during her life. Unquestionably the devise to the widow, if considered alone, would have given to her, under the statute of this state, the personalty absolutely and a fee in the real estate but the residuary devise negatives such intent. Accordingly such instrument construed in accordance with the intent of the testator as determined by this court reads upon such construction, for practical purposes, as follows:—

"I give, devise, and bequeath all the rest, residue, and remainder of my estate, both real and personal, to my beloved wife, Elizabeth Priewe; after her death I give, devise, and bequeath all of the rest, residue, and remainder of my estate, both real and personal, then remaining, not then sold or used for her support and maintenance, to Albert G. Priewe, his heirs, and assigns forever, subject to the special legacies."

Under this construction the widow possessed a life estate with a power of alienation or encumbrance, if necessary, for her use and support.

The question thereupon is presented whether the principle of law is not applicable that a life estate granted with the power of alienation renders void the limitation over, upon grounds of repugnancy, in accordance with the well-recognized principle of law stated by Chancellor Kent in the cases of Jackson ex dem. Brewster v. Bull, 10 Johns. 19, and Jackson ex dem. Livingston, v. Robins, 16 Johns. 537 and followed by the great weight of authority, Tiffany, Real Prop. vol. 1, p. 332. It is unnecessary to discuss this principle of law, which has been a subject of much academic discussion in this country, for the reason that a specific statutory provision in this state covers the question. Sec. 5298, Comp. Laws 1913, specifically provides: "A future interest may be defeated in any manner or by any act or means, which the party creating such interest provided for or authorized in the creation thereof; nor is a future interest thus liable to be defeated to be on that ground adjudged void in its creation."

This section of the statute follows very similarly the New York statute, which specifically provides: "An expectant estate cannot be defeated or barred by any transfer or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger or otherwise; but an expectant estate may be defeated in any manner, or by any act or means which the party creating such estate, in the creation thereof, has provided for or authorized. An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation." 4 Birdseye's Cumming & Gilbert's Consol. Laws of N. Y. p. 4952, § 57; Laws 1896, § 47, chap. 547.

The New York act was construed in Leggett v. Firth, 132 N. Y. 7, 29 N. E. 950 where a will contained the clause, "I also give, devise, and bequeath to my wife, Elisheba, all the rest and residue of my real estate, but on her decease the remainder thereof, if any, I give and devise to my said children or their heirs respectively, to be divided in equal shares between them." It was held in constructing such provision, that at the common law such gift over would have been void as repugnant to the prior estate upon the ground that a valid executory

devise cannot be defeated at the will of the testator, citing the famous Jackson ex dem. Brewster v. Bull case supra; Van Horne v. Campbell, 100 N. Y. 287, 53 Am. Rep. 166, 3 N. E. 316, 771. The court held, however, that the statute has specifically changed the rule. See also Thomas v. Wolford, 49 Hun, 145, 1 N. Y. Supp. 610; Colt v. Heard, 10 Hun, 189; Terry v. Wiggins, 47 N. Y. 512, 518. We agree with the determination of the trial court, that the accountings made by the administrator, to which no objection or appeal therefrom were taken, are final, and not subject to view. Comp. Laws 1913, §§ 8819, 8833, 8837. The order of the county court thereupon stands in the same position as an order of the county court allowing a final account. Under similar statutes in California it has likewise been held. See § 1637, Cal. Code; Re Grant, 131 Cal. 426, 63 Pac. 731; Re Marshall, 118 Cal. 379, 50 Pac. 540; Re Fernandez, 119 Cal. 579, 51 Pac. 851; Re Cout, 100 Cal. 400, 34 Pac. 865.

Accordingly, the appellant herein is not in a position to dispute the disbursements made by the administrator pursuant to the nine different accountings that he made in the county court. Upon this construction and interpretation it follows, therefore, that the disbursements made by the administrator, as shown by nine accountings, are not subject to review, and therefore are concluded; that the payment of claims for funeral expenses, for last sickness, and for the care of the deceased widow, is dependent upon the moneys received from the use and disposition of the property of the deceased during the lifetime of the widow; with propriety, owing to the form of administration had, such claims may be allowed by the administrator and by the county court only out of such moneys available; that in considering such moneys there should be added thereto the value of the property taken by the appellant herein and converted to his use during the lifetime of the deceased widow that the special bequests imposed upon the appellant herein are payable by him out of the residue of the property remaining after the death of the widow, with legal interest thereon from the date of her death, the same being a personal charge upon the appellant. One further question is raised in the record concerning the proper fees to be paid the administrator; namely, whether such administrator should receive his commission only upon moneys actually handled and received by him, including the value of unsold prop-

erty as inventoried, or upon moneys handled and received by him, plus the present actual value of the property undisposed of. In this record it is our opinion that the administrator in this case should receive fees based upon the actual moneys handled by him, plus the value of the property undisposed of as originally inventoried and appraised. He has handled the rents and profits of the unsold property for years. This is sufficient without adding thereto the unearned increment of increased value of the land accruing during these years. The appellant is entitled to the rents and profits of the remaining property, after the decease of the widow. It is therefore ordered that this case be remanded by the trial court to the county court for further proceedings upon final accounting and final distribution of the estate consonant with the views expressed herein.

No costs are awarded to any of the parties upon this appeal.

BRONSON, J. Some of the respondents herein, upon petition for rehearing and for modification of the order of this court, complain that the opinion of this court, limiting the payment of creditors' claims only to moneys received by the administrator, practically eliminates the claims of creditors, for the reason that there are no moneys so available.

Such position is a misconstruction of the views of this court as contained in the opinion; properly the county court may consider, for purposes of such creditors' claims, the moneys received by the administrator upon the sale of the land, and by him paid, upon the principal mortgage indebtedness, to wit, $700, and the moneys borrowed by the administrator, to wit, some $610, for purposes of the deceased widow. This makes a total of $1310 available. Under the circumstances of this case the interest paid on the principal mortgage indebtedness by the widow, or the administrator, out of the moneys received during her lifetime, may be considered the complement of the amount of such mortgage indebtedness that the widow should have assumed and paid. The principal mortgage indebtedness, therefore, is properly chargeable upon the residue of the estate. The fees and expenses of the administrator, not heretofore paid, out of moneys received by him, during the course of administration, may likewise be considered a charge upon the residue of the estate. The claims of the

respondents, Emil Priewe and the Mergners, first presented in the district court, are not for the consideration nor the review of this court upon this record. The final settlement of the account, the determination of administrator's fees, and the allowance of claims (properly filed, and properly to be allowed), are matters for the consideration of the county court, pursuant to the opinion of this court. The petition for rehearing is denied.

VICTOR E. KALLBERG, Appellant, v. G. S. NEWBERRY, Respondent.

(170 N. W. 113.)

Option land contract — action to rescind — decision adverse to plaintiff — subsequent action by plaintiff — on the option contract — for difference in price — between option price and sum realized — election of remedies — plaintiff bound by first suit.

Plaintiff gave defendant a thirty-day option on certain land, at $25 per acre, and within the thirty days defendant found a purchaser, accepted the option, and the land was conveyed. A short time prior to the giving of the option, plaintiff had given defendant a similar option at the same price, which had expired, and had offered to sell the land to others at the same price. Subsequent to the conveyance by the plaintiff, a dispute arose relative to the transaction, and the plaintiff, with full knowledge of the surrounding facts, brought an action to rescind the option contract, claiming therein to be entitled to the full amount which defendant had obtained upon a resale of the property. The purchaser from the defendant was not made a party to the rescission suit, which terminated in favor of the defendant. *Held:*

1. That the termination of the recission suit adversely to the plaintiff bound him to his election of remedies, and he could not subsequently maintain an action upon the option contract for the recovery of the difference between the price stated in the option and the amount realized upon the resale.

Res judicata — doctrine of — precludes repeated litigation — same parties — same issues — or issues properly involved in former suit.

2. That the doctrine of *res judicata* precludes repeated litigation and prevents the relitigation of issues which were properly involved in a previous suit between the same parties.

Opinion filed December 21, 1917. Petition for rehearing filed April 12, 1918.

Appeal from District Court of Foster County, Honorable *J. A. Coffey,* Judge.

Affirmed.

T. F. McCue, for appellant.

"A mere attempt to claim a right or pursue a remedy to which a party is not entitled, and that without obtaining any legal satisfaction therefor, will not deprive him of a right or the benefit of a remedy to which he orginally had a right to claim or resort. The doctrine of election between inconsistent rights or remedies has no application to such a case." Bennet v. Lapp, 41 Minn. 494, 43 N. W. 334.

Where one brings a suit to recover what he has paid on the contract, based upon a rescission of the contract by him, and fails to recover because of no legal right to rescind, another suit for damages is maintainable. Where there exists but one remedy for a wrong, an election of remedies is an impossibility. Ibid., Detroit H. & L. Co. v. Stevens, 58 Pac. 195.

The remedy which one pursues in the belief that it exists in his favor must actually exist before he is estopped. 7 Am. & Eng. Enc. Pl. & Pr. p. 366; Elliott v. Collins (Idaho) 55 Pac. 302; Marshall v. Gilman (Minn.) 53 N. W. 811.

The former action was a mere empty suit, under which plaintiff derived no benefit; he was mistaken in his remedy. Such an empty proceeding will not constitute an election of remedies so as to bar a party from recovery in a proper action. Omaha v. Redick (Neb.) 84 N. W. 46; McLaughlin v. Austin (Mich.) 62 N. W. 719; Bistline v. United States, 144 C. C. A. 6, 229 Fed. 546; Pruett v. Edwards, 88 S. E. 36; McGibbon v. Schmidt (Cal.) 155 Pac. 460; Commercial Nat. Bank v. Faser, 155 N. W. 601; Corbett v. Boston Ry. C. 107 N. E. 60; Union Central Life v. Drake, 214 Fed. 536; Snow v. Allen (Mass.) 30 N. E. 691; Sullivan v. Rose (Mich.) 76 N. W. 309; Chaddoch v. Tabor (Mich.) 72 N. W. 1093; Shanahan v. Corburn, 87 N. W. 1038; Smith v. Bricker, 86 Iowa, 285, 53 N. W. 250.

In order for the doctrine of the election of remedies to bar an action, the party must have received some benefit under the election. Register v. Carmichael, 169 Ala. 588, 34 L.R.A.(N.S.) 309 and cases cited; Todd v. International Mtg. & Bond Co. 71 So. 661; Fitzgerald v. Fer. Trust Co. 187 S. W. 600; Whitley v. Spokane Ry. Co. 132 Pac. 121; Molher v. Chamber of Commerce, 153 N. W. 617; Kaufman v. Cooper,

39 Mont. 146, 101 Pac. 969; Wilson v. Edwards, 113 N. Y. Supp. 687; Calhoun County v. Met. Constr. Co. 152 Ala. 607; Belt v. Washington Power Co. (Wash.) 64 Pac. 523.

"A party who imagines he has two or more remedies, or who misconceives his rights, is not to be barred from all remedy because he first tries a wrong one. Justice should not be wholly denied because a wrong remedy was first pursued." Bunch v. Graves, 111 Ind. 357, 12 N. E. 514; Agar v. Winslow (Cal.) 56 Pac. 422.

In order that a judgment will constitute an estoppel, the issue must be necessarily tried and determined in the former action. Carter v. Carter, 14 N. D. 66, 103 N. W. 425.

And the subject-matter and demand must be the same. Selbie v. Graham, 18 S. D. 365, 100 N. W. 755; Mosteler v. Holborn, 21 S. D. 547, 114 N. W. 693; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Gehering v. School Dist. (Neb.) 107 N. W. 250; Woodman v. Blue Grass Land Co. (Minn.) 107 N. W. 1052; Coyle v. Due, 28 N. D. 406; Stitt v. Rat Portage Co. 101 Minn. 93, 11 N. W. 948.

Where it is pleaded and proved that a written contract is signed only upon the faith placed by said party in certain oral promises made by the other party at the same time and prior to the signing of the written contract, and in the full belief that such oral promises constituted a part of their entire contract, and that the party making them would carry them out, evidence of such oral promises is highly competent and should be received. Erickson v. Wiper, 33 N. D. 193; De Rue v. McIntosh, 26 S. D. 42, 127 N. W. 532; Chapin v. Dobson, 78 N. Y. 74, 34 Am. Rep. 512; Thomas v. Loose, 114 Pa. 35, 6 Atl. 326; Dicken v. Morgan, 54 Iowa, 684, 7 N. W. 145; Cullman v. Lindsay, 114 Pa. 166, 6 Atl. 332; Barnett v. Pratt, 37 Neb. 352, 55 N. W. 1050; Ayer v. Bell Mfg. Co. 147 Mass. 46, 16 N. E. 754; Davison v. Cochran, 71 Iowa, 369, 32 N. W. 445; 9 Enc. Ev. 350; Ferguson v. Raferty, 128 Pa. 337, 6 L.R.A. 33, 18 Atl. 484; Hines v. Wilcox, 96 Tenn. 148, 34 L.R.A. 824, 54 Am. St. Rep. 826, 33 S. W. 914; Walker v. France, 112 Pa. 203, 5 Atl. 208; Bourne v. Sherill, 143 N. C. 381, 118 Am. St. Rep. 809, 55 S. E. 799; Brown v. Hobbs, 147 N. C. 73, 60 S. E. 716; Devlin, Deeds, 3d ed. § 826; Mapes v. Metcalf, 10 N. D. 609.

When the consideration of a written contract is the material sub-

ject of inquiry, parol evidence is always admissible. Winsor v. St. Paul M. & M. R. Co. (Wash.) 79 Pac. 613.

Before a party is entitled to a judgment notwithstanding the verdict, it must appear clearly, upon the whole record, that he is entitled to a judgment on the merits of the case, as a matter of law. First Nat. Bank v. Kelly, 30 N. D. 98; Cruikshank v. St. P. F. & M. Ins. Co. 75 Minn. 266, 7 N. W. 958; Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617.

Edward P. Kelly, for respondent:

"No suitor is allowed to invoke the aid of the courts upon contradictory principles of redress, upon one and the same line of facts. The whole doctrine of election of remedies is based upon the theory that there are inconsistent rights and remedies of which a party may avail himself, and the choice of one is held to be an election not to pursue the other. The principle does not apply to coexisting and consistent remedies." Standard Sewing Machine Co. v. Owings, 140 N. C. 503, 53 S. E. 345, 8 L.R.A.(N.S.) 582; Whittier v. Collins, 15 R. I. 90, Am. St. Rep. 879; Bacon v. Moody, 117 Ga. 207, 43 S. E. 482; Austin Mfg. Co. v. Dexter, 109 Iowa, 277, 80 N. W. 312; Black v. Miller, 75 Mich. 323, 42 N. W. 837; Sonnesyn v. Akin, 14 N. D. 248; Dennies v. New Pub. Co. (N. D.) 129 N. W. 93; Poirer Mfg. Co. v. Kitts, 18 N. D. 556, 120 N. W. 558; Cobb v. Hatfield, 46 N. Y. 536; Schiffer v. Ditze, 83 N. Y. 308; Maron v. Bovet, 43 Am. Dec. 651; Humpner v. Osborne Co. (S. D.) 50 N. W. 88; Sullivan v. Ross Estate, (Mich.) 71 N. W. 634; Farwell v. Myers, 26 N. W. 328; Roberts v. Ely, 9 N. Y. S. R. 796; Stewart v. Huntingdon, 16 N. Y. Supp. 112; Brown v. Ball, 29 N. D. 223; Zimmerman v. Robinson & Co. (Iowa), 102 N. W. 814.

The judgment in a prior action bears as an estoppel only as to matters in issue or controverted upon the determination of which the findings or verdict was rendered, where the second action between the parties is upon a different claim or demand. A former judgment is a bar not only as to every matter which is offered to sustain the verdict or claim or demand, but as to any other admissible matter which might have been offered for that purpose. Selby v. Graham, 18 S. D. 365, 100 N. W. 755, 24 Am. & Eng. Enc. Law p. 779.

"The execution of a contract in writing, whether the law requires

it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Comp. Laws 1913, § 5889.

"Parol testimony cannot be introduced to vary, add to, or alter a written instrument which in itself is plain and free from doubt, in the absence of fraud, surprise, or mistake." Durkin v. Cobleight (Mass.) 17 L.R.A. 270 and note; N. W. Fuel Co. v. Brunz, 1 N. D. 137.

"The testimony was evidenced by a writing; to permit some supposed agreement to be proven by parol would be to vary, contradict, and annul the written agreement by a parol contemporaneous arrangement. This the law will not tolerate." National German Am. Bank v. Lang, 2 N. D. 11; Thompson v. McKee, 5 N. D. 196, 37 N. W. 367; Plano Mfg. v. Rott, 3 N. D. 165; Hutchinson v. Clary, 3 N. D. 270; Wm. Deering & Co. v. Russell, 5 N. D. 319.

The agreement here sought to be proved by parol was in no manner a collateral matter distinct from the subject-matter of the written contract, but directly connected therewith. First Nat. Bank v. Prior, 10 N. D. 146; Jones & Son v. G. N. R. Co. 12 N. D. 336; Merchants State Bank v. Ruetell, 12 N. D. 519.

If the contrary principle were established no written contract could be made that could not be defeated by parol. Mukland v. Menasha Wooden Ware Co. 68 Wis. 34; Reeves v. Bruening, 13 N. D. 157; Dowagiac Mfg. Co. v. Mahon & Robinson, 13 N. D. 516; Alsterberg v. Bennett, 14 N. D. 596; Putnam v. Prouty, 24 N. D. 517.

BIRDZELL, J. This is an appeal from an order entered in the district court of Foster county, setting aside the verdict of a jury in favor of the plaintiff for $1,440, and directing the entry of a judgment *non obstante* for the defendant. The facts are as follows: Plaintiff Kallberg, being indebted to the First National Bank of Carrington, of which the defendant Newberry was cashier, and there being liens outstanding upon his land in considerable amount, was apparently desirous of disposing of his property and paying his debts. The bank was also apparently desirous of collecting the amount owing to it by Kallberg. In carrying out this purpose, Kallberg, in the fall of 1914, talked with the defendant concerning the proposed sale of his land, and on October 20th gave Newberry a fifteen-day option upon

the land at $25 per acre. During the life of this option, some prospective deals were discussed and investigated by the plaintiff and defendant, but inasmuch as they involved trades which, for one reason or another, were regarded as undesirable, the sale was not consummated. During this same year, Kallberg had listed his land with at least two real estate men in Carrington at $25 per acre. He had also offered it for sale to one Herman at the same price. On November 19th, Kallberg gave to the defendant a second option for thirty days, on the terms of $25 per acre. The stated consideration for each of these options was "$1, receipt of which is hereby acknowledged." While there is some conflict in the testimony relative to the understanding of the parties at the time the second option was given, it is not disputed that on the morning of the day the option was signed, Newberry, in company with one A. T. Johnson and a prospective purchaser by the name of Ganske, and the wife of the latter, went to the Kallberg farm for the purpose of inspecting it with a view to the purchase thereof by Ganske. It appears that Johnson was interested in the matter by reason of the fact that he held a lumberman's lien against the land, amounting to about $900, which had been assigned by him as collateral to his indebtedness to the First National Bank. Furthermore, it appears that Johnson had found the prospective purchaser, having learned from one Nolton, with whom the Ganskes were stopping in Carrington, that they were desirous of purchasing land in the locality. Newberry's explanation of the reason why he desired the option is that Johnson also had other land which he could show to these people, but that, inasmuch as he, Newberry, was desirous of selling this land for Kallberg, he would like Kallberg to execute the option, so that he, Newberry, would be protected in making the deal. While there is a conflict between the testimony of Newberry and Kallberg regarding the conversation at the time of the signing of the option, the former contending that it was understood that the option was a straight proposal to sell the land at $25 per acre, and the latter contending that it was intended that he should have all of the money realized from the sale, over and above his indebtedness, in the view that we take of the case this conflict is immaterial, as will later appear. The deal was later consummated, the land being sold to Ganske at $29.50 per acre. A few days after the option was given, Kallberg gave

Newberry a deed for the land, and Newberry entered into contract with Ganske and wife, whereby the latter was to make his first substantial payment on March 15, 1915, following, it being understood that Kallberg was to retain possession of the land until that date. A few days prior to March 15, 1915, while Kallberg was making preparations to conduct a sale of his personal property, preparatory to giving up the possession of the premises, a question arose relative to some indebtedness owing by Kallberg to the First National Bank, as security for which the bank held a chattel mortgage on some property which Kallberg desired to sell. The merits of the controversy respecting this chattel indebtedness are not involved in this action, and are unimportant here, except as this transaction furnished the occasion for the discussion between the parties relative to the interest upon the purchase price during the interim between the date of the sale of the land and the date of the settlement, the following March. During this controversy the whole deal was rehashed, and the parties, through their respective agents, attempted to negotiate a settlement of the entire matter in dispute. For some reason the settlement failed, and Kallberg instituted a suit for the rescission of the sale contract and the cancelation of the deed. This suit was later terminated by the entry of a judgment for the dismissal of the action. It should be stated here that, after the termination of the rescission suit, the defendant settled with Johnson for his and Nolton's participation in the deal. This action was then brought for the purpose of recovering the difference between the price recited in the option of November 19th, or $25 per acre, and the price at which the land was sold to Ganske, namely, $29.50 per acre, which difference amounted to the sum of $1,440. The complaint is founded upon an alleged agreement, whereby the defendants obligated themselves to pay or account to the plaintiff for whatever sum was received for the land in excess of $25 per acre.

Upon this appeal the appellant asks for a reversal of the order of the trial court and the entry of a judgment on the verdict of the jury. In support of his position appellant contends: First; that the bringing of the rescission suit was not an election of remedies; second, that under the doctrine of *res judicata* he is not precluded from pursuing this action; and, third, that the evidence going to establish the oral

agreement as to additional consideration was admissible and afforded sufficient foundation for the verdict of the jury.

It is clear that this suit is founded upon an alleged contract between plaintiff and defendant, whereby the defendant became bound to pay to the plaintiff not $25 per acre for the land, according to the option, but whatever sum defendant received therefor in making the resale of the premises. It is equally clear that in the rescission suit the plaintiff sought relief upon the ground that the contract between him and defendant was not binding, and that the relief asked was founded upon a disaffirmance of the contract. These remedies, as applied to the transaction of the parties, are therefore clearly inconsistent. The appellant does not contend that at the time he instituted the rescission suit he was not fully apprised of the facts surrounding the transaction in question. It appears, however, on the contrary, that, with full knowledge of the facts, the plaintiff instituted the rescission suit, in which he would have been entitled either to a return of the property, or, in case the property could not be returned, to its value. In so doing he must be held to have elected his remedy.

The elements of an election are: First, the existence of two or more concurrent remedies; second, the inconsistency of the remedies; and third, a decisive choice between them. 15 Cyc. 252; 9 R.C.L. 958. An examination of the record in this case shows conclusively that all of the elements of a binding election are present. The judgment roll, which is in evidence, shows that the plaintiff claimed, in the former suit, that the defendant induced him to enter into the transaction for the purpose of reaping a profit measured by the difference between $25 per acre and the price at which the land was sold, while professing that he "was not getting anything personally out of the deal." It is true that the complaint in the former action was drawn on the theory that the option contract bound Kallberg to sell the land at $25 per acre, but that such contract was voidable by reason of Newberry's alleged fraud and breach of a confidential relationship; whereas in this case the contention is that the real contract was that Kallberg should be bound to sell the land for not less than $25 per acre, and should receive, in addition to that, whatever sum Newberry would be able to obtain upon a resale. On either theory of the plaintiff's right, however, that is, whether it be a right to have the contract rescinded and

the deed canceled (or in lieu thereof money damages), or a right to have the alleged contract enforced, the substantial thing the plaintiff sought to recover in both actions was the same. He knew of the transfer to Ganske when the rescission suit was brought, and did not make him a party. The real object of that suit was the same as in this; namely, to recover the difference between $25 per acre and a higher valuation of the property which defendant would be precluded from disputing. While the prayer for relief in the rescission suit asked for a cancelation of the deed and for general relief, it is clear that a money decree would have been within the issue; and, when it was demonstrated that a cancelation could not be had by reason of a transfer of the land to persons who were not parties to the action, no relief, other than a money judgment, would have been appropriate.

Nor does the fact that the plaintiff now claims that the true contract was different from that expressed in the option agreement alter the situation. A plaintiff who is apprised of all of the facts connected with his transaction cannot, for the purpose of maintaining a rescission suit, claim that the transaction had resulted in the consummation of one contract, and then subsequently, for the purpose of maintaining an action for breach of the contract, maintain that the contract was entirely different. Especially is this true where the pursuit of either remedy to its conclusion would result in substantially the same measure of recovery. We are of the opinion that the bringing of the former action and its prosecution to final judgment amounted to a conclusive election. See Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026; Cohoon v. Fisher, 146 Ind. 583, 36 L.R.A. 193, 44 N. E. 664, 45 N. E. 787; Board of Education v. Day, 128 Ga. 156, 57 S. E. 359; Wheeler v. Dunn, 13 Colo. 428, 22 Pac. 827; Sanger v. Wood, 3 Johns. Ch. 416.

The appellant further contends that he is not precluded by the doctrine of *res judicata*. What has already been said, in referring to the judgment roll in the previous action, demonstrates the unsoundness of this contention. The doctrine of *res judicata* is founded upon the principle that litigation must not be so conducted as to be needlessly vexatious. It is not designed to preclude a thorough judicial injury into the rights of litigants which arise out of a given set of circumstances, but it must be and is properly employed to prevent litigants

from harassing their adversaries by compelling them to repeatedly litigate matters which have previously been at issue between them, or which, if not subjected to judicial scrutiny, were properly involved in the previous litigation. The court, in the previous action, having fully examined the option transaction and having determined therein that the plaintiff had in fact no equity in the land litigated the very matters now at issue. Such determination is conclusive upon the plaintiff in this action, where he asks to reverse this holding and to have it determined that he has an equity, as against this defendant amounting to $1,440.

As to the admissibility of parol testimony to impeach the consideration recited in the option contract and to establish the true consideration existing between the parties, we feel that it is unnecessary to express any opinion, for it is quite apparent from what has been said that the appellant is precluded from maintaining this action. We are impressed that there would be much merit in appellant's argument if the action were one to rescind, cancel, or reform the contract. Erickson v. Wiper, 33 N. D. 193, 157 N. W. 592. And it may even have some merit as applied to the present case; but, inasmuch as the decision of this question cannot affect the result, we prefer to express no opinion upon it.

For the foregoing reasons the order appealed from is affirmed.

ROBINSON, J. (dissenting). In this case the plaintiff seems to have been in the distress of Esau when he sold his birthright for a mess of pottage. By taking advantage of his necessity and distress, Cashier Newberry obtained his signature to a paper consenting to the sale of his land at $25 an acre. The next day he obtained a deed of the land, and the next day, November 21, 1914, Newberry sold the land to one Ganske at $29.50 per acre. In the course of time he allowed the plaintiff $8,000 or $25 an acre. The claim of plaintiff is that Newberry was his creditor and banker and confidential adviser; that the deed to him was made in trust, relying on his promise to sell the land and to pay to the plaintiff the entire purchase price, less the liens and mortgages. The jury found a verdict in favor of the plaintiff for $1,440, the balance due on his land at $29.50 an acre. Contrary to the verdict the court gave judgment for defendant, and plaintiff ap-

peals. The verdict is well sustained by the positive evidence and by the facts and circumstances. The plaintiff was largely indebted to Newberry, or his bank, on 12 per cent paper, and the cashier was pressing him for payment. Plaintiff testifies: "In the early morning, when he was milking, Banker Newberry came in his auto and went to the barn and said that he had a buyer for the land. He had a piece of paper and wanted me to sign it. I said, 'twenty-five dollars an acre is too cheap.' He said, 'Whatever the land sells for after paying the debts will be turned over to you.' I signed it. Next Saturday I saw Banker Newberry at the bank, and he told me he wanted the deed to the land. I asked him the price. He would not tell me. I signed the deed and left it with him. He gave me no papers. In January he said he would not settle until Ganske settled up. He said he would not do anything before the 15th day of March, when Ganske was to pay up. After March 15th, I had McCue go to the bank to get a settlement. I got no settlement. Newberry never paid me one penny."

The testimony of the plaintiff is well supported by the facts and circumstances. If the deed to Newberry had been an absolute sale at $25 an acre, the proper thing for him was to have made a settlement with plaintiff at the time of receiving the deed. That was the time for him to settle and to turn over to plaintiff his 12 per cent paper, release the mortgages, and pay to him the balance. That is just what Newberry or any honest banker would have done had he bought the land at $25 an acre. The jury believed, and had a right to believe, the testimony of the plaintiff in regard to the price of the land, and the court had no right to order judgment contrary to the verdict.

In March, 1915, the plaintiff commenced an ill-advised action against Newberry to annul and cancel the deed, and to rescind the deal with Newberry. The complaint stated facts to show that for a long time Newberry had been the banker and adviser of the plaintiff, and held a large amount of securities against him; that plaintiff had reposed confidence in Newberry; that the deed was obtained by undue influence and by taking a grossly unfair advantage of the plaintiff's necessity and distress.

However the rescission suit was a mere blunder. In any view of the case the deed to Newberry gave him an absolute power to sell the

land and to account for the proceeds, and under that power he had sold the land for $29.50 an acre, Ganske, the purchaser, was not made a party to the suit, and for that reason the court justly held that it had no jurisdiction over Ganske or his contract, and dismissed the action.

Then this action was commenced to recover $1,440, the balance of the purchase price, and the jury found in favor of the plaintiff. But counsel for Newberry contends that, by the false action to rescind the contract and cancel the deed, the plaintiff waived the right to an action to recover the purchase price of the land. And strange to say that view appeals to our judges. They say: "This action is brought for the purpose of recovering the difference between the price recited in the option of November 19th, of $25 an acre, and the price at which the land was sold to Ganske, namely, $29.50 an acre, which difference amounts to $1,440. The complaint is founded upon an alleged agreement of defendant to pay or account to the plaintiff for whatever sum was received for the land in excess of $25 an acre. Appellant contends that the bringing of the rescission suit was not an election of remedies, and that it does not preclude him from bringing this action." Then the judges hold that the action for rescission of the contract is a bar to this action. Under such a ruling if the plaintiff had not received a dollar for his land, a suit to rescind his deed would bar him from ever recovering the price. To me that seems perfectly absurd. Indeed it seems a shame to accuse our judges of making such a decision.

When an action to rescind a sale is dismissed, it is dead and buried, and it can serve no purpose except to bar another action for the same identical cause. There is no rule or principle of law that a vendor of land may forfeit the price of the same, or any part of the price, by a false action or an attempt to rescind the sale. An action to rescind a sale is an action in equity, and is triable by the court or judge; and an action to recover the price of land is an action to recover money only, and it is triable by a jury. The one is not a bar to the other. In this case it was not permissible to unite the two causes of action because they did not affect all the necessary parties to the action. While Ganske was a necessary party to one cause of action, he was no party to the other cause.

Both of the actions in question were commenced and prosecuted by McCue, the ex-attorney general. He holds a certificate from this

court that he may safely be trusted to practise law. Now, if McCue was so unwise as to forfeit $1,440 of his client's money by prosecuting an action to rescind a sale, someone should make good the loss. If the judges gave McCue a false certificate, it is for them to make it good by paying the money, or directing McCue to pay it or to show cause why he should not be disbarred for incompetency. McCue neglected to argue this case. He was too confident. Now his duty is to move for the rehearing, and to set himself and the judges right or to pay the $1,440.

On Petition for Rehearing.

BIRDZELL, J. In a petition for rehearing, counsel for appellant contends that the legal doctrines relating to election and *res judicata* have been erroneously applied, and an apparently logical argument has been adduced to the effect that it is impossible that both doctrines could be conclusive against the appellant in the same action. The basic premise of the petition is that, in order that there may be a binding election, the party must be entitled to two different remedies; that they must be inconsistent; and that there must have been an unequivocal choice; whereas, in order to be precluded by the doctrine of *res judicata,* it is stated that the following requisites must exist: "(1) That there is a complete, actual identity between the things sued for in each action; (2) that the two causes of action must not only be consistent one with the other, but identical, a logical impossibility; and (3) that the parties to both actions must be the same." The statement quoted is a paraphrase of the statement contained in Bouvier's Law Dictionary and quoted in 34 Cyc. 1666, note 56. See also Freeman, Judgm. § 252. The second requisite, however, according to the above authorities, is not that the two causes of action must be consistent, but that there must be an *identity* of the *cause of action* involved in the previous proceeding and that involved in the present proceeding. The term is singular, not plural, as used by counsel. The doctrine of *res judicata* is not, except in unusual cases such as merger, employed for the purpose of preventing the separate litigation of separate and distinct causes of action. It is a well-established rule, however, that questions of fact which have actually been directly in issue in a former suit and

have been judicially determined by a court of competent jurisdiction are conclusively settled so far as concerns the parties to that action, and cannot be litigated again between such parties or their privies in the same or a *different* cause of action. 23 Cyc. 1215 and authorities cited.

Let us apply this principle to the instant case. The parties are the same; in the former suit there was an issue as to the terms of the contract; and the findings, which are in evidence in this case, establish that the issue was determined adversely to the present contention of the appellant; for the court found "that at the time of the giving to the defendant the option (exhibit 2) it was his (plaintiff's and appellant's) intention and purpose to sell said land, if said option was accepted, at the agreed price of twenty five dollars ($25) per acre, and that on the 21st day of November, 1914, when he executed and delivered the warranty deed (plaintiff's exhibit A), it was his intention and purpose to transfer and convey the title therein described to the defendant, and at the agreed price of $25 per acre, or $8,000." It was also found that the plaintiff knew that Newberry was negotiating a sale of the premises at a higher price. It is too clear for argument that the issues of fact relative to the contract between Newberry and Kallberg were proper subjects of litigation in the former action, that they were litigated therein, and that the parties are concluded by such former adjudication. *Nemo bis vexari debet pro eadem causa.*

Is there any inconsistency in the holding that the appellant is precluded both by the doctrine of *res judicata* and the doctrine of election? We think not. *Res judicata* has to do with the cause of action or with some fact or issue involved in some former proceeding between the same parties, and operates to preclude its redetermination in a subsequent suit, even though the subsequent suit may be upon a different cause of action: whereas, the doctrine of election has to do with the legal means of enforcing a right arising out of a given transaction or set of facts; or, to attempt to state the doctrine more accurately, it involves nothing more or less than a choice of inconsistent rights arising out of the given transaction, together with the selection of the appropriate remedy, the latter being merely incidental. Thus, it may be both logically consistent and perfectly conformable to the rationale of both doctrines referred to that a suitor may be precluded from liti-

gating certain questions of fact by reason of having previously litigated them with his adversary, and also prevented from maintaining a subsequent action by reason of the reliance of his adversary upon his unequivocal choice to litigate the matters arising out of the transaction in a former proceeding, which was appropriate to give him adequate relief.

So far as the doctrine of election itself is concerned, we are convinced that hard and fast rules cannot be laid down for its application without danger of being compelled to so apply them as to result in injustice in particular cases. The real basis for a binding election is estoppel; and if the election is held binding or not binding, depending upon whether or not the elements of an estoppel are present, no injustice can result. In the present case the appellant first sought to avail himself of his right to rescind, and in the action brought litigated every issue that is material to the maintenance of his present action. His adversary not only relied upon his choice to the extent of meeting the issues presented; but, after the determination of the case, he dealt with others on the strength of the result. We are convinced that under the facts stated in the main opinion, and repeated here, the appellant should be and is estopped to maintain the action at bar. If the contract, as found in the previous suit to be, had not been performed and this action were brought for its breach, a different question would be presented.

Many authorities are cited by appellant's counsel, in which the doctrine of election had been unsuccessfully invoked; but a careful examination of them discloses that the doctrine was generally held not applicable, and consequently not efficacious to defeat a second suit, where the plaintiff had previously chosen a wholly inappropriate remedy and where he was defeated by reason of such choice. It appears here that the parties litigated their cause in full in the previous rescission suit, and that the court made findings on the merits against the plaintiff. Thus, it becomes a matter of little or no consequence that relief by way of rescission would have had to be denied for the additional reason that Ganske, the purchaser of the land, was not made a party.

In addition to what has already been said in regard to the election of remedies, it would seem that a proper observance of the Code of Civil Procedure would require that a plaintiff in a civil action, brought

for the redress of a particular wrong, should be compelled to obtain his redress in that action, especially where it would be unnecessary for him to amend his pleadings. It must be remembered that the prayer for relief is not an essential part of a pleading, and that the plaintiff herein could have obtained all the relief he now seeks under the original pleadings.

The petition for a rehearing is denied.

GRANT S. YOUMANS, Appellant, v. LOUIS B. HANNA, Thomas Hall, S. C. Severtson, Robert E. Barron, et al., Respondents.

(171 N. W. 835.)

Appeal and error — recall of remittitur — jurisdiction — res judicata.

Plaintiff files what is denominated a "motion for rehearing." It is *held* that the matter is controlled and decided by the former decisions of this court in Hilmen v. Nygaard, 31 N. D. 419; Youmans v. Hanna, 35 N. D. 479, and Patterson Land Co. v. Lynn, 36 N. D. 341.

Opinion filed July 27, 1918.

Plaintiff files a motion for rehearing.

Motion denied.

James Manahan, Arthur LeSeuer, and *Wm. Lemke,* for motion.

Per Curiam. By an opinion of this court filed December 2, 1916 (35 N. D. 479, 160 N. W. 705, 161 N. W. 797, Ann. Cas. 1917E, 263), this court affirmed a judgment in favor of the defendants. Plaintiff filed a petition for rehearing on December 22, 1916, and on December 28, 1916, an order was entered denying a rehearing. The remittitur was thereupon transmitted to, and judgment entered thereon in, the district court. On January 2, 1917, the plaintiff filed a mo-

tion to vacate the order denying a rehearing. Such motion was based on the grounds: "That Judges Fisk, Burke, and Goss participated in the deliberations of the court and the decision denying the application [for a rehearing], and were not judges of this court at said time, their term of office having expired upon the first Monday in December of the year 1916, and the said three persons constituting a majority of those assuming to act as the supreme court of this state, and being without legal right or authority to so act, the order denying the said motion was without authority of law and void. 'That the said order amounts in effect to a complete denial of justice in the above- entitled action, no fair hearing upon the merits having ever been allowed in this action in this court.'" 35 N. D. 514. Upon the hearing of that motion Judges Birdzell and Grace regarded themselves to be disqualified, as the questions presented involved their tenure of office. But while the same condition existed with respect to Judge Robinson, he did not deem himself to be disqualified, and signified his intention to sit as a member of this court. District Judges J. M. Hanley, of the eleventh district, and A. T. Cole, of the third district, were thereupon duly called in and requested to sit in the place of Judges Birdzell and Grace. The application to recall the remittitur and reconsider the case was fully argued before the court, as thus constituted. And in the opinion prepared by District Judge Cole this court held that the decision and order participated in by Judges Fisk, Burke, and Goss were, in fact, the decision and order respectively of this court, and consequently valid. And this court further held that when this court has entered a final order in a cause brought to it on appeal, and the remittitur has been transmitted to, and judgment entered therein, the court below, the supreme court loses jurisdiction to recall the remittitur and reinstate the cause, unless the order directing the issuance of the remittitur was based on fraud or mistake of fact. 35 N. D. 481, 160 N. W. 705, 161 N. W. 797, Ann. Cas. 1917E, 263. It may be mentioned that the latter principle was merely reaffirmed, as it had been formerly announced in at least two decisions of this court (see State v. Lund, 25 N. D. 59, 62, 140 N. W. 716; Hileman v. Nygaard, 31 N. D. 419, 154 N. W. 529, Ann. Cas. 1917A, 282). The principle was subsequently reaffirmed by this court in Patterson Land Co. v. Lynn, 36 N. D. 341, 162 N. W. 702. The rule as thus settled has the

support of the overwhelmng weight of judicial authority. See note to Hileman v. Nygaard, Ann. Cas. 1917A, commencing at page 284.

Plaintiff thereafter filed what is denominated a "motion for rehearing." It is somewhat difficult to understand the exact character or purpose of the motion. It does not comply with the rules relating to petitions for rehearing. Neither does the language used indicate an intention to petition for a rehearing of the motion to recall the remittitur. It appears rather to be the intention to make a new motion for a reargument and reconsideration of the cause on the merits thereof. In other words, we are asked to set aside or ignore the original decision, the order denying the rehearing, and the order denying the motion to recall the remittitur. It is not contended in the moving papers, or at all, that the order denying a rehearing was entered, or the remittitur transmitted, through inadvertence or mistake, but on the contrary it is assumed that the order was entered and the remittitur transmitted as the deliberate act of the court as then constituted. Neither is it contended that the decision and order entered on March 15, 1917, denying the application to vacate the order denying a rehearing, was entered through inadvertence or mistake. As disclosed by the former opinions in this litigation, this cause is no longer pending in this court. Manifestly there could be no rehearing on the merits of the cause, until the remittitur had been recalled. This court has already held that it is without jurisdiction to recall the remittitur, and that it has lost jurisdiction over the cause itself. A motion for a reconsideration of the merits of this case is, therefore, manifestly controlled and decided by the decision on the former motion to recall the remittitur, as well as by the former decision of this court in Patterson Land Co. v. Lynn, 36 N. D. 341, 161 N. W. 702. What is said in those decisions is equally applicable here.

It is also clear that the decision of this court on the former motion to recall the remittitur is *res judicata* as to the matters determined in that decision.

We are, therefore, agreed that if the purported motion be considered as a petition for rehearing, it should be denied; and if it be considered as a motion for rehearing of the cause on its merits, it presents no question which this court has jurisdiction to consider, and cannot be entertained, as the cause in which the motion is made is no longer pending. The motion is denied.

GRACE, J. (dissenting). It has been determined by a majority of the members of this court that the question before it, in the above-entitled matter, is whether or not a certain motion for rehearing, addressed to the merits of the case, which motion will be more particularly hereinafter referred to, should be received and considered by this court. In the above-entitled case a motion for a rehearing was filed in this court as appears from the records thereof, on June 8, 1917, *nunc pro tunc* April 2, 1917. Said motion is dated the 28th day of March, 1917, and is signed by James Manahan, Arthur LeSeur, and William Lemke, attorneys for appellant and petitioner. The moving part of, said motion is as follows:

"The appellant respectfully moves and petitions this honorable court to reconsider this case upon its merits, and to grant a rehearing or a new trial because there never was a fair trial below nor a fair hearing in this court."

The remittitur in said case having gone down to the court below, the question presented to this court now is: Should the motion which we are now considering be received into this court, or should the motion be taken into consideration in this court and passed upon and decided by this court in the same manner as any ordinary motion presented to this court? Should the motion be received and decided by this court in the same manner as motions are ordinarily received and decided by this court? The majority of the court is of the opinion that though the motion has been filed in this court on the above-mentioned date, the same should not be received or considered by this court. We think the motion, being filed and entered on the records of this court, is entitled to be received and considered. If the evidence in the case substantiates the claim of the appellant made in their arguments and brief in support of said motion, not only that there was not a fair trial, but that there was no trial, and the argument in the brief of his appellant filed in this motion is to the effect that there was no fair or no trial, then it would seem the motion should be received and considered in order to intelligently decide whether this motion should be received and decided by this court, and whether or not there is any merit to the claim of the appellant that there was no fair or no trial. In order to intelligently determine whether said motion should or should not be received and considered by the court, it is first neces-

sary to determine from all evidence whether there was a trial in the court below. In order to determine this matter, it is necessary to know what the issues were in the trial below, and whether the case was one tried to the court or to the court with a jury. The action was one for damages. Actions at law for damages are triable to a jury. The main issue presented in the case, as we understand the same, was whether or not the plaintiff's bank was solvent or insolvent, and the further question of whether or not the plaintiff was compelled, by duress, to execute a certain contract by which he was compelled to dispose of the bank and its assets. As we read the record, there was evidence submitted on these two questions. It was a question of fact for the jury to decide, under all the testimony, whether the bank was solvent or insolvent, and whether there was any duress exercised upon the plaintiff to compel him to sign the contract above referred to.

It was the peculiar and exclusive province of the jury to pass upon these questions of fact. It is the constitutional right of the plaintiff to have the jury pass upon these facts. If the jury did not pass upon these facts, if they did not return any verdict in the ordinary manner and way, or if the court took the case from the jury so that they could not pass upon these facts and so that they could not perform their duty and exercise the functions preserved to them by the Constitution, which functions are exclusive and apart from any of the powers of the court, then it must necessarily follow that there was no trial in the court below.

In the closing paragraph of its instructions, the court below used the following language as it appears in the transcript in this case: "I have no right under the law to usurp the functions of a jury. I have no right to pass upon any question of fact. I have a right to instruct the jury on questions of law, and it is their duty, under their oaths, to accept the law as given by me, and I state to you, gentlemen of the jury, that, in my opinion, the plaintiff has wholly failed to make a case; that there is no evidence or question of fact to be submitted to you; and I instruct you to sign a verdict in favor of the defendant, and will ask one of the jurors to sign the verdict."

It is plain from such instruction that the jury did not pass upon the questions of fact in this case; that the verdict of the jury signed under direction of the court by one of the jurymen is not a decision by the

jury, nor, in reality, a verdict by the jury, but in such case the decision is by the court, and not by the jury. In other words, the case was taken away from the jury and the jury decided in the manner directed by the court; that is, in favor of the defendant. In such case, it is not the will of the jury that is acting, but they follow the will and direction of the court, and exercise no judgment or discretion as a jury.

If the case was one, therefore, which involved questions of fact triable to a jury, the refusal of the court to permit the jury to determine such questions of fact would defeat plaintiff's constitutional right of trial by jury, and there would be, in reality, no trial.

The two great questions are those we have above stated: Was the plaintiff's bank solvent or insolvent? and, Was there duress exercised upon the plaintiff in the execution of the contract we have referred to? The transcript of the evidence is very long, covering over 900 pages, and a great share of it relates to these particular questions; and, as we view the matter, these were questions exclusively for decision by the jury, with which the court could not interfere.

The question of what constitutes solvency or insolvency, as we view the matter, is a question of law for the court. The court could instruct the jury that a person was deemed to be insolvent when the total amount of his liabilities exceeded the total of his assets; but whether the total of the liabilities did, in fact, exceed the total of the assets, is a question of fact exclusively for the jury. It is for the court to define insolvency and for the jury to determine whether or not insolvency exists. The same is true of duress. The court could define to the jury of what duress consists. The court could define duress as applied to a contract, and could instruct the jury that, if one were compelled to sign a contract against his will and through fear or through fear of threatened imprisonment, such a contract would be executed under duress or without the free and voluntary consent of the person signing the same, and against his will and consent, and would therefore be void; but it would be the exclusive province of the jury to determine as a question of fact whether duress actually existed or was exercised or resorted to in the particular transaction. In other words, the court could define to the jury what constitutes duress as a matter of law, but it is for the jury to determine as a question of fact whether duress in fact existed. Galusha v. Sherman, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495; 9 R. C. L. 716.

Whether or not solvency or insolvency existed or duress existed at the time of the making and execution of the contract being questions of fact exclusively for the jury, and a great share of the evidence being with reference to whether the bank was solvent or insolvent, and other evidence relating to whether duress was used or not used with reference to the execution of the contract in question, these questions could not be taken from the jury, it being the exclusive province of the jury to pass upon such questions, and if such questions were taken from the jury by the court and they were not allowed to pass upon them, there was, in reality, no trial.

If there was, in reality, no trial by reason of the plaintiff being denied his constitutional privilege of having the facts of the case determined by the verdict of a jury, there could be no effective judgment entered in the case. It appearing in the record itself that the case was taken from the jury and a verdict directed for the defendants, and it appearing on record that the questions of fact were not submitted to the jury for its determination, the appellate court could do nothing less than remand the case to the trial court in order that the questions of fact in the case might be submitted to a jury, and plaintiff protected in his constitutional right to have the facts of the case decided by a jury of his peers. If, as we have pointed out, the failure to submit the facts in the case to the jury resulted, in effect, in no trial or mistrial, and the judgment entered thereby became of no effect, no subsequent affirmance of the judgment by the appellate court could make the judgment effective, nor could any action of the appellate court, other than the remanding of the case for a new trial before a new jury, protect the plaintiff in his right to a trial of the facts to a jury whose exclusive duty it would be to render a verdict. The trial of the case in the supreme court could be no more effective than the trial of the case below. If the trial of the case below was a mistrial or it was not a trial, the judgment would be ineffective and void, and nothing the supreme court could do, in view of this situation, could make the judgment effective; not even the sending down of the remittitur. The decision of the case in the supreme court and the sending down of the remittitur would not afford the plaintiff his right to have the facts in the case decided by jury. Where a case has been fully and fairly tried upon its merits, and the parties to the action have not been denied any

of the constitutional rights, including the right of trial of the facts of the case to a jury, and there has been no inadvertence or mistake, the remittitur should not be recalled; but the sending down of the remittitur should not operate to defeat a citizen in his constitutional right of trial by jury of any issues of fact which are in the case, or of any other constitutional right which the citizen possesses.

In this case, a jury was impaneled and heard all the evidence relating to the questions of fact, but were not permitted, as a jury in the ordinary and customary manner, to exercise their own judgment and render a verdict according to their own judgment, but they were directed by the court to return a verdict for the defendant, and one of the jurymen was ordered to sign the same. Such a proceeding is not a trial by jury.

The appellate court may have overlooked these important matters, which appear of record in this case, and by inadvertency failed to grant a new trial, as it should have done, and may have inadvertently permitted the remittitur to go down instead of remanding the case to the trial court for a new trial of the facts in the case, and requiring them to be submitted to a jury for a verdict by them, under all the evidence of the case.

The right of trial by jury is provided for in § 7 of article 1, of the Constitution of North Dakota, Said section is as follows: "The right of trial by jury shall be secured to all, and remain inviolate; but a jury in civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law."

A provision to the same effect is contained in the Federal Constitution; and while it is not probably applicable to the suits in state courts, it may be referred to, to show how the Federal courts regard this provision in the Federal Constitution. The 7th Amendment to the Federal Constitution is as follows: "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The Supreme Court of the United States, in the case of Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029, which was a case in which the circuit

court of appeals directed the judgment for one party when the verdict was for the other, and did this on the theory not that the judgment was required by the state of the pleadings, but that it was warranted by the evidence, had the following to say: "That what was done may be clearly in mind, it is well to repeat that while on the trial in the circuit court the jury returned a general verdict for the plaintiff, this circuit court of appeals, on an examination of the evidence, concluded that it was not sufficient to sustain the verdict, and on that ground directed a judgment for the defendant. In other words, the circuit court of appeals directed a judgment for one party when the verdict was for the other, and did this on the theory not that the judgment was required by the state of the pleadings, but that it was warranted by the evidence."

It will be perceived, therefore, that the court, although practically setting the verdict aside, did not order a new trial, *but it assumed to pass finally upon the issues of fact presented by the pleadings and to direct judgment accordingly.* If this was an infraction of the 7th Amendment, it matters not that it was in conformity with the state statute, or with the practice thereunder in the courts of the state; but neither the statute nor the practice could be followed in opposition to the amendment, which, although not applicable to proceedings in the courts of the several states, is controlling in the Federal court.

In the case of United States v. Wonson, 1 Gall. 5, Fed. Cas. No. 16,750, Mr. Justice Story said: "Now, according to the rules of the common law, the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court before which the suit is depending, for a good cause shown; or unless the judgment of such court is reversed by a superior tribunal on a writ of error and the *venire facias de novo* is awarded. This is the invariable usage settled by the decisions of ages."

In Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732, the same learned justice, speaking for the court, said: "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

In the case of Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768, where the

7th Amendment to the Federal Constitution was again under consideration, it was said by the Supreme Court of the United States, speaking through Mr. Justice Brewer, as follows: "Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative."

The above citations are valuable only in that they show the great care of the highest court of the United States in preserving to the citizens of the United States their right to the jury trial by reason of the provision of the 7th Amendment. There are very many decisions of Supreme Court of the United States largely to the same effect, which show what jealousness and care that high court has manifested in protecting the citizens of the United States in the right of trial by jury.

The majority of the court, in a discussion of the matters under consideration, cite the case of Patterson Land Co. v. Lynn, 36 N. D. 341, 162 N. W. 702. The issues involved in that case are entirely different than those involved in the case at bar. The Patterson Land Co. v. Lynn case was a case in equity, and, as we understand it, an action brought to quiet title to certain lands. In that case the court not only had authority to declare the law, but also full authority and jurisdiction to pass upon facts. In that case the court declared what it considered to be the law, and also found the facts, as it had authority and jurisdiction to do. The judgment was entered by the court, and an appeal was taken to the supreme court, where the case was again tried *de novo*. Clearly in that case the court had authority to declare what it considered the law of the case, and authority and jurisdiction to decide all the facts, and in that case it must be considered that the case was tried upon its merits, the court having jurisdiction to declare the law and determine the facts, and the defendant, in that case, was not entitled to a jury trial.

In the case of Hileman v. Nygaard, 31 N. D. 419, 154 N. W. 529, Ann Cas. 1917A, 282, the action was originally one to foreclose a mortgage. That decision shows that the appeal was taken from the judgment in an action for foreclosure wherein all the issues were fully litigated and tried to the court. No statement of the case was proposed, served, or settled, nor a transcript of the proceedings had in the court

below procured. The case was one properly triable to the court, and the court had authority to determine the law, and jurisdiction to find upon the facts which were submitted to it on the trial. In that case, the issues of law and fact had been determined by the court below, and, the case being one of equity, the court had jurisdiction of both the law and fact. This is not true of the case at bar, which is an action for damages wherein the court had only the authority to declare the law, and the facts of which case the plaintiff had constitutional right to have submitted to the jury. The court below having made this mistake and having assumed jurisdiction of the facts, where plainly under the Constitution it had none, thus denying the plaintiff the constitutional right of trial by jury, no subsequent action of the trial or the appellate court could restore the plaintiff to his constitutional right of having issues of fact determined by jury, other than granting of a new trial.

The mistake and inadvertence of the trial court in taking the case away from the jury and directing a verdict for the defendant were sanctioned by the decision of the appellate court, and the mistake and inadvertence of the trial court in refusing to submit the issues of fact to the jury was not corrected by the appellate court as it should have been, by sending the case back for a new trial, and requiring the issues of fact to be submitted to the jury, as the plaintiff, under the constitution of the state, had a perfect right to have done.

ROBINSON, J. concurs with GRACE, J.

ADOLPH RAAD, Respondent, v. R. A. GRANT and Ethel M. Grant, Appellants.

(169 N. W. 588.)

Appeal — error assigned on — party asserting must clearly show it — from record.

1. A party who asserts error on appeal must show the existence thereof clearly and affirmatively from the record itself.

Record complete — claimed omissions from — presumption as to — if included — would sustain decision — contingencies presumed.

2. Where the record is incomplete it will be assumed that the portions

omitted, if included, would have sustained the decision. And where, on any contingency in the state of the record, the decision below might have been valid, such contingency will be presumed.

Settled statement of case — absence of — findings of fact — covering matters not in issue — covered on trial — presumption.

3. Where no statement of case has been settled, and the findings of fact cover matters not embraced in the issues formed by the pleadings, it will be presumed that such additional matters were properly made determinable by the action of the parties upon the trial.

Agreement of settlement — judgment based upon — evidence — supporting.

4. In the instant case it is *held* that a judgment against the defendants predicated upon a certain agreement of settlement is not shown to be erroneous by the record presented on this appeal.

Opinion filed November 4, 1918. Rehearing denied November 29, 1918.

From a judgment of the District Court of Hettinger County, Honorable *W. C. Crawford,* Judge, defendants appeal.

Affirmed.

Jacobsen & Murray, for appellants.

A vendor of land is entitled to retain money paid by the vendee on account of the purchase price as liquidated damages, after the vendee's breach, whether it be so designated in the contract or not. Glock v. Howard & W. Colony Co. (Cal.) 55 Pac. 713; 39 Cyc. 1325, 1382.

A vendee cannot in any event recover back such money without complying with the settlement contract and turning back the contract for deed. 13 C. J. 567–572.

In this case the defendants were the prevailing parties and entitled to costs, as a matter of course. Comp. Laws 1913, §§ 7789, 7794.

M. S. Odle, for respondent.

The appellants not having paid, offered to pay, nor tendered the amount fixed by the settlement contract, nor returned the notes canceled, as provided by such contract, their obligation created by such contract was never satisfied or discharged. Comp. Laws 1913, § 5800.

A money obligation is only discharged or extinguished by a due offer of payment, and the depositing of the money in the name of the creditor in some suitable bank, with notice thereof to the creditor. Comp. Laws 1913, § 5815.

CHRISTIANSON, J. This is an action to rescind a contract for the purchase and sale of 160 acres of land, in Hettinger county in this state, and to recover the consideration paid under the contract.

The plaintiff's claim as stated in the complaint is that the defendant R. A. Grant "falsely and fraudulently represented that said land was much nearer Mott, North Dakota, and Burt, North Dakota, both market points for said land, than the same in fact is; that he falsely and fraudulently represented that said land was all good farming land with no gumbo or stone on the same, when in truth and in fact the said land has stone on the same and much of the same is gumbo; that he falsely and fraudulently represented that said land or place had a good well of water thereon, when in truth and in fact the water thereon cannot be used; that he falsely and fraudulently represented that said land was worth $40 per acre and that all land adjoining and near was selling for that amount, when in truth and in fact said land is not worth to exceed the sum of $25 per acre; that he falsely and fraudulently induced this plaintiff to buy said land for the sum of $39 per acre or a total of $6,240." And that the plaintiff, relying upon said representations, agreed in writing to buy the premises, and paid to the defendants the sum of $1,000 as part of the purchase price. That by reason of the falsity of said representations, the plaintiff was deprived of all the benefits which he otherwise would have derived from the purchase, and that as soon as he discovered that the representations were false, he demanded a rescission, and a return of the $1,000 which he had paid to the defendants.

The defendants, in their answer, admit that they sold the land in controversy to the plaintiff under the written contract attached to the answer, and that the plaintiff paid $1,000, as part of the purchase price according to the terms of such contract. The answer further avers that the plaintiff has defaulted in the terms of the contract, rendering the same subject to cancelation, and that the defendants have elected to cancel and terminate the contract. The defendants prayed judgment:

That plaintiff's action be dismissed; that the land contract be canceled and terminated, and all rights of the plaintiff thereunder foreclosed, and that the $1,000 paid by the plaintiff be forfeited to the defendants as liquidated damages under the terms of the contract.

The case was tried to the court without a jury. The court made findings of fact, among others, to the effect: "That prior to entering into said contract the plaintiff personally examined the land on two different occasions, that the defendants did not misrepresent to the plaintiff that there was no gumbo or stone on the land; that the defendants did not misrepresent the distance of said land from Mott and Burt; that the defendants did not misrepresent the value of said land; that prior to the purchase of the land the plaintiff rode out from Mott to said land on two different occasions and had an opportunity to observe the distance of said land from Mott and Burt; that the plaintiff did not rely upon any of the statements made by the defendants relative to the situation of the land or the character of same; that at the time of entering into said contract the reasonable value of said land was $40 per acre; that the defendants did not misrepresent the well; that at the time of making said contract said well did contain average North Dakota water; that said land contained 160 acres and had 150 acres broken thereon and under cultivation, and that it was 8½ miles from Mott and 6 miles from Burt; that the defendants did not commit any fraud upon the plaintiff in connection with the sale of said land."

The court further found: "That on the 24th day of September, 1917, the plaintiff and defendants entered into the following agreement in writing: 'September 24th, 1917. I hereby agree to surrender to R. A. Grant contract for deed which I hold conveying the N. E. ¼ of 14–132–92, upon payment of $200 on or before December 1st, 1917, providing that he will be put to no further expense in connection with this settlement.' "

The court also found that the defendants have at all times been willing, ready, and able to comply with the terms of said land contract and settlement agreement, and that the defendants have incurred expenses aggregating $200 in conducting the litigation in the instant case. The court ordered judgment: (1) That the contract "be and the same is hereby in all things foreclosed and canceled, and the plaintiff barred from all right to redemption thereunder, and the defendants be and they are hereby given immediate possession of said premises, and defendants' title to said premises is quieted as to any and all claims of the plaintiff to said land;" (2) that the plaintiff have judgment against the defendants for the sum of $200, with interest thereon at 6

per cent from September 24, 1917; and (3) that each party pay his own costs and disbursements. Judgment was entered as ordered, and defendants appeal.

The only error assigned on this appeal is that the court erred in rendering judgment against the defendants for $200, and interest. The appeal is taken from the judgment roll proper. No statement of case has been settled. Hence, we have no means of knowing what evidence was introduced, stipulations made, or proceedings had in the court below. We have before us merely the pleadings, the findings of fact, conclusions of law, and the judgment. It is, of course, elementary that the judgment comes before us with all presumptions in its favor. And the appellant has the burden of showing error. And he must present a record affirmatively showing such error. 2 Enc. Pl. & Pr. 423, 424; Erickson v. Wiper, 33 N. D. 193, 225, 157 N. W. 592. "A mere suspicion or color of error is not sufficient, but every reasonable intendment establishing the regularity of the decision rendered must be removed, as all doubtful interpretations will be resolved in favor of the validity of the action of the trial court." 2 Enc. Pl. & Pr. 425. Where a material fact or circumstance essential to establish the error is omitted, the presumption on appeal is that it would have sustained the decision objected to, if included. And where the record does not affirmatively show error, it will be presumed "that every proceeding below essential to its legality was validly taken, and that every fact essential to its regularity was legally shown. And where, on any contingency supposable in the state of the record, the decision below might have been valid, such contingency will be so presumed." 2 Enc. Pl. & Pr. 425, 428–433.

And so, while the settlement agreement was not an issue under the pleadings, we must assume that it properly became one by action of the parties during the course of the trial. The plaintiff in his brief asserts that the agreement was offered in evidence by the defendants. As already stated we have no means of knowing what the fact is with respect to the admission of this agreement, but we must assume, in support of the decision appealed from, any contingency which might have occurred upon the trial under which it might have been proper for the court to render the judgment which it did. Hence, we must assume that the settlement agreement came properly before the court by action of the defendants themselves.

It will be observed that the defendants prayed for affirmative equitable relief against the plaintiff. And defendants were awarded the affirmative relief asked. The land contract was adjudged canceled, plaintiff's rights in the land were terminated, and defendants were awarded the immediate possession of the land. In this connection it should be noted that there is nothing to indicate that the defendants ever served notice of cancelation of the land contract as required by article 4, chapter 30, Code of Civil Procedure. Nor is there any contention that the defendants have paid to the plaintiff the amount stipulated in the settlement agreement, or that they have made offer of payment, followed by deposit, in accordance with § 5815, Compiled Laws 1913, and thereby extinguished the obligation. The defendants availed themselves of the settlement agreement, and received the benefits of its provisions, upon the trial. The defendants were awarded immediate possession of the land; and all rights of the plaintiff thereto, including the right of redemption, were annulled. This portion of the judgment was decidedly favorable to the defendants. It was more favorable than the court was required to render under the facts found, —if the settlement agreement is excluded. It seems probable that it was on the strength, and by virtue, of that agreement that the court decreed that the plaintiff be barred from all right of redemption in, defendants given immediate possession of, and defendants' title quieted against all claims of the plaintiff to, the land.

On this appeal, the defendants seek to retain the benefit of this favorable portion of the judgment. They have carefully limited their assignments of error so as to assail only that portion of the judgment which awards to the plaintiff judgment against the defendants for the amount stipulated to be paid under the settlement agreement. The only question presented on this appeal is whether that portion of the judgment should be eliminated and the remainder of the judgment allowed to stand. Upon the record before us we are not prepared to say that the trial court erred in rendering the judgment which it did. The defendants asked for and received equitable relief. We cannot say that the trial court erred in requiring these defendants to pay to the plaintiff the amount stipulated in the settlement or compromise agreement of September 24, 1917. It follows from what has been said that the judgment appealed from must be affirmed. It is so ordered.

BRUCE and BIRDZELL, JJ., concur.

GRACE, J. I concur in the result.

ROBINSON, J. (dissenting). This is an action to rescind a contract for the purchase and sale of a quarter section of land which is about 10 miles from Mott, in Hettinger county, North Dakota. (N. E. ¼ 14–134–92.) In May, 1917, the plaintiff contracted to buy the land at $39 an acre and to pay (as he did) $1,000 cash and the balance at stated times, with interest, and to pay the taxes for the year 1917, and during that year the defendant reserved to himself the use of the land. And thus the sale price was about $45 an acre.

The complaint avers that to induce the plaintiff to make the contract and to pay $1,000 cash, R. A. Grant falsely misrepresented the nearness of the land to Mott and Burt, the nearest market towns; and that it was all good farming land, with no gumbo or stones, and that it had a good well, and that it was worth $40 an acre; and that all adjacent land was selling at $40 an acre; that plaintiff relied on said representations, which were wholly false. The well did not contain water fit for use, and there was on the land much stone and gumbo, and it was not worth over $25 an acre.

In the brief of counsel for plaintiff, it is said that, at the time of contracting, plaintiff was a mere boy, in his early twenties, and he resided at Madison, South Dakota. That in May, 1917, plaintiff arrived at Mott with a confederate of Grant, was given a sumptuous dinner, and taken on a car to overlook the country and to see the land. That about dusk Grant drove hurriedly along one side of the land, falsely assuring the plaintiff that it was all the same as that along the road; that it had a good well and was free from stones or gumbo, and that it was only 8 miles from Mott, when in truth it was 10 miles from Mott. It had several acres of stone and gumbo land, and the well was unfit for use.

The answer denies any fraud or misrepresentation, and avers that the defendants have been damaged by reason of the sale in the sum of $3,000 or more. It demands a rescission of the contract and a forfeiture of the $1,000. The action was commenced in due time, to wit, November 13, 1917. On March 15, 1917, judgment was entered, and

on March 20th, defendants appealed. Though it is not alleged in the answer, the court found, that the parties had made a written agreement as follows:

September 24, 1917.

I hereby agree to surrender to R. A. Grant contract for deed which I hold, conveying the northeast quarter of 14–132–92 upon payment of $200, and R. A. Grant agrees to surrender all notes given with said contract, and to pay $200 on or before December 1, 1917, if not put to further expense in connection with the settlement.

[Signed] Adolph Raad
R. A. Grant.

The judgment is that the contract be canceled and that Grant pay the $200. The conditional promise to pay $200 amounts to nothing; it was not in accord and satisfaction; it was repudiated by Grant, and it was not pleaded, and it should not have been received in evidence. The judgment should have been in favor of the plaintiff for a rescission of the contract and a return of the $1,000, with interest, or it should have been for the foreclosure of the contract by a sale of the land, or by giving the plaintiff a reasonable time to make his payment in accordance with the contract.

It is true the contract contains the clause that in case the purchaser fails to make any payment the contract shall, at the option of Grant, be canceled, and all payments shall be forfeited and retained as damages; but the province of equity is to grant relief from penalties and forfeitures, and not to enforce them. "The rule is practically absolute that equity will not lend its aid to enforce either a penalty or a forfeiture." 16 Cyc. 75, 80.

A party to a contract may rescind the same in the following cases: 1. If the consent of the party rescinding was given by mistake or obtained by fraud or undue influence. Comp. Laws, § 5936. Undue influence consists: a. In the use by one in whom confidence is reposed by another, of such confidence for the purpose of obtaining an unfair advantage over him. b. In taking an unfair advantage of another's credulity or weakness of mind. c. A contract by a minor between eighteen and twenty-one years may be rescinded or disaffirmed as of course, on returning the consideration.

The young are credulous and trusty. They make quick friendships and are very liable to imposition. The law is not disposed to look with favor on overreaching and unscrupulous contracts. It is not more important to protect the physically weak against assaults of the strong and powerful, than to protect the mentally weak or credulous against the cunning devices of the artful and unscrupulous.

While the record does not present a statement of the case, there are facts which do speak. The plaintiff is lacking in years and in shrewdness, and his counsel is a young lawyer just commencing the practice. Defendant is a shrewd land trader, and he has no burden of scruples. In May, 1917, he received from the boy plaintiff $1,000 on a sharp and overreaching land contract, and he has shown himself perfectly willing to keep the land and the money. He has always retained possession of the land, and has never given the plaintiff any value for his money. He has induced the plaintiff to sign a paper releasing his claim to the land and the money for a mere conditional promise to pay him $200, and now, without offering to pay $1, he is willing to retain the land and the $1,000 of plaintiff's money.

The court may well take official notice of what is generally known concerning the average rainfall, the crop, and land values in Hettinger county. Twenty-five dollars to $30 an acre is a good price for any ordinary quarter section of land. Expert opinion fixes the average valuation at $17.62. In township 134 of range 92, the assessed valuation per acre is $3.92, and most of the land in that township is nearer market and better located than section 14. Manifestly there was a mistrial and a gross miscarriage of justice. Hence, the judgment should be reversed and a new trial granted.

This case has been decided without any conference and the result of the majority opinion is to permit a robbery to the amount of $800.

On Petition for Rehearing.

PER CURIAM. Defendants have petitioned for a rehearing. They contend that our decision in this case is contrary to the rule announced in Regent State Bank v. Grimm, 35 N. D. 290, 159 N. W. 842. An examination of the decision in the Grimm Case will disclose that in that case we expressly recognized the rule which we invoked in sustaining the judgment in the case at bar.

It is also contended that in our former opinion we held it to be necessary to serve notice of cancelation of a land contract as a prerequisite to the maintenance of an action to cancel such contract; and that in so doing we overlooked chapter 151, Laws of 1917, which provides that such notice "shall not be deemed necessary where the contract in question is sought to be terminated by an action at law or in equity, brought for that purpose upon failure to perform." This contention is based upon an erroneous premise. We did not hold in our former opinion that service of notice of cancelation was a necessary jurisdictional prerequisite to an action to cancel a land contract. In fact we have expressly held (in another case) that such contract may be canceled by action without the prior service of notice of cancelation. It is a fact, however, that in many cases such notice has been served prior to the institution of the action to cancel the contract. And obviously a different judgment might properly be rendered where notice of cancelation has been served from that which might be rendered where it has not.

We referred to the fact that notice of cancelation has not been served, in discussing the terms of the judgment rendered by the trial court. It has been the policy of our laws for a long period of years that executory contracts for the sale of land shall not be canceled, and payments thereon forfeited, without first affording the vendee an opportunity to comply with the terms, and obviate the cancelation of the contract. The vendor may not by stipulation in the contract reserve the right to declare a cancelation; nor can he declare such cancelation except by service of written notice stating the grounds of default. Comp. Laws 1913, §§ 8119–8122. Under the original statute enacted in 1903 (Laws 1903, chap. 204), the vendee was allowed "thirty days after the service of the notice upon him, in which to perform the conditions or comply with the provisions upon which the default shall have occurred." And such compliance obviated a cancelation, and caused the contract to remain in full force. § 8122, supra. This policy was not only continued in force by chapter 151, Laws 1917, but the time allowed to the vendee in which to make compliance was extended to six months. Of course, where a contract is sought to be canceled by an equitable action, the court is required to proceed on equitable principles and render such judgment as the equities in the

case justify. In the case at bar the defendants introduced in evidence a certain settlement agreement. The trial court gave them the benefit of the provisions of such agreement, and ordered a cancelation of the contract without right of redemption, and awarded the defendants the immediate possession of the premises. In awarding such relief, the court also required the defendants to pay the amount which they had agreed to pay in such agreement. We refused to interfere with this latter provision of the judgment. The views of the court have undergone no change on this point since the decision was handed down.

It is insisted, however, that in any event the judgment should be reversed as against Ethel M. Grant, for the reason that she did not sign the settlement agreement. This question is presented for the first time on the petition for rehearing. This fact alone would justify a denial of the petition as to this ground. Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481. But in this case a denial of the petition also as to this ground may well be placed upon the merits of the proposition. For the findings of fact are to the effect that "the plaintiff and *defendants* entered into 'the' agreement in writing."

The former decision will stand. A rehearing is denied.

GRACE, J. I concur in the result.

STATE OF NORTH DAKOTA EX REL. WILLIAM LANGER, Attorney General, Petitioner, v. NORTHERN PACIFIC RAILWAY COMPANY, and Walker D. Hines, as Director General of Railroads of the United States, Defendants.

(172 N. W. 324 [reversed in 250 U. S. 135, 63 L. ed. 897, P.U.R.1919D, 705, 39 Sup. Ct. Rep. 502, 18 N. C. C. A. 878]).

Under the authority vested in him by Act of Congress of August 29, 1916, the President of the United States, on December 26, 1917, issued a proclamation assuming the possession and control of the railroad systems of the United

NOTE.—Authorities discussing the question of power of the President in time of war, to take possession and assume control of any system of transportation, are collated in notes in 4 A.L.R. 1680; 8 A.L.R. 969; 10 A.L.R. 956 and 11 A.L.R. 1450, on Federal control of public utilities

States. On March 21, 1918, an act of Congress was approved, which provided for the operation of the transportation systems then under government control and for just compensation to their owners. Acting under § 10 of that act, the Director General of Railroads promulgated general order No. 28, increasing freight rates horizontally and prescribing a uniform passenger fare of 3 cents per mile, not distinguishing between interstate and intrastate traffic. *Held:*

Railroads — Federal control during war with Germany — extent of President's power.

1. The Act of Congress of March 21, 1918, confers upon the President extraordinary executive powers rendered necessary by the existence of a state of war.

Railroads — Federal control did not cease with signing of armistice.

2. The termination of hostilities under the armistice does not justify judicial interference to restrain the further exercise of the extraordinary executive powers rendered necessary by the existence of a state of war.

Railroads — President's power over interstate rates during Federal control.

3. Section 10 of the Act of Congress of March 21, 1918, which gives to the President power to initiate rates, fares, charges, classifications, regulations, and practices, is construed in the light of the other provisions of the act and of the pre-existing method of regulating commerce through the agencies of Federal and state governments, and as so construed it does not confer original authority to initiate intrastate rates which will supersede pre-existing lawful rates, prescribed by the legislature or other competent state authority.

Railroads — Federal control — review of rates by Interstate Commerce Commission.

4. Rates initiated by the President or Director General, under § 10, are subject to review by the Interstate Commerce Commission, and its power to revise or alter is the power previously vested in it under the act to regulate interstate commerce, as amended, which gives it no authority to regulate intrastate rates as such.

Railroads — review of rates by Interstate Commerce Commission.

5. Under the Interstate Commerce Act as amended, the Interstate Commerce Commission has authority to modify intrastate rates otherwise valid only when the modification of such rates is necessary to the complete exercise of its jurisdiction over interstate commerce.

Railroads — regulation of rates by state.

6. In the absence of a clear expression of intention to repeal existing state regulations affecting intrastate commerce, it will not be presumed that Congress so intended.

Railroads — Federal control — rates existing before Federal control in interstate police regulation.

7. Under § 15 of the Act of March 21, 1918, which provides that nothing

in the act shall be construed to repeal, impair, or affect the existing lawful police regulations of the states except where such regulations may affect the transportation of troops, war materials, and government supplies, or the issue of stocks and bonds, pre-existing intrastate rates continue in effect as lawful police regulations.

Railroads — police regulation.

8. The term "police regulations" as used in § 15 is not limited to regulations directly affecting the health, lives, and morals of the people, but embraces regulations designed to prevent discrimination and economic oppression.

Opinion filed April 1, 1919.

Original proceeding in mandamus on relation of the Attorney General.

Peremptory writ awarded.

Charles Donnelly, Attorney for Director General, *M. A. Hildreth,* United States District Attorney for North Dakota, *John Carmody,* Assistant United States District Attorney for North Dakota, of counsel.

Congress was empowered by the Constitution to vest in the President, or in the Interstate Commerce Commission, control over intrastate rates and fares. Pappens v. United States, 252 Fed. 55; Minnesota Rate Cases, 230 U. S. 352, 399; Shreveport Case, 234 U. S. 342.

By the acts of August 29, 1916, and March 21, 1918, the President was given control over all traffic, state and interstate, and was empowered to initiate rates, fares, and charges by filing them with the Interstate Commerce Commission. Act of August 29, 1916; Act of March 21, 1918, §§ 9, 10; Employer's Liability Cases, 207 U. S. 463, 500; Trade-Mark Cases, 100 U. S. 82, 98; Beer Co. v. Massachusetts, 97 U. S. 25, 33.

Any doubt as to the meaning of the law will be resolved in favor of the executive's practical construction of it. Heath v. Wallace, 138 U. S. 573, 582; Pennoyer v. McConnaughy, 140 U. S. 1, 23; Hahn v. United States, 107 U. S. 402; United States v. Moore, 95 U. S. 760.

William Langer, Attorney General (*Frank E. Packard* of counsel) for petitioner.

The right of action in the instant case arises under the Constitution and statutes of the state of North Dakota, and is not a Federal question. Tennessee v. Union Planters Bank, 152 U. S. 454; Chapple v. Waterworth, 155 U. S. 102; Walker v. Collins, 167 U. S. 57.

The decisions are assembled in Stanfield v. Umattlie River Water Users Asso. 152 Fed. 596.

Reasonable regulations to safeguard the resources upon which the nation depends for military success must be regarded as being within the powers confided to Congress to enable it to prosecute a successful Navy. McCullough v. Maryland, 4 Wheat. 316–421; Miller v. United States, 11 Wall. 268; Steward v. Kahn, 78 U. S. 493–507; Mayfield v. Richards, 115 U. S. 137.

The boundary line of state and Federal power has been clearly marked out by the Supreme Court in such leading decisions as the Minnesota Rate Cases, 230 U. S. 352, the Shreveport Cases (Houston & T. R. Co. v. United States, 234 U. S. 342).

BIRDZELL, J. On the application of the above-named plaintiff an alternative writ of mandamus issued out of this court, commanding the defendants to desist from collecting any fares, rates, or charges for carrying passengers, freight, and baggage between points wholly within the state of North Dakota, other than those stated in the schedules on file in the office of the board of railroad commissioners of the state; or that they show cause why they have not done so. The foregoing writ issued in accordance with the prayer of a complaint and petition, alleging, among other things not material to be noticed, that, by virtue of an Act of Congress of August 29, 1916, the President of the United States issued a proclamation on December 26, 1917, following which he assumed possession and control of the railroad systems of the United States, and that he has been in such possession since January 1, 1918; that on May 25, 1918, William G. McAdoo, predecessor in office of the defendant Walker D. Hines, as Director General of Railroads of the United States, issued general order No. 28, whereby he directed the railroads, under his control, to put into force and effect on June 10, 1918, certain passenger fares and baggage charges, and on June 25, 1918, certain freight rates, which fares, charges, and rates were in excess of those previously authorized to be collected on the intrastate commerce of the defendant company within the state of North Dakota.

Separate answers were filed by the railroad company and by the said Hines, as Director General. The answer of the railroad company alleges that from December 28, 1917, until on or about August 1, 1918, the

Director General exercised possession and control of its transportation system through the officers and agents of the defendant company; but that since August 1, 1918, such possession and control have been exercised through various agents appointed by the Director General. Denying that the defendant company has any power or authority over the tariffs complained of, it asks that the action be dismissed as to it.

The answer of the Director General sets forth the legal basis relied upon to support general order No. 28, and asks that the alternative writ be quashed.

Counsel for the Director General, at the outset of the argument, expressly state that no question relating to the jurisdiction of the court is raised; that jurisdiction is conceded, and that the question before the court is one of the power of the Director General under the Rail Control Act. Consequently it is unnecessary for us to consider what the authority of the Director General may be outside the act.

There is, then, but a single question involved in this proceeding, and that is the validity of general order No. 28 as applied to rates, fares, and charges for the intrastate commerce. The effect of the order, if valid, is admitted. It fulfils the intention therein expressed to increase freight rates upon all business, both interstate and intrastate, 25 per cent, and to establish passenger fares on the basis of 3 cents per mile for both interstate and intrastate carriage (except that where the intrastate rate of fare may exceed 3 cents per mile it is not reduced), and changes are also effected in charges for excess baggage, which purport to be applicable to both interstate and intrastate commerce.

The validity of the order depends upon the construction of § 10 of the Act of March 21, 1918, which is entitled "An Act to Provide for the Operation of Transportation Systems While under Federal Control, for the Just Compensation of Their Owners and for Other Purposes." The section which is relied upon as containing the authority to promulgate the order in question is as follows:

"Section 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and

judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control, or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

"That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

"After full hearing the Commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act: Provided, however, That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating

expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulations, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make." [40 Stat. at L. 456, chap. 25, Comp. Stat. § 3115¾ j, Fed. Stat. Anno. Supp. 1918, p. 762.]

Before entering upon the discussion of the meaning of the above section, we should note the fact that possession and control of the railroads had been assumed by the President, acting under the authority of an Act of Congress of August 29, 1916, which provided that the President in time of war was "empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." [39 Stat. at L. 645, chap. 418, Comp. Stat. § 1974a, 9 Fed. Stat. Anno. 2d ed. p. 1095.] The act, of which § 10 first above quoted is a portion, was adopted after Federal control was an established fact. It should be stated, too, that the finding and certificate referred to in the proviso of § 10 above were made and filed with the Interstate Commerce Commission.

The contention of the plaintiff is that the authority to "initiate rates, fares, charges, etc.," is only applicable to interstate commerce, and in support of this contention, arguments are advanced which are drawn from the history of the Federal regulation of commerce, as well as from other sections of the act in question, considered in connection with the act to regulate interstate and foreign commerce, as amended. It is also argued that the order is void on the ground that it is not apparent that the act giving such plenary power to the President was adopted for the purpose of enabling him to exercise the broad executive functions rendered necessary by the existence of a state of war. And, further, that, if such powers are justified only as war powers, the justification ceased upon the signing of the armistice. It is recalled that immediately fol-

lowing this event the President announced to Congress, "The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it." We feel that the latter contention may be briefly disposed of by referring to § 10 of the act. It provides for the initiation of rates by the President "whenever, in his opinion, the public interest requires." The vesting of such a power in the Executive is so patently obnoxious to the competent method of rate regulation under normal conditions, that it is not to be assumed Congress would have vested the power in such terms except as a means of facilitating the extraordinary executive functions which are conferred upon the President in times of war. The power to regulate rates is legislative, and rates are initiated either by the carriers themselves, by legislation, or by a tribunal or agency upon which the legislature has imposed the duty.

It was not until the Act of June 18, 1910, that the power to prescribe a rate applicable to interstate commerce was vested in the Interstate Commerce Commission. Prior thereto, under § 15 of the Hepburn Act of June 29, 1906, the Interstate Commerce Commission had power to declare given rates unjust or unreasonable; but it was held by the United States Supreme Court, in Interstate Commerce Commission v. Cincinnati, N. O. & T. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896, that the power to declare certain rates charged by the carrier to be unreasonable and unjust did not include the power to prescribe or fix rates, and, as this power was legislative in character, it could not be held to be vested in the Interstate Commerce Commission by implication. Later, however, when the Act of 1910 vested in the Commission power to prescribe and fix rates, the court held, in Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185, that the statute which, in reality, delegated the legislative function to the Interstate Commerce Commission, was valid; but it was held to be valid because it provided for due process of law in such matters. The court said: "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. *A finding without evidence is arbitrary and baseless.* And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative

body, or tribunal, under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however, beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

The above language is, of course, as applicable to any attempt to confer upon the President a power to prescribe, without a hearing, rates which cannot be suspended pending a final determination by another tribunal as to any attempt to vest a similar power in a commission. The fact that Congress originally authorized the possession and control to be taken in the event of war, coupled with the fact that it expressly made applicable a rate-making procedure which would be clearly unconstitutional in times of peace, is satisfactory evidence that the possession and control of the railroads by the President is purely a war measure. As a war measure, the government necessarily assumes its constitutional obligation to make compensation. See United States v. Russell, 13 Wall. 623, 20 L. ed. 474. And the burden of administration was placed where it would be free from possibility of conflict with the constitutional authority to command the armies and Navy, hence it devolved primarily upon the Chief Executive.

The foregoing observations would not be strictly applicable to the fixing of rates for a service that is supplied by the government itself through its own agency or instrumentality. But we do not find in the act in question any evidence that Congress intended to treat the transportation systems as belonging to the government. It rather appears that they are to be utilized primarily for war purposes, while at the same time their ordinary uses are to continue as far as possible. It is provided, for instance, that suits may be maintained against the carriers; that the rates, fares, and charges are to be measured by an existing standard of reasonableness, which is to be finally determined and applied by an authority other than the President, and that the property is to remain subject to the taxing power of the states. These and other provisions sufficiently indicate the intention to continue the pre-existing legal relationship between the carriers on the one hand, and the public on the other, that we ought not to presume, in the absence of some

definite expression, a purpose to discontinue the ordinary standards and means for determining the rights of patrons. Except to the extent that these standards and means are subordinated to the needs of the government in handling the problem before it, they still exist.

Neither can we construe the military exigency which gave rise to the necessity for the government taking possession of the transportation facilities to have terminated. The act itself fixes the period of control as one which shall continue during the war "and for a reasonable time thereafter, which shall not exceed one year and nine months first following the date of the proclamation by the President of the exchange of the ratifications of the treaty of peace." So, even though hostilities may have ceased, it is apparent that the time has not arrived for the mandatory termination of government control under the act of Congress, or for the enforced rescission of orders thereunder, originally justified, as meeting war emergencies. A reading of the legislation upon the subject of transportation in its relation to the national defense discloses that there are many interests affected, both of the government, of the carriers, and of the public, which are sought to be safeguarded through the employment of appropriate means to that end by the executive department. The variety and extent of these interests suggest numerous intricate problems to be solved by the legislative and executive departments. For these reasons it is apparent to us that the termination of Federal control cannot be judicially fixed at any other time than that prescribed by Congress.

The case then resolves to a mere question of statutory construction, and in arriving at the meaning of the act the various provisions must be read so that all may be given effect without inconsistency (New Lamp Chimney Co. v. Ansomia Brass & Copper Co. 91 U. S. 656–661, 23 L. ed. 336–338), and particular words must not be selected or given an effect that will "virtually destroy the meaning of the entire context" or "give them a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive as of its obvious intent." Van Duke v. Cordova Copper Co. 234 U. S. 188–191, 58 L. ed. 1273–1274, 34 Sup. Ct. Rep. 884. It is important that every provision of the act shall be regarded, and that it shall be so construed as to give effect to its spirit and paramount purpose. In so construing the law, it is proper not only to consider the language found within its four corners,

but to look as well to the history of the subject-matter involved, in an effect to harmonize, if possible, any provisions that are apparently conflicting.

It is true, as asserted by counsel for the petitioner, that Congress, prior to the enactment of the legislation in question, had never undertaken to regulate commerce carried on within a state. Section 1 of the Interstate Commerce Act expressly provides that it "shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid." [24 Stat. at L. 379, chap. 104, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. p. 337.] Since this act, as amended from time to time, gives to the Interstate Commerce Commission all the regulatory authority it possesses (unless the Federal Control Act enlarges it), it is clear that it has not been authorized to regulate, directly and primarily, intrastate commerce. It will readily be conceded that Congress possesses ample power to regulate intrastate commerce to the extent necessary to make effective its power to regulate interstate commerce. Shreveport Case (Houston, E. & W. T. R. Co. v. United States) 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833; American Exp. Co. v. South Dakota, 244 U. S. 617, 61 L. ed. 1352, P.U.R.1917F, 45, 37 Sup. Ct. Rep. 656; but it is important to keep in mind the limitations. In the absence of clearly expressed legislative intention it will not be presumed that the power to regulate interstate commerce has been so vested in Federal authorities as to nullify every state regulation that only indirectly or remotely affects interstate business. Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

Neither are we inclined to question the power of Congress, in providing for Federal control of transportation during a war emergency, to vest in the President the full administrative power necessary to effectuate such a degree of unified control as would be independent in every respect of existing state regulations or of all state regulating authority. We are only concerned here with ascertaining whether or not *Congress has* vested powers in the President which may properly be

exercised independently of all state regulations affecting intrastate rates. It would seem that, if it were intended to invest the President with the broadest range of authority, language would have been employed which would be wholly adequate to manifest that intent. As was said by Mr. Justice Brewer in the case of Reagan v. Mercantile Trust Co. supra, page 416, in interpreting an act under which a railroad corporation was organized: "There is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it [i. e., from state regulation], and there is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation, Congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points also within the state, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the state, *and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear.* Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the state, it intended that it should be subjected to the ordinary control exercised by the state over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the legislature of the state, passed in 1873 in respect to it, we are of opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

Another expression opposed to the implying of restrictions on the power of the states to regulate intrastate commerce is that of Mr. Justice Hughes, in the Minnesota Rate Cases (Simpson v. Shepard) supra, page 417: "If this authority of the state be restricted, it must be by virtue of the paramount power of Congress over interstate commerce

and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power; that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the state which otherwise would clearly be within its province."

The argument that the intrastate commerce rates prescribed by the Minnesota statutes were invalid because operating prejudicially upon interstate rates was met by the following considerations, page 420:

"Having regard to the terms of the Federal statutes, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court, recognizing and upholding this authority, we find no foundation for the proposition that the act to regulate commerce contemplated interference therewith.

"Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable, or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for interstate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the states without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the states and the agencies created by the states to deal with that subject."

The terse statement of Mr. Justice Harlan, in delivering the opinion of the court in the case of Reid v. Colorado, 187 U. S. 137–148, 47 L. ed. 108–114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, supports the rule of construction for acts of Congress which we deem to be proper when the subject-matter vitally affects the principal power of a state, and one which must give way to the paramount power of the Federal government only when Congress deems it wise to intervene. The statement is: "It should never be held that Congress intends to supersede, or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested."

Since the only portion of the act in question which may be said to vest in the President the authority contended for is that portion of § 10 giving him power to initiate rates, fares, charges, etc., it remains to be seen whether, when read in connection with its context and with other sections of the act in the light of the pre-existing scheme, according to which commerce was regulated by the Federal and state governments, Congress has clearly manifested its desire to authorize what has been done. Standing alone, the expression of authority to initiate rates would clearly be broad enough to cover both interstate and intrastate commerce. We are of the opinion, too, that this broad language was entirely appropriate. The power to "initiate" a rate is one that has always been exercised by the carriers, and with the assumption of Federal control it was essential that the full power be placed in a Federal agency. This is a sufficient reason for vesting the power in unrestricted terms. But the crucial question is whether or not limitations upon its future exercise are not prescribed in the act.

The same section provides for an appeal to the Interstate Commerce Commission, and authorizes that body to set aside or modify any rate, fare, charge, etc., that may be found to be unjust or unreasonable. In making its findings, the authority of this body must be sought in the act to regulate commerce as amended, since it is expressly remitted to that act for authority to make its findings and enforce its orders. It is clearly the intent of § 10, construed as a whole, to give to the Interstate Commerce Commission an authority to review that is coextensive with the authority of the President to initiate. It is doubtless also intended to require that all rates, fares, charges, etc., initiated under the act shall be just and reasonable in the light of the circumstances, taking into consideration the necessity for increased operating revenue. It follows from this that, if increased powers, extending to existing lawful intrastate rates, are given to the Interstate Commerce Commission, they are given in the Federal Control Act, and it is not at all clear that such was intended. To give to the control act the construction necessary to support the contention made is equivalent to amending by implication the Interstate Commerce Act so as to extend its scope to matters which were never before embraced within it. Indeed, it is tantamount to repealing the express provision that it shall not operate as to transportation wholly within a state. This might well have been the intention as to

matters not previously covered by state regulations; but it is another matter entirely to ascribe such an intention as to a field of regulation already occupied.

That it was not intended to entirely supplant pre-existing regulations of the states seems to us to be even more clearly demonstrated by § 15. The section is as follows:

"Section 15. Nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds." [40 Stat. at L. 458, chap. 25, Comp. Stat. § 3115¾o, Fed. Stat. Anno. Supp. 1918, p. 765.]

The foregoing section lays down a rule of construction for the entire act, according to which it shall not be held to amend, repeal, or impair or affect existing lawful police regulations of the several states, except wherein such regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds. The query arising from this section is, Does the expression "lawful police regulations" include existing regulations with respect to intrastate rates, fares, and charges? It is contended on behalf of the Director General that such regulations are not included, because, it is stated, the regulation of rates is not an exercise of the police power of the state. In support of this contention, it is argued that the police power, in the exercise of which lawful police regulations are made, is one which exists for the general welfare of society, and is, therefore, one which cannot be bargained away. Attention is called to the fact that the regulation of rates is frequently accomplished, to a degree at least, by the exercise of the power to contract. We fail to perceive the force of the argument that would remove rate regulations from the category of the lawful police regulations of the state on account of the practical necessity which has rendered necessary the recognition of contract obligations originating in franchises. Never since Lord Hale gave expression in his De Portibus Maris, to the principle according to which public callings are subject to regulation, has there been any doubt of the right or the power of the state to regulate charges. In fact, it was the exaction of "arbitrary and excessive duties for cranage, wharfage, etc.," that led to the exercise of

the power of control which was vindicated in the statement referred to. See 2 Hargrave, Law Tracts, 78. That this power is a part of the state's police power is hardly open to question, since the decision in Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77. In that case, Chief Justice Waite, delivering the opinion of the court, quoted the definition of the police powers as framed by Chief Justice Taney in the License Cases, 5 How. 583, 12 L. ed. 292, in which he referred to them as "nothing more nor less than the powers of government inherent in every sovereignty . . .; that is to say, . . . the power to govern men and things." They were said to be powers which sprung from adherence to the maxim, "sic uteri tuo ut alienum non laedas." It is the purpose of all rate regulations to preserve the common right to the service rendered in a public calling at a reasonable cost. Fundamentally this is as much a matter of police regulation as are regulations designed to protect health and safety or to prevent discrimination. It matters little whether, in considering specific arrangements looking toward the security of the rights of the public in relation to common carriers, it may become necessary to recognize contractual arrangements made by a legislative body as a practical expedient; the power to regulate the rate is in its essence police, and the exercise of the power results in a "police regulation."

In the case of Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060, supra, it will be noted that the United States Supreme Court expressly characterized state regulations of rates as "police regulations" in the following expression: "We are of the opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

But, it is contended that the term "police regulations" appearing in the statute is one which may be used either in a limited sense or in a very comprehensive sense, and that in the statute in question it is used in its "ordinary accepted sense" as referring to the exercise of the power to protect the health, lives, and morals of the people (Manigault v. Springs, 199 U. S. 473–481, 50 L. ed. 274–279, 26 Sup. Ct. Rep. 127), rather than in the broader acceptation, which, in reality, embraces everything essential to "the great public needs." Noble State Bank v.

Haskell, 219 U. S. 104–111, 55 L. ed. 112–116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. In substance, the contention is that the particular sense in which the term is used in a given place must be gathered from the context. We find nothing in the act, however, which, in our opinion, makes it necessary in executing its various provisions to distinguish between those police regulations that affect the health, lives, and morals of the people, and those that protect their convenience and economic welfare.

The argument that the reservation of "lawful police regulations," rather than the police *power,* shows a purpose to limit the scope of the meaning, is well met by a comparison with the reservation of the taxing power in the same section. The section preserves in full, not only the existing laws of the states relative to taxation, but it preserves as well, unimpaired, the *power* to tax. See Congressional Record, vol. 56, part 4, p. 3313. So, the states may pass such future legislation upon the subject of taxation as would be constitutional if the roads were in private hands; provided, of course, it does not interfere with the transportation of troops, war materials, and government supplies. The roads are not declared to be in public ownership, and the power to tax is as broad as the similar power over roads incorporated by act of Congress (Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; see also Congressional Record, supra), or as conceded by act of Congress in the case of national banks. On the other hand, with regard to the *police power* generally, it is not to be exerted anew, or in a different measure or manner during Federal control from that existing before. The act only continues in force the *existing* police regulations, and the railroad administration is not bound to respect any additional police regulations. Centralization of administrative authority free from future interruptions was accomplished, but Congress accepted the *status quo ante,* so far as police regulations were concerned; and it authorized them to be ignored only when necessary to secure military efficiency in the matter of the transportation of troops, war materials, and government supplies.

The suggestion that a rate prescribed by statute, from which a carrier is prohibited from departing under penalty, is not a police regulation concerning the carriage of intrastate commerce, seems to us also, as hereinabove indicated, to ignore the fundamental considerations that deter-

mine the validity of such regulations. In Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, it was said: "There can be no doubt of their power and duty [of the courts] to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

To a similar effect are Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198, and Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612. Rates are regulated because the business is affected with a public interest. Every regulation must be measured by the yardstick of reasonableness, and must fall short of prohibition, destruction, or confiscation in order to be valid. Freund, Pol. Power, § 63. Nothing, it seems to us, falls more properly within the domain of police regulations than rules prescribed as a means of preventing economic oppression and securing equality of right to the service in a public calling. See Freund, Pol. Power, § 378.

A strong indication that the term "police regulations" was used in a much broader sense than that contended for is the fact that, in making exceptions to the regulations that should continue in force, Congress saw fit to expressly except regulations affecting the issuance of stock and bonds. It will be noted that § 7 gives to the President, in unambiguous terms, the right to control the issuance of securities during the period of Federal operation. Yet it was thought necessary in § 15 to expressly except from the police regulations of the states which were to continue in force those affecting the issuance of stocks and bonds. Clearly these regulations are of a character that would not directly affect the public health, safety, or morals. They are as much designed to protect the economic welfare of society as are those relating to rates, and there would have been no occasion to make the exception had the term "police regulations" been used in the sense contended for. (A statute of this character was involved in a recent case,—Union P. R. Co. v. Public Service Commission, 248 U. S. 67, 63 L. ed. 131, P.U.R.1919B, 315, 39 Sup. Ct. Rep. 24.)

The Congressional history of the act in question, appended hereto, in

our judgment, amply supports this construction. When the bill originally passed the Senate it provided only for the continuation of the states' powers to tax. It was amended, however, in the House, by the addition of the following clause: "Or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or government supplies, *the regulation of rates, the expenditure of revenues, the addition or improvement of properties* or the issue of stocks and bonds. Congressional Record, vol. 56, part 3, p. 2820.

The foregoing clause, after being tacked on the provision "that nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation," as previously contained in the bill, was transferred to the end and became a new section—now § 15. The conference committee later, reporting to the House and Senate, struck from the exceptions to the proviso above those exceptions which are italicized. This is a matter of some significance in determining the sense in which the term "police regulations" is used. If the exception of "the regulation of rates" previously inserted had been allowed to stand, it is clear that every existing state regulation affecting rates would have been rendered nugatory upon the promulgation of an order by the Director General superseding such rates, whether or not the transportation of troops, war materials, or government supplies was affected, and the power would have existed just as it is contended for in this case. The striking of that clause, however, from the exceptions, indicates an intention to preserve existing state regulations affecting rates, except in so far as the transportation of troops, war materials, and government supplies may be affected. To this must also be added, we believe, the power to prevent existing intrastate rates from operating in such a way as to result in unlawful discriminations on account of such regulations as it may be found necessary to promulgate in operating the roads as a unit.

As hereinbefore stated, the Federal government is supreme in the domain of interstate commerce, and there is nothing in this act to indicate that the regulatory power, as it previously existed, was intended to be modified in the slightest degree by existing state regulations. All the powers possessed by the Interstate Commerce Commission are to continue except the power to suspend rates.

In the case of Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833, supra, the Supreme Court of the United States held that under § 3 of the original Act to Regulate Commerce, February 4, 1887 (see chap. 104, 24 Stat. at L. 379, 380, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. p. 337). Congress, having prescribed discriminatory rates and practices, the Commission had authority to correct unjust discriminations even though, in so doing, it became necessary to alter pre-existing rates on intrastate commerce. Thus, under the power previously possessed by the Commission, under the Act to Regulate Commerce, it would have full power to alter any intrastate rate that might result in an unlawful discrimination by reason of the initiation of a new interstate rate by executive authority, or that may result from a valid routing order. To the same effect is the recent case of American Exp. Co. v. South Dakota, 244 U. S. 617, 61 L. ed. 1352, P.U.R.1917F, 45, 37 Sup. Ct. Rep. 656, supra.

The order in the instant case, as it relates to intrastate commerce, does not purport to have been promulgated for the purpose of obviating discriminations. On the contrary, a portion of the order, at least,—that which relates to intrastate passenger fares,—cannot possibly be justified on any such basis, as a simple illustration will suffice to demonstrate. Prima facie, it creates discriminations by disturbing the balance of pre-existing fares that were just and reasonable. Prior to the order in question intrastate tickets were sold to and from all points within Minnesota at 2 cents per mile; from and to all points within North Dakota at 2½ cents per mile; and from and to all points in Montana at 3 cents per mile, and the interstate fares were based upon the local rates. These intrastate fares were all presumptively legal and had been in operation for some time. Such differences as existed were readily accounted for by differences in cost of constructing roads in the various states, density of traffic, etc. Yet the necessity demanding increased revenues from the purely intrastate business was not recognized in the order as being general. The burden is not distributed by percentage increases that will affect all localities alike; but the patrons in one state are required to pay 50 per cent above the previous lawful and reasonable fare, in another, 20 per cent above, and in the other, no additional charge is imposed. This is a sufficient demonstration that a portion of the order at least is not to be justified as a means of preventing discrimi-

nation; so it would not fall within any regulatory power previously exercised by the Federal government or possessed by the Interstate Commerce Commission.

In considering the character of order No. 28 in its direct effects upon interstate commerce, it is also proper to note that all rates initiated are to be measured upon review by the Interstate Commerce Commission according to the "expenses of Federal control and operation *fairly chargeable to railway operating expenses,*" and to pay certain fixed charges. This is not a blanket authority to increase rates, but a limitation. Its true character is perhaps best understood by referring to the very substantial appropriation of $500,000,000 to be used as a revolving fund, and to the then recent fact of the denial by the Interstate Commerce Commission of an application for a general increase of 15 per cent in interstate freight rates. Fifteen Per Cent Case, 45 Inters. Com. Rep. 303. These facts, together with the further well-known fact that by far the larger percentage of earnings is from interstate commerce, do not indicate that a percentage raise on all traffic, or that a mileage raise on a portion of the passenger traffic, was in contemplation. On the contrary, they rather indicate that, at the time Congress passed the Control Act, there was no immediate necessity for increased revenues, and that, if such necessity should arise, it was contemplated that it could be fully met by applying the remedy which had so recently been sought, and without making possible a general repeal of numerous laws of sovereign states whenever, in the judgment of the Director General, such repeal might seem to be desirable for reasons apart from military efficiency, or even to enable the exercise of an unhampered control of interstate commerce.

The requirement that the Interstate Commerce Commission shall take into consideration "the fact that the transportation systems are being operated under a unified and co-ordinated national control, and not in competition, "does not, in our opinion, broaden the authority of the Director General or the Interstate Commerce Commission, except where it may be sought to correct conditions incompatible with a unified system, and which were probably due to previous unwholesome competition.

The Congressional debates affirmatively disclose that the propriety of compelling the patrons of the railroads to pay all additional costs incident to Federal control was considered and weighed as against the plan

of meeting prospective deficiencies, in part at least, by Congressional appropriation. The question is one with which Congress might well be concerned, for upon its decision would depend whether additional burdens directly due to the war are to be borne by taxation, or whether the particular burden must be borne by those who use the service,—a service which has been inextricably interwoven into the business fabric of the nation. In the act it is clearly contemplated that only such added burden may be placed upon the traffic as is "*fairly* chargeable to railroad operating expenses," and the President is also authorized to meet deficiencies from the appropriation. The act, as we view it, is neither a revenue measure nor a general license to supplant pre-existing regulations made by competent authority.

Another significant fact which is disclosed by a study of the Congressional debates upon the subject of the rate-fixing power is that all of the discussion of § 10, pertaining to the power given the President to initiate rates, concerns only the merits of that proposal as compared with a proposal to vest the power directly in the Interstate Commerce Commission, so that it might continue to exercise, in but slightly modified form, the authority previously vested in it. Nowhere was it suggested that the powers of the Commission should be extended to embrace original regulations of intrastate rates, nor was it ever intimated, so far as our observation goes, that the powers contended for were being vested in the Executive.

Being of the opinion that the rate statutes of this state and the tariffs on file with the state railroad commission, in accordance with statutory requirements, in so far as they pertain to intrastate commerce, have not been lawfully superseded by any competent order made by the Director General under the Rail Control Act, and particularly by general order No. 28, a writ will issue in accordance with the views expressed in the foregoing opinion.

CHRISTIANSON and ROBINSON, JJ. concur.

ROBINSON, J. (concurring specially). This is an action by the state of North Dakota against several railway carriers and those who control and operate the railways, to prevent them from continuing to rob the people by the exaction of excessive passenger and freight rates, contrary

to the laws of the state. The right of action arises under the Constitution and laws of the state, and not under the laws of the United States. Hence, the jurisdiction of the court is in no way questionable, and it is expressly and fully conceded. In the operation of the public highways between points within the state, there must be a compliance with the laws of the state, or the laws are not laws; and the courts must maintain and uphold the laws of the state and protect the people from plunder and robbery in any form, or else the courts are mere cravens, and not courts.

The claim is that the railroads are operated under acts of Congress, by direction of the President, and his appointed Director General, and it is conceded that the operation is not in accordance with the laws of the state. As it appears, on every railroad and system of railroads in the United States, extending over about 400,000 miles, the passenger fares and freight rates have been advanced from 25 to 50 per cent. The advance was made as a war measure under the plea of military necessity; but now, in this year of peace, it is continued in defiance of the just laws and powers of the several states. The assumed railroad control and the orders of the President are based on acts of Congress. In August, 1916, at the time of some trouble with Mexico, Congress passed an act as follows: "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system . . . of transportation, . . . and to utilize the same . . . for the . . . transportation of troops, war material, and equipment." This was a nice rider on the Army Appropriation Act, covering forty-eight pages of the statute. 39 Stat. at L. 645, chap. 418, Comp. Stat. § 1974a, 9 Fed. Stat. Anno. 2d ed. p. 1095. The rider is short and simple. Its manifest purpose was to authorize the President, in time of war, to use the military force to control and operate railroads for the removal of troops and war supplies, —"only that and nothing more." But, in December, 1917, after Congress had declared war against Germany and Austria, the President magnified his power and issued a fiat or proclamation, assuming the possession and control of all railroads for all purposes, regardless of any military necessity. The fiat decreed that the possession and control should be in his famous son-in-law, as Director General. By the same fiat the President attempted to legislate, and he decreed that, except with the written consent of the Director General, no attachment by a

mesne process or by execution should be levied on the property of the railway carriers; that no suit may be brought against them, except as permitted by the general or special order of the Director. By this order the President innocently attempted to repeal or suspend a vast system of Federal and state laws and constitutions, and to make his famous son-in-law the greatest dictator on earth. But, in March, 1918, Congress passed the Federal Control Act, which expressly repealed the legislative part of the fiat. The act provides thus: That actions at law and suits in equity may be brought by and against such carriers, and judgments rendered in actions at law or suits in equity against the carriers. And that no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the government. Under that act it is manifest that wrongdoers who control a common carrier and exact excessive rates and fares in defiance of the laws of the state cannot defend themselves on the ground that in so doing they are an agency of the government.

Section 10 of the act provides the President may initiate rates, fares, and charges by filing the same with the Interstate Commerce Commission, and "that said rates, fares, and charges must be just and reasonable." Also, that on complaint the justness and reasonableness of such rates may be determined by the Interstate Commerce Commission in accordance with the Act to Regulate Commerce as amended. But as the act of Commerce gave the Commission no power to regulate rates between any two points or places of a state, it must be that the Federal Control Act refers only to interstate rates. Congress did not contemplate that the President or his Director General should attempt to initiate intrastate rates, contrary to the laws of any state. Certain it was not within the power or the purpose of Congress to give the President and his famous son-in-law the right to repeal and undo the rate laws of any state. That is shown to a demonstration by § 15 of the act: "Section 15. Nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds." [40 Stat. at L. 458, chap. 25, Comp. Stat. § 3115¾o, Fed. Stat. Anno. Supp. 1918, p. 765.]

Now in reading § 15, some question may arise as to what is meant by the *lawful police power of the several states.* Does it include the rate-making power? Does it include a power to prevent the people from being robbed by the excessive rates and exactions of carriers or by those in control of them? Clearly the purpose of police laws and police powers is to prevent filching, robberies, and holdups, to protect life, liberty, and property. So far as a man is dispossessed of his property, his means of living are impaired. "You do take my life when you do take the means whereby I live." The carrier is employed by the force of necessity. When the employer is forced to pay excessive rates, then, to the extent of the excess, he is filched, robbed, and held up. "Such is the scope of police power that it extends to the protection of the lives, health, comfort, and quiet of all persons, and the protection of all property within the state." 8 Cyc. 864. Under the police power the legislature may enact just laws that common carriers shall not charge more than certain maximum rates. In every state such laws have been passed and have been uniformly sustained by the highest courts. 8 Cyc. 874. Hence it is that nothing in the Federal act must be so construed as to amend, repeal, impair, or affect the *lawful police regulations of the several states.*

As the Federal Control Bill was first submitted to Congress, it was strictly an administration measure, conforming to the proclamation of the President; but in each House, and in conference, it was carefully considered and finally passed with salutary amendments, and among them the last and most important was § 15. While the act empowered the president to initiate interstate commerce rates, subject to review by the Commission, it expressly provided that the rates should be just and reasonable. It did not contemplate the addition of a billion dollars a year to the burden of the wealth producers by a general and uniform advance of 50 per cent in all rates and fares. And this court may well take official notice of that fact that such an advance was not just or reasonable; that it was contrary to a recent and prior ruling of the Interstate Commerce Commission refusing to permit an advance of 15 per cent.

It was in the spring of 1918, when the food supplies were reduced and when the people were contributing their utmost to the war fund, that Congress gave the carriers half a billion dollars, and then, by

advance rates, the Director General gave them $1,000,000,000. Without any such advance James Hill ran his railroads, and in the course of a few years he saved up for himself and heirs over $100,000,000, besides good sums for many others. Under the former rates in a few decades the rail carriers succeeded in filching from the people 10 per cent or one-tenth of the total wealth of the nation.

There is no reason for extending the discussion. It is a well-known fact that the rail carriers have always charged excessive rates, and that they are fast amassing the wealth of the country. By skill, prudence, and economy the Director General might well have reduced the cost of operating the railroads, and, indeed, when the Federal Control bill was before Congress, he was called as a witness and gave assurance that the result of Federal control would be to reduce the expenses—and such was the assurances under which the bill was passed. The Director could well have reduced the burden of rates and fares instead of advancing them; but, however that may be, now that the war has ended, there is no longer any reason or excuse for any person on earth to operate railways in disregard and defiance of the *lawful police regulations of the several states.* It is beyond the constitutional power of Congress and the national government, and, so far as persisted in, it must lead to anarchy, Bolshevism, and endanger the safety of the Republic. The writ of mandamus should be awarded.

GRACE, J. (disssenting). An alternative writ of mandamus was issued out of this court. The purpose of such writ is to command and prohibit the defendants from collecting increased fares or rates over and above those stated in certain schedules on file with the board of railroad commissioners of this state for carrying passengers, freight, and baggage between intrastate points, or to show cause why the rates, fares, and charges specified in said schedules should not be in force, instead of the increased rates initiated by the President of the United States, and which are now being charged and collected. Walker B. Hines is the direct representative of the President of the United States, and together they represent the United States, so that, in fact, the action is one of the state of North Dakota against the United States to determine the authority of the defendant to initiate and collect the rates complained of.

Congress passed an act which was approved August 29, 1916, by which the the President, in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable. Congress, by an act of March 21, 1918, gave the President, during the time of war, control of all traffic over systems of transportation, with exclusive power to initiate rates, fares, and charges by filing them with the Interstate Commerce Commission within the time and manner specified in the act under consideration. Congress in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives, on the 6th day of April, 1917, formally declared war against the Imperial German Government; in such resolution, Congress authorized and directed the President to employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial German Government, and to bring the conflict to a successful termination, Congress pledged all of the resources of the United States. On December 7, 1917, the Congress of the United States, by resolution, declared war to exist between the United States of America and the Imperial and Royal Austro-Hungarian Government; and this resolution contains the same authority and direction to the President as is contained in the resolution wherein war was formally declared against the Imperial German Government, with reference to the employment of the entire naval and military forces of the United States and the resources thereof, and the pledge of all the resources of the United States to bringing the conflict to a successful termination. Under and by virtue of the authority vested in the President of the United States by authority of the Act of August 29, 1916, he did, through Newton D. Baker, Secretary of War, take possession of and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof, located wholly or in part within the boundaries of the continental United States, as is more fully shown and set forth in the proclamation at that time by the President of the United States, duly issued and

published. By this proclamation, were not taken over electric passenger or interurban railways, but the right was reserved by subsequent order or proclamation to do so if it were found necessary or desirable. It was further stated in the proclamation that by subsequent order and proclamation, possession, control, and operation, in whole or in part, might be relinquished to the owners of the railroad systems of railroad and water systems, the possession and control of which had been assumed. Congress on March 21, 1918, approved the act for the operation of transportation systems while under Federal control, which provided for the just compensation of their owners and for other purposes.

The construction of certain sections of this act is the task with which we are confronted. For the purpose of properly construing the Federal Court Act and war powers of the President, it would be well to mentally place ourselves back to the 28th of December, 1917, and from thence look forward into the future as it then presented itself; instead of looking from the point where we now are retrospectively to the 28th day of December, 1917. If we should do this, we would realize that transportation for war purposes and as a whole under private control had largely become inefficient; that at such time there were millions of soldiers to be transferred to training camps; that millions upon millions of tons of war material were to be transported from the place where produced to the place of manufacture, and the finished product again to be transported; that millions of tons of food stuffs and clothing had to be transported to the various places where the soldiers were in camps, for their use. The magnitude of transportation for war purposes alone was so stupendous that it is almost beyond the comprehension of those not so situated as to have an opportunity to acquaint themselves with the immensity of the task of the transportation of the necessities of war. It must be remembered that all of this was an added burden to the transportation facilities of our country. Again, we think it is a matter of common knowledge that the transportation systems, prior to the declaration of war and prior to the time the almost illimitable amount of war transportation was added to the work of the transportation companies, were finding difficulty in properly handling and transporting the products of trade, production, and manufacture which were tendered them for transportation during times of peace. It is apparent, therefore, that Federal control was taken for the purpose of facilitating

transportation and systematizing it to the end that transportation systems, under Federal control, would be efficiently reorganized, so that more service could be rendered by them and much more material transported over them.

We must also keep in view the fact that when war is once officially declared by the duly constituted authorities of the United States with whom the power is placed, by the Constitution, to declare war, that a state of war continues to exist until a treaty of peace is signed with those against whom war was declared, and until such treaty of peace by the President's proclamation is duly proclaimed. The President having by due proclamation taken over the transportation companies, each and every official and employee, and all those who entered the employ of the transportation companies after being taken over by the Federal government, were thereafter, by proper authority, duly constituted and made officials and employees of the Federal government, and, as such, were employed and paid by the Federal government. With these preliminary observations, we may proceed to examine some of the real issues presented in this case. The paramount issue presented is that which relates to

A Conflict of Power.

The conflict of power arises between certain tribunals, as state railroad commissions, possibly the Interstate Commerce Commission, and the powers conferred upon the President under the Federal Control Act, or possibly other war powers possessed by the President, as to which has the lawful authority to fix passenger and freight rates and other charges during the time of the war, on intrastate commerce. We think, in this discussion, it will not be necessary to advert to other war powers possessed by the President than those conferred upon him by the Federal Control Act. In time of peace, it may be conceded that certain state tribunals, as the state railroad commission, have the exclusive power to fix all intrastate rates of transportation, likewise the Interstate Commerce Commission, in time of peace, has exclusive power to determine the reasonableness and justness of rates affecting interstate commerce, and, since the Act of the Interstate Commerce was amended, the power to prescribe rates and the power to prescribe an intrastate rate where that rate is such as to cause a discrimination in an interstate rate between a point or points within the state to a point or

points without the state. These constitute the general powers of such tribunals in time of peace. They are such powers, however, as are intended to be exercised only in times of peace, with the exception that Interstate Commerce retains power in the act under consideration, upon complaint being made, to pass upon the reasonableness and justness of rates initiated in war times by the President, and, with this single exception, all other powers with reference to rate making and the fixing of charges and fares for transportation systems are, by the Federal Control Act, suspended during time of war; such power is supplanted, for the time of war, by the power of the President to initiate rates, which, when initiated by him, become binding and effective as to every kind of transportation from the time they are filed with the Interstate Commerce Commission, and are subject to no change except, upon complaint to the Interstate Commerce Commission, such rates and fares may be examined as to their reasonableness and justness, which must be determined upon the conditions which exist in time of war, and not those of peace. With this exception, there is no limitation upon the power of the President with reference to the initiation of rates, charges, and fares. The power of the President, under the Federal Control Act, to initiate rates, fares, and charges, contains no limitation as to kind, and extends equally to interstate and intrastate fares, rates, and charges. The Federal Control Act contains no limitation other than as above stated. It is claimed there is a limitation by § 15, but we will disprove this contention later in this opinion.

The power conferred upon the President by the Federal Control Act, with reference to rates, was intended to be a power with which there could be no interference, with the exception of that of the Interstate Commerce Commission as to the reasonableness and justness thereof. The power was intended by Congress to be one which would enable the President, by use thereof, to accomplish without delay or interference the objects intended to be accomplished by the Federal Control Act. If this be true, then the rate-making powers of all other tribunals must be suspended during the time of war, including that of the Interstate Commerce Commission, except as it is preserved in the Federal Control Act. If, as is contended by plaintiff, the power to initiate and prescribe rates as to intrastate remained the same in time of war as in time of peace, then it would be within the power of the state or states, through the

railroad commissions, or rate-making power within the state, to make any power conferred upon the President by the Federal Control Act an empty, impotent power. The President having at a certain date advanced the freight rate 25 per cent on all freight thereafter carried by the transportation systems within the continental United States, the effect would be to increase the intrastate rate 25 per cent. Let us assume that, after the President had initiated such advanced freight rate, each state railroad commission should thereafter proceed to fix the intrastate freight rates and readjust them, and that the final result of their deliberations resulted in a decrease of intrastate freight charges of 35 per cent; it is not difficult to comprehend that if such could be the case, the advanced freight rate so initiated by the President of the United States for a war purpose, at least in part, would fail of accomplishing the purpose for which it was intended; and in this discussion it must be assumed that the President would not advance the rate any more than the necessity of war required. The 25 per cent advance of freight rates initiated by the President did affect all freight, and was chargeable upon all freight, both intrastate and interstate. If, as contended by the plaintiff, the power to fix intrastate rates remained, during time of war, unimpaired by the order of the President which made the 25 per cent increase in intrastate freight rates, and if such order of the President was subordinate to the power of the railroad commission of the state to prescribe the intrastate rate and determine its reasonableness and justness, under this contention, before the President could make effective the said increase on intrastate rates, it would be necessary for him to procure the assent of the rate-making power of each state before he would have power to increase the intrastate freight rate in the manner in which it was increased. If the President were required to do this, it might take a long period of time before the President would get the rate-making power of each state to approve of the intrastate rate initiated by him. If the state, in war time and in the light of the Federal Control Act, possesses the power above claimed for it, such power would constitute a limitation on the right of the President to initiate rates and fares, and the possession and use of such power by the state, in time of war, could not but affect the transportation of troops, war material, and government supplies, and, in addition to this, have a general tendency to decrease the efficiency of the systems of transportation in general.

We are satisfied that during war time, in view of the Federal Control Act, no state tribunal has any authority to initiate, prescribe, determine, or fix an intrastate rate; that by the Federal Control Act, during the time of war, the power to fix rates and charges, both interstate and intrastate, was placed exclusively with the President, and he has the exclusive power to initiate them; no other power can initiate rates or charges; and such rates and charges as he does initiate under such power can only be examined as to their reasonableness and justness by the Interstate Commerce Commission. The Federal Control Act was meant by Congress to become effective at once, and to become an effective means in the hands of the President, whereby he could wholly control and operate the transportation systems of the United States, including the exclusive power to initiate rates and charges for transportation. Congress did not intend that the President, in time of war, should be hampered nor delayed in any manner in the control and operation of transportation systems so taken over, and, for that very reason, placed the exclusive power to initiate the rates and charges with him; and in order that the President might immediately proceed in such matters and make the transportation companies more efficient, and that such powers might be at once exercised, it was declared that the act in question was emergency legislation; and that fact is evidence that it was the intention of Congress that all powers therein conferred by Congress upon the President were to be exercised by him promptly and without delay; this was indisputably necessary by reason of the pressing necessities then existing for immediate efficient transportation. The power to initiate all rates and charges was lodged with him during the time of war, thus removing from his path the power of state tribunals, such as railroad commissions, during such time, to interfere with the rates or charges for transportation initiated by the President.

It must also be remembered, in construing the Federal Control Act and the President's right to initiate an increase of 25 per cent in the freight rate, that certain conditions existed of which the following may be mentioned: The large increase in the wages of thousands upon thousands of employees who were operating the transportation systems while under Federal control, the millions of dollars that must be expended to rehabilitate the transportation systems to make them more efficient in transportation, the accumulation of a reserve fund to insure a

ready means to maintain the efficiency of the systems, and many other matters we might mention which would demonstrate the necessity of an increased rate or charge. It must follow that the power to initiate and make effective such increased rates or charges in time of war, and in view of the immediate necessity, must be lodged where it could be exercised immediately, and where the exercise of it could not be delayed by agencies such as a state railroad commission, which had theretofore exercised such power. Hence, the power to initiate rates and charges, either passenger or freight, of the transportation systems, was exclusively by the Federal Control Act, placed with the President, with no limitation other than, upon complaint, an examination might be had of them before the Interstate Commerce Commission to determine the reasonableness or justness thereof. We think the interpretation we have so far given the act in question is correct. We are strengthened in this assumption by the contemporaneous construction given the act by those upon whom devolved the duty of interpreting and enforcing the act, and also by the interpretation given the act by those who were affected by it; during all the time of the operation of the act until the present time neither the railroad commission of any state, nor shippers, nor anyone compelled to pay the increased interstate or intrastate rate, had made any complaint. They, and all persons affected by the act, have uniformly placed the same construction upon it as the President of the United States did. They have acquiesced in the construction thus placed upon it by the President of the United States and those charged with its enforcement. The act being one the powers of which the President was to execute, his acts thereunder must be considered executive acts. It must be conceded that he used his best executive discretion in the execution of such powers, and, this being true, the court should be reluctant to interfere with his exercise of such discretion.

The most important remaining point to be discussed is the meaning of § 15, which is to the effect that nothing in the act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the state in relation to taxation, or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds. It is claimed by the state that the power to prescribe or initiate a rate or charge for transportation is a

police power. Assuming that to be true, and assume, further, that every state law, to a greater or lesser extent, is a police power in that, in some degree either present or remote, it may affect the health, safety, and morals of the people of the state, it is clear that as the term is used in § 15 it has no such extended meaning. What is intended by the words "police regulations" as used in § 15 are those police regulations with which all are familiar, those which it can readily be understood have a direct relation to the health, safety, or morals of the people. The words are susceptible of two uses,—one broad and comprehensive, the other narrow and restrictive. If we speak of the initiation or regulation of rates and charges as a police regulation or a police power, the use is in the broad and comprehensive sense; when we say that the police powers ars as broad as the sovereignty of a state, this is the most comprehensive sense; but, as the words are generally used and commonly understood by the great mass of people within the state or within the nation, they have a restricted meaning, and mean only such police powers or regulations as exist for the purpose of directly protecting the health, safety, or morals of the people. For instance, a police regulation which prescribes quarantine in case of smallpox or other contagious or infectious disease is a police regulation which acts directly to protect the health of the people by preventing the spread of the disease; and so an illustration might be given as applying to morals or safety, and it is in this restricted sense that the word is used in § 15. Certainly the words "police regulations" in § 15 do not refer to rate, for Congress by § 10 of the act had wholly disposed of the rate question. It had, by that section, placed the power, during the time of war, exclusively with the President, to initiate rates, and this meant all rates and every kind of a rate relating to transportation, and had exclusively placed the power, during the time of war, to review the reasonableness and justness of such rate, with the Interstate Commerce Commission.

There is a well-settled rule of statutory construction, which is, that the intention of the whole act will control the interpretation of the parts. Sutherland, Stat. Constr. 319. The intention of the Federal Control Act is easily discerned. It plainly appears from it that it was the intent of Congress to place the control and operation of all transportation systems with the President, and that he had full authority to initiate all rates, fares, and charges for transportation. This was the

cardinal purpose or intent of the whole act. Each part of the act must be construed in harmony with the general intent and cardinal purpose of the act. Section 15, being a part of the act, must be construed so as to harmonize with the general intent and purpose of the act as expressed in it, and which we have above pointed out.

The powers enumerated and granted in the Federal Control Act to the President are wholly and exclusively war powers. When the war shall have been terminated, and treaties of peace shall have been signed with those with whom we are at war, and when such treaties of peace have been duly proclaimed by the President, we shall then have returned to a state of peace, and after the expiration of not more than twenty-one months thereafter, the war powers conferred upon the President in the Federal Control Act will not further be effective so long as a state of peace continues. At the expiration of twenty-one months after a treaty of peace has been signed, and by the President proclaimed, and in the absence of further Federal legislation retaining for a longer period of time control of the transportation systems of the United States, or unless the President has theretofore relinquished such Federal control, such transportation systems will be returned to their owners, and will again become, at that time, subject to the same rates, fares, and charges for transportation as existed at the time the President, by proclamation, took Federal control of such transportation systems; and the power to initiate and prescribe fares, rates, and charges will again be the same in the states and the Interstate Commerce Commission as existed at the time of the taking of Federal control of such systems, which powers were, as we have seen, suspended in the manner above stated during the time of war. At such time when such transportation systems are returned to their owners, if they be so returned, all state regulations and powers will be again revived, and be of the same force and effect as they were at the time of the taking of Federal control. The power of the state, at the time of taking of Federal control, to prescribe fares, rates, and charges, was not repealed, but merely suspended during the Federal control, and, upon the termination of that, will again have the same force and effect as at the time of taking Federal control.

The Federal Control Act is one that conferred upon the President certain rights, authority, and power with reference to initiating rates and charges for transportation. If anyone had a just complaint with

reference to rates, fares, and charges initiated by the President, the act itself prescribed a definite remedy. If complaint were made that the rates and charges and fares were unreasonable, the Interstate Commerce Commission had full power and authority to examine into the complaint with reference to the unreasonableness or unjustness of any fare, rate, or charge, and it could, after a hearing upon the complaint, fully determine as to the reasonableness or justness of the fare, rate, or charge. Thus there was a complete remedy. Where a statute or an act creates a right, authority, or power, and provides a remedy for its enforcement, and provides a remedy for those who may claim to be injuriously affected by it, such remedies are generally held to be exclusive. United States v. Stevenson, 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35; Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726; Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80.

It is conceded the rates and charges fixed by order No. 28 have not been scheduled nor filed with the state railroad commission before they were put into effect, as § 4725 of the Compiled Laws of North Dakota of 1913 provides; that the schedule of fares, rates, and charges under order 28 were only filed as a matter of courtesy for the use and information of the board of railroad commissioners of North Dakota, and not in compliance with § 4725.

The main contention of plaintiff is that there is no authority for the President, under the Federal Control Act, to increase rates, fares, and charges on transportation which is wholly intrastate. In finally disposing of this matter, as we view it, it must be presumed that the President, and every subordinate officer or Federal employee acting under his authority, in executing the powers conferred upon him by the Federal Control Act, were, at all times, in the execution of such powers, acting in the highest good faith. It must also, be presumed that the President did not initiate a higher fare, rate, or charge than was necessary to maintain the efficiency of the transportation systems taken under Federal control, and that it was necessary to fix such rates and charges as he did, for the purpose of transporting troops and war material, and for the further purpose of maintaining the efficiency of the transportation systems, so that all transportation immediately connected with war purposes might be promptly carried on as well, as all other transportation.

The 25 per cent increase of freight rates on intrastate commerce in all of the states, we can readily understand, would amount to many millions of dollars. It would constitute a substantial part of the amount of revenue raised by the 25 per cent increase on all freight. It would constitute a considerable share of the means and funds whereby transportation of every kind could be made efficient. It would constitute a large fund which would assist in paying the hundreds of millions of dollars of increased wages to Federal employees of the transportation systems while under Federal control, and without this large amount the operation of the transportation systems under Federal control would be impaired, and their efficiency for all purposes decreased, and thus affect the transportation of troops, war materials, and government supplies.

It seems clear that the act in question is one conferring upon the President war powers. The language of the act is clear, and it confers upon the President the exclusive power to initiate all rates upon the transportation systems of the continental United States during the time of Federal control, and, during that time, his right to do so cannot be limited by the state. It is clear that such power included the right to initiate all rates, both on interstate and intrastate commerce, during Federal control of the transportation systems; and that all such rates should become effective by filing the same with the Interstate Commerce Commission upon one day's noticee. If the conclusion at which we have arrived is correct, and we think it is, the contentions of the plaintiff cannot be upheld, the writ of mandamus issued by this court should be quashed.

BRONSON, J. I dissent. In my opinion the majority opinions wholly ignore the fundamental considerations of law involved in this action. If mandamus is awarded and maintained now, it ought to have been awarded and made effective when the order was first promulgated. During the crucial period of the great war, now ended, this order was in effect and in force without complaint, and with the acquiescence of this state.

The opinion of Judge Birdzell is based upon the broad proposition that the regulatory powers of the state over intrastate rates were not suspended by the Act of Congress of March 21, 1918, by reason, particularly, of the provisions of § 15 thereof.

Readily, the court may arrive at such a conclusion when it assumes as a premise that the exercise of this war power by Congress is the exercise of the common-law power of regulation, and not the exercise of that higher power, the soveriegn right to operate in war times a governmental instrumentality for war purposes, and to prescribe the rates thereof. The purpose for which the railroads were taken and rates prescribed are disclosed not only by the terms of the act, but by the actual purposes for which in fact the railroads were used and the rates were prescribed.

Upon *a priori* reasoning, as I view it, Justice Birdzell holds that the intent of Congress in the act was to prescribe a method of initiating common-law reasonable rates, by the President instead of by the railroads themselves, based upon the old theory that the charge made to the public must be reasonable, and not discriminatory. It is necessary, through this technically narrow construction, to virtually read in the act, § 10, thereof, the following: "The President may initiate *interstate* rates, fares, charges, etc.," and also to virtually read into such act, § 15 thereof: "That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the state in relation to taxation, *regulation of rates,* or the lawful police regulation, etc." Congress might have so legislated; but it did not so legislate. It gave to the President direct authority to initiate *rates,*— the term used is broader than *interstate rates.* See Employers Liability Cases (Howard v. Illinois C. R. Co) 207 U. S. 463, 500, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141. From the very force of the circumstances then existing with this nation involved in a mighty struggle, in war time, it would seem perfectly obvious that the President, if he were to initiate any rates at all, must initiate rates that applied to both interstate and intrastate commerce. Otherwise the power might as well not have been conferred.

At the time the Act of March 21, 1918, was enacted, Congress recognized that certain transportation systems then were being operated as Federal instrumentalities, under the terms of a proclamation of the President by which state regulatory powers might be or were subordinated. It knew then that the President, through the Director General, was exercising the power to route freight, and that this necessarily included the power to change the rate to shippers. This regulatory power, if exercised, applied to both interstate and intrastate ship-

ments. In such Act of March 21, 1918, Congress specifically required the Commerce Commission to give due consideration to the fact that the transportation systems then were being operated under a unified and co-ordinated national control, and not in competition. In the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 417, 57 L. ed. 1511, 1549, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, the United States Supreme Court, in considering the then Federal statute concerning the powers of the Commerce Commission, stated: "Neither by the original act nor by the amendment did Congress seek to establish a unified control over interstate and intrastate commerce." In such act Congress further required the Commission to give due consideration to the certificate of the President, when made, that increased railway operation revenues are necessary in order to pay the expenses of Federal control and operation, etc., to the carriers operating as a unit. Although Congress retained the machinery of the Commerce Commission to preserve the reasonable and just character of Federal rates, as much as possible; it nevertheless appears reasonably clear that Congress, recognizing the exclusive Federal control in operation, both interstate and intrastate then existing, meant and intended to give a corollary and additional war power of exclusive rate making over such systems under Federal control, by which alone a unified and co-ordinated national control and operation could be effected. There is no question that the President has so interpreted such power, and this Executive interpretation should not be lightly considered. Justice Birdzell attacks, in his opinion, the reasonableness of the rate promulgated as applied to intrastate Commerce, and holds that prima facie it is discriminatory, and therefore not justified. This argument begs the very question upon which the logic of his decision is founded, namely, that the power exercised, is the power to regulate rates in interstate commerce as a common-law power; he argues that the rate promulgated does not purport to be promulgated for the purpose of obviating discrimination in intrastate commerce; he must concede that it was, in fact, applied to both interstate and intrastate commerce. If such power be the sovereign power in war times to prescribe rates, the regulatory power of the state does not obtain; if it be, as contended by the majority opinion, the power to regulate the common-law obligation of carriers concerning rates, then no attempt by anyone has been made to subject these rates, so pro-

mulgated, to review before the Commission which has jurisdiction thereof. Surely, under the authorities quoted in the majority opinion, Congress had authority to grant to the President and the Interstate Commerce Commission the right to initiate, or review, a common-law rate in interstate commerce, and to give authority to the Interstate Commerce Commission and the President, as the initiating power, to so prescribe an intrastate rate which would not, by its terms, or by its effect, serve to interfere with or impede interstate commerce.

It is also worthy of consideration to note that under the state law (Comp. Laws 1913, art. 21, chap. 14) the railroad commissioners of the state simply review, investigate, or determine a rate theretofore established by the common carriers. Even under the state law the common carriers initiate a rate, except statutory prescribed maximum rates. The whole act looks to an exercise of jurisdiction over a private corporation operating a railroad as a common carrier. Nor, either under the state act, or under the present Federal act, can such private corporation, for instance, the defendant railroad herein, initiate a rate, or file a schedule? How, further, under the state law, is any jurisdiction of any kind conferred over or concerning the President in the exercise of his power to prescribe rates? Are we to understand from the majority opinion that it is now the duty of the private corporation owning the railroad, but not having the control or operation of the same, to initiate intrastate rates within the state, and the duty of the President to initiate rates over the same railroad within the state upon interstate commerce?

The opinion of Justice Robinson, by reason of which only the sanction of this court is given for a writ of mandamus herein, needs little comment. It contains no legal discussion. It gives no consideration to the war power of Congress or of the President, or of the necessities of this nation in a time of war to utilize, under the war power, every resource of man and property in the nation. It is merely a diatribe attempting to ridicule our Federal government for its action taken, and for its alleged lack of economy concerning the operation of railroads under Federal control in times of stress and of war necessity. It is rather unfortunate that it happens in this action, the court being so divided, that a writ of mandamus is awarded against our Federal government, based upon an opinion (which under the circumstances is the controlling

factor) directed rather to a discussion of the faults of railway operation, and of principles of expediency, rather than of law and of the war powers and necessities of this nation in war times.

My views upon this matter are expressed in the following opinion prepared in advance of the majority opinions of the court now presented, and, to the view therein expressed, I still adhere. They are therefore hereinafter set forth:

This is an original proceeding instituted upon the relation of William Langer, the Attorney General, against the Northern Pacific Railway Company, and the Director General of Railroads, seeking a writ of mandamus from this court to enjoin the defendants from collecting or enforcing the schedule of freight rates, and passenger fares and charges promulgated, and put in force and operation by the Director General pursuant to general order No. 28, issued May 25, 1918, so far as the same applies to intrastate traffic in the state of North Dakota.

The petition of the relator in substance alleges:— That the President of the United States assumed control of the Railroad in question, under the Act of Congress, August 28, 1916.

That, pursuant thereto, on December 26, 1917, the President issued his proclamation for Federal control, and created the office of Director General to operate the railroads, and that they have been so operated through the Director General since January 1, 1918.

That on March 21, 1918, Congress enacted the Federal Control Act, providing for the compensation, operation, and rehabilitation of transportation lines.

That on May 25, 1918, the Director General issued general order No. 28, whereby on June 10, 1918, certain increased passenger fares and baggage charges, and on June 25, 1918, certain increased freight rates, were promulgated and put in force upon transportation lines, including the defendant railway company.

That, by reason thereof, freight rates in the state of North Dakota were increased 25 per cent and passenger rates from 2½ cents per mile to 3 cents per mile. That the Constitution of this state, § 82, provides for the election of a board of railway commissioners, and that such board always, in this state, has exercised supervision and control over transportation systems operating in and through the state as to intrastate rates and service. That § 4725 Comp. Laws 1913, provides that no railway

corporation may change its fares, rates, or charges for service without first filing such schedule of fares, rates, and charges with such board ten days before the same become effective, and that the railway company, therefore, pursuant to such statute, had filed a schedule of fares, rates, and charges with such board, and that no petition of complaint was filed with the board by such company since such date, asking for any increase in such rates within the state of North Dakota; that the schedule of rates so promulgated, and so put in force by the Director General are without authorization pursuant to the acts of Congress and the proclamation of the President, and that the same does not affect the government transportation of troops, war materials, or government supplies, or the issue of stocks and bonds; that the same are unreasonable and excessive, and constitutes an illegal burden upon the patrons of the railroad company; that they are against the public welfare, convenience, and business interest of the state and contrary to the law of the state.

The answer and return of the Director General admits that the railway company owns the transportation line involved, and that it is an instrumentality both of state and intrastate commerce; it specifically denies that the company has operated its system since December 25, 1917. It specifically alleges that the Director General has exercised possession and control over the transportation line involved pursuant to the acts of Congress and of the President of the United States. It specifically alleges that the Director General, pursuant to general order No. 28, put into full force and effect and applied the said schedule of rates and charges, and specifically denies that the railway company did put the same in force and effect to apply to intrastate business in North Dakota; it specifically alleges that on April 6, 1917, the Federal Congress declared a state of war to exist between the United States and the Imperial German Government; that pursuant to general order No. 28, the Director General, having duly filed the same with the intrastate Commerce Commission, made effective the increased rates, fares, and charges, provided in said order, between points in North Dakota as well as between other points along its line; and that the same are still in effect and force, and the transportation line in question has been and is now conducted, and the collection of such rates, fares, and charges has been made, by and in the name of the Director General of Railroads.

The railroad company interposed a separate answer, or return, alleg-

ing in substance that since December 28, 1918, the possession and control of its transportation system has been under the President of the United States, and that all of its officers, directors, and agents are under the direction of the United States government, and not of the railroad; and, further, that it did not put in force or effect the schedules complained of, and that the same were so put into effect under the sole authority of the Director General.

Upon these pleadings of the parties, the only issues presented to this court are the questions of law that arise upon such pleadings. There is no question presented to this court for its determination as to whether the schedules in force are in fact excessive or unreasonable; nor is there any question presented of discriminatory acts by the Director General, or the railway company, in operating the transportation line under general order No. 28. There is likewise no question presented to this court concerning its jurisdiction to grant the relief sought, so far as it might be contended that the acts in question are those of the Director General, and not those of the carrier, for the reason that the Director General expressly waive this question. The proceeding, therefore, is before this court upon its merits upon the sole question of law, to wit, the legal authority of the Director General of Railroads to maintain in force and effect the schedule of increased rates, charges, and fares promulgated upon and affecting intrastate traffic in the state, contrary to the law of the state, without the supervising control or direction of the board of railroad commissioners.

The century old controversy of the rights of Federal government and of the state in the exercising of their respective sovereign functions is again involved.

In determining the exercise of the power complained against herein, the following questions present themselves for consideration:—

(1) The power of Congress to authorize the Federal control and operation of the railway transportation lines as assumed.

(2) The authority of Congress to prescribe or regulate rates on such transportation systems so taken.

(3) Whether the power granted to the President to initiate rates is a delegation of legislative power.

(4) Whether Congress, if it did possess such powers, expressly exercised the same to create a Federal agency for purposes of operation and rate making.

(5) The power of the state to exercise, under its laws and police regulations, the rate-making power over intrastate traffic upon railways under Federal control.

(6) Whether the emergency for which the Congressional acts were enacted has passed, and the powers conferred thereunder are now ineffective.

The legal consideration of these questions is determinative of the issue presented in this proceeding. They will therefore be considered separately.

1. *The authority of Congress to assume control of transportation lines.*—It will scarcely now be denied that Congress has the power to enact legislation to effect a governmental control over the transportation line involved. The state rather so concedes the power. This power may be drawn from its powers, to declare war, raise and support armies and to make all laws necessary and proper therefor, or from the power to regulate interstate commerce, or even to establish post roads. Const. art. 1, § 8.

Concerning these war powers, in Stewart v. Kahn, 11 Wall. 493, 20 L. ed. 176, the court said:— "The Constitution gives to Congress the power to declare war; to grant letters of marque and reprisal, and to make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions. The President is the Commander-in-Chief of the Army and Navy, and of the Militia of the several states, when called into the service of the United States; and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

In Pappens v. United States, 164 C. C. A. 167, 252 Fed. 55, the court said: "The execution of these powers assigned to the national government came within the obligation or duties of Congress, and its control over the subject is plenary. Tarble's Case, 13 Wall. 397, 20 L. ed.

597. Power to raise an army to carry on the war was recognized by the pledge of Congress (by joint resolution approved April 6, 1917 [40 Stat. at L. 1, chap. 1]) of all the resources of the country 'to bring the conflict to a successful termination,' and has been executed by the several acts of legislation providing for the organization and support of the Army and Navy and to promote the efficiency thereof. It is obvious that, to avoid calamity to the nation, the powers referred to in their greatest strength must be upheld as indispensably incidental to the power to declare war. It has been written by Story, in reference to the unlimited power of Congress to raise and support armies, that to be of value the power must be unlimited. 'It is impossible,' he wrote, 'to foresee or define the extent and variety of national exigencies and the correspondent extent and variety of the national means necessary to satisfy them. The power must be coextensive with all possible combinations of circumstances, and under the direction of the councils intrusted with the common defense. These must, therefore, be unlimited in every matter essential to its efficacy; that is, in the formation, direction, and support of the national forces.' 2 Story, Const. § 1183."

Under the power to regulate interstate commerce or to establish post roads, Congress has undoubtedly the power to construct, maintain, or operate a transportation line.

In Wilson v. Shaw, 204 U. S. 24, 51 L. ed. 351, 27 Sup. Ct. Rep. 233, an action brought to restrain the Secretary of the Treasury from paying out money in the purchase of property for the construction of the Panama Canal, etc., the plaintiff contended that the government had no authority to engage anywhere in the work of constructing a railway or canal. Justice Brewer, in holding that the decisions of the court were to the contrary, quoted from California v. Central P. R. Co. 127 U. S. 1, 39, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073, as follows: "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and

bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories, and employing the agency of state as well as Federal corporations."

So, in Luxton v. North River Bridge Co. 153 U. S. 525, 33 L. ed. 808, 14 Sup. Ct. Rep. 891, Justice Gray stated as follows: "Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states. M'Culloch v. Maryland, 4 Wheat. 316, 411, 422, 4 L. ed. 579, 602, 605; Osborn v. Bank of United States, 9 Wheat. 738, 861, 873, 6 L. ed. 204, 233, 236; Pacific R. Removal Cases, 115 U. S. 1, 18, 29 L. ed. 319, 325, 5 Sup. Ct. Rep. 1113; California v. Central P. R. Co. 127 U. S. 1, 39, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073. Congress has likewise the power, exercised early in this century by successive acts in the case of the Cumberland or National Road, from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several states. See Indiana v. United States, 148 U. S. 148, 37 L. ed. 401, 13 Sup. Ct. Rep. 564."

Justice Brewer, with reference to the contentions of the plaintiff that these decisions were *obiter dicta,* stated that plainly they were not; that they announced distinctly the opinion of the Supreme Court on the

question presented; that Congress had acted in reliance upon such decision in many ways, and that the court adhered to the principles stated. 204 U. S. 24.

Concerning the war powers, it is stated in Stewart v. Kahn, 11 Wall. 493, 20 L. ed. 176, as follows: "The Constitution gives to Congress the power to declare war; to grant letters of marque and reprisal; and to make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions. The President is the commander in chief of the Army and Navy, and of the Militia of the several states, when called into the service of the United States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrections are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

Concerning the authority of Congress to make all laws which will be necessary and proper to carry into execution the express powers granted, Chief Justice Marshall, in M'Culloch v. Maryland, 4 Wheat. 421, 4 L. ed. 605, stated: "But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

The United States district attorney for this state, of counsel for the Director General, contends that the President could have taken over the railroads, as a war measure, without any acts of Congress, and that the state cannot interefere with his management or use of the road.

Congress having ample constitutional powers concerning the subject-matter, it is unnecessary to consider the war power of the President to take such property without the authority of Congress. This question

was raised in Civil War times, when Congress enacted the statute authorizing the President to take over railroads and transportation lines whenever the public safety required. 12 Stat. at L. 334, chap. 15, Comp. Stat. § 322, 9 Fed. Stat. Anno. 2d ed. p. 911; C. Haney, Congressional History of Railroads, vol. 11, 158.

2. *The authority of Congress to prescribe or regulate rates on transportation systems.*—Does Congress possess the constitutional power to fix or prescribe rates of Federal making which may supersede or subordinate intrastate rate regulations? A distinction may be drawn between the powers of rate making and of operation; they may be classed, in many respects, as separate and distinct functions. The power to operate, however, with respect to the efficiency of operation and the prompt movement of traffic, may depend largely upon the rate prescribed; the rate prescribed may facilitate, deter, or even prohibit the movement of certain traffic. Revenues, when dependent upon rate, may vitally affect the operation of transportation systems. If Congress possesses the power to control or operate a railroad transportation system, it must necessarily be conceded that it possesses, likewise, the power to prescribe or to fix a method of fixing rates to be charged for the service rendered in operating a governmental instrumentality. Whether this power flows from the exercise of the constitutional war power, or from the exercise of the constitutional power to establish post roads, or regulate interstate commerce, in any case, the authority necessarily exists as essentially implied in the execution of the power. It exists, concededly so, in the Federal operation of postoffices, and of the parcel post (Re Jackson, 96 U. S. 727, 24 L. ed. 877), in the control and management of the Panama canal (32 Stat. at L. 481, chap. 1302, 34 Stat. at L. 5, chap. 3, Comp. Stat. § 6827, 8 Fed. Stat. Anno. 2d ed. p. 416), and in various other Federal instrumentalities.

The question involved is not the power of regulation, but the power concerned with operation. The common-law obligation is imposed upon the common carrier to make charges reasonable and just. This obligation is subject to regulation by the sovereign power; the legislative sovereign will may prescribe this common-law obligation, a rule of conduct, and fix a rate. (Munn v. Illinois, 94 U. S. 113, 125, 24 L. ed. 77, 87). In the above case Justice Waite stated: "This brings us to inquire as to the principles upon which this power of regulation rests, in order that

we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise De Portibus Maris, 1 Hargrave, Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control. See Watkins, Shippers & Carr. 2d ed. § 61.

When, however, the public itself, through its government, assumes management, or exercises a proprietary control over such property as an instrumentality or agency of the government, the very reason for the regulation disappears; there then exists a merger of the interests of the owner and his patrons. Then, in theory of law, the property, theretofore privately owned and operated but affected with a public interest, subject to regulation for the common good, is now operated and maintained as a governmental agency for the common good. The legislative will may then prescribe a rate for the governmental service to be rendered regardless of the common-law obligations of a common carrier; the exercise of such power becomes similar to the power to tax; the Federal Constitution does provide that duties, imposts, and excises shall be uniform; it contains no inhibition against discriminatory rates; the equality clause of the 14th Amendment applies to states only. It is therefore readily appreciated that the power of the states to prescribe or regulate the rates intrastate, of a common carrier privately owned and operated, is entirely different power than the power of the state to prescribe or regulate rates, upon or over a Federally owned or operated common carrier. In observing the distinction, no one will contend that this state, under its right to regulate rates, possesses any authority to regulate or review the charges

made by the Federal government, for carrying or delivering a letter or a parcel post package through the United States mail intrastate. The argument presented by the state, that the police powers of the state cannot be surrendered and that the supervising of railroad rates is a police regulation within the police powers, does not apply to the question presented. It is unnecessary to consider whether the exercise of the rate-making power is within the police power, for clearly the police powers of the state do not apply to a Federal instrumentality when Congress has specifically legislated concerning the exercise thereof. Furthermore, under the power to regulate interstate commerce, the plenary power of Congress concerning such matter, to the exclusion of the rights of the state, is recognized in the cases cited by the state.

In the Minnesota Rate Case (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, the right of the state to exercise its regulatory powers over intrastate rates was expressly based upon the principle that Congress had not taken from the state this power. In the Shreveport Case (Houston, E. & W. T. R. Co. v. United States) 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833, the principle was recognized that Congress had paramount power with reference to interstate commerce and the regulation thereof, but that this did not mean that Congress possessed any authority to regulate the internal affairs of a state.

Likewise, in the Keokuk Case (Illinois C. R. Co. v. Public Utilities Commission), 245 U. S. 493, 62 L. ed. 425, P.U.R.1918C, 1279, 38 Sup. Ct. Rep. 170, and in American Exp. Co. v. South Dakota, 244 U. S. 617, 61 L. ed. 1352, P.U.R.1917F, 45, 37 Sup. Ct. Rep. 656, the power of the Interstate Commerce Commission was restricted within the limits which require a definite showing of interference with the interstate rate prescribed.

Likewise, in the Union Pacific Cases, 9 Wall. 579, 19 L. ed. 792; 18 Wall. 5, 21 L. ed. 787, 3 Fed. 106; 29 Fed. 728, the right of the state to tax the property of the Union Pacific Railway Company, to subject its property to the right of eminent domain of the state, or to affect a physical connection with another railroad, was conceded upon the basic holding that such railway was a private corporation, with property of its own; and that it was not a Federal instrumentality, except as Congress had made it so for special purposes; and it not being shown that

the action of the state interfered with any of these specific purposes, which Congress had required it to fulfil, the sovereign right of the state could act.

It clearly follows, therefore, that under the Federal Constitution, and the interpretation made concerning the powers granted to Congress by the courts, Congress does possess the authority to prescribe the rate to be charged for services rendered by a common carrier as a Federal instrumentality.

3. *The authority of Congress to delegate the rate-making power to the President.*—It would seem to be obvious that if Congress had the power to prescribe a rate for service rendered by a government instrumentality, it possesses the right to prescribe the means by which it shall be determined. Heretofore it has constituted the Interstate Commerce Commission, as a body, to consider the reasonableness of service charges of common carriers in interstate commerce. This body has the power to determine whether a given or proposed rate is reasonable or discriminatory. Under the Act of August 10, 1917, Congress has imposed directly additional powers upon such Commission to grant preference on priority in transportation of traffic, and to fix just and reasonable rates for persons or property in carrying out the directions and orders of the President. This power, so given to the Commerce Commission, is, of course, not a delegation of legislative power. This power, of course, the Congress could impose upon the President or the Director General, as well as upon the Commission (Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896). In United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480, the court said, concerning the delegation of legislative power as follows:—

"From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations —not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done

"Thus it is unlawful to charge unreasonable rates or to discriminate between shippers, and the Interstate Commerce Commission has been given authority to make reasonable rates and to administer the law against discrimination. Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651. Congress provided that after a given date only cars with drawbars of uniform height should be used in interstate commerce, and then constitutionally left to the Commission the administrative duty of fixing a uniform standard. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 287, 52 L. ed. 1064, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464. In Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349. It appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams; to sell unbranded oleomargarin; or to import unwholesome teas. With this unlawfulness as a predicate, the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute, they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect."

As heretofore discussed, the power to prescribe a service charge for a government instrumentality is not the common-law power of determining a reasonable charge; it is the sovereign power to prescribe the charge, or to fix the means of accomplishing the same. It is similar to the power to impose tariff duties; the right of the President to impose a tariff on wheat; it is analogous to the authority granted the President to fix the price of wheat under the food control acts. In fact, under present war measures many similar duties have been imposed or conferred upon the President, *viz.*, freight rates on vessels. Act, July 18, 1918.

Clearly this power, not a power to legislate a rate, not to determine the reasonableness or discriminatory character of a rate, is a right that may properly be granted, within proper bounds, not transgressing the delegation of a legislative power, to the President. Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495.

4. *Whether Congress, if it did possess such powers, expressly exercised the same to create a Federal agency for purposes of operation and rate making.*—The Act of August 29, 1916 (39 Stat. at L. 645, chap. 418, Comp. Stat. § 1974a, 9 Fed. Stat. Anno. 2d ed. p. 1095) provides: "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

It is apparent that Congress by this act intended to exercise and did exercise its war power. The paragraph in question was incorporated into the Army Appropriation Act; evidently the enactment was intended to provide for our troops in Mexico, and to provide full authority in the President in case of any difficulties with Mexico. Unquestionably, it gave to the President the direct authority in time of war, to take possession and assume control of the transportation lines involved.

On April 6, 1917, a state of war was formally declared to exist by Congress, between the United States and the Imperial German Government. On December 7, 1917, Congress authorized and directed the President to employ the entire naval and military resources of the United States, and the other resources of the United States, to carry on the war, and to bring the conflict to a successful determination. On December 28, 1917, the President of the United States, pursuant to the Act of August 29, 1916, and the resolutions of Congress declaring war on Germany and the Austro-Hungarian government, did take possession and assume control of transportation lines, including the transportation line involved herein; and he expressly directed that the possession, control, operation, and utilization of such systems of transportation should be exercised through the Director General. His proclamation further provided that such systems should be utilized for the transferring and trans-

portation of troops, war material, and equipment, to the exclusion, so far as may be necessary, of all other traffic thereon; that so far as such exclusive use be not necessary or desirable, such systems of transportation should be operated and utilized, in the performance of such other services as the national interests may require, and of the usual and ordinary business and duties of common carriers. The proclamation further provided that "until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission, and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such." [40 Stat. at L. 1734.]

Under this proclamation and the authority theretofore conferred, the possession and control of railways, as outlined in the proclamation, was taken. It can scarcely be contended that the President did not properly determine an urgency and immediate necessity for so doing. By this act of the President the private property of the carriers became subject to the public use required to meet the public necessities then existing. Under this assumption of power the transportation systems passed under governmental operation. There can be little question that then and there they became Federal instrumentalities to the extent of the purpose for which control and possession of the same were taken. As such, in operation in the manner in which the trains should be operated, traffic should be handled, passengers carried, merchandise transported, they became subject to the orders of the Director General, and, in so far as any statute of any state or of any order of any railroad commission of any state served to prescribe otherwise, or was in contravention thereof, the same was subordinated or suspended. These principles obtain not only from the nature of the power conferred upon the Federal government to carry on war, but also from the reciprocal duty of the states to aid and assist the Federal government, in times of war, by subordinating every state agency which may serve to interfere with the successful prosecution of the war, and of the enforcement of the war powers. Under this act, providing the assumption of control, there was no attempt to legislate or exercise the rate-making power.

Under the Act of March 21, 1918, Congress recognized that the President had, in time of war, taken over the possession and use, the control and operation, of certain transportation systems. It provided for an annual compensation to the railway corporations equivalent to their respective, average annual railway operating income for the three years, ending June 30, 1917. It provided that railway operating income accruing during the period of Federal control, in excess of such compensation, should remain the property of the United States. It further provided that taxes assessed under Federal or any other governmental authority, for the period of Federal control, on the property used under such Federal control, or on the right to operate as a carrier, or on the revenues derived from operation, should be paid out of revenues derived from railway operations while under Federal control, excepting that war taxes assessed under the Act of October 3, 1917, or subsequent acts, should be paid by the carrier out of its own funds, and also assessments for public improvements, or taxes assessed on property under construction. The act also provided that the President might execute any of the powers conferred with relation to Federal control through such agency as he may determine, and that he may fix a reasonable charge for the performance of services in connection therewith, and may avail himself of the advice, assistance, and co-operation of the Interstate Commerce Commission; that, furthermore, during the period of Federal control, whenever in his opinion the public interests requires, he, the President, may initiate rates, fares, and charges, classifications, regulations, and practices, by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination. The act further provides that—

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges,

classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

"After full hearing the Commission may make such findings and orders as are authorized by the Act to Regulate Commerce as amended, and said findings and orders shall be enforced as provided in said act: Provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make." [40 Stat. at L. 456, chap. 25, Comp. Stat. § 3115¾ j, Fed. Stat. Anno. Supp. 1918, p. 763.]

The act also provides the sum of $500,000,000 of Federal moneys, which, together with the funds available from operating income, shall be used as a revolving fund for the purpose of paying the expenses of Federal control, and compensation to carriers, and providing equipment, etc., and further that moneys and other properties derived from the operation of the carriers during the Federal control are declared to be Federal property. The act further provides that this Federal control shall continue for and during the period of the war, and for a reasonable time thereafter, not exceeding one year and nine months after the date of the proclamation by the President of the exchange of ratifications of the Treaty of Peace. It grants, however, to the President the right to relinquish Federal control at any time he should deem such action needful, or desirable. This act is expressly declared to be an emergency declaration enacted to meet conditions growing out of the war.

It is at once seen that this act directly authorizes the exercise of the rate-making power by the President over transportation lines under Federal control. There can be no question of the intent and purpose of Congress to do so from the very express words of the act. A means and

a method is prescribed for fixing rates to be charged through the agency of the President and the established Interstate Commerce Commission.

It may perhaps be contended that the act granting the power to initiate rates, and providing that they shall be just and reasonable and subject to review or consideration by the Interstate Commerce Commission, is drafted analogously to the Interstate Commerce Act, creating and defining the powers of the Interstate Commerce Commission in the investigation and determination of the reasonableness of rates in interstate commerce. That such act simply incorporated the common-law obligation imposed upon common carriers to make all rates reasonable and just, and that the power of the Commission has been confined by the act and by the decisions of the courts to a determination of the reasonableness and the equality of a given rate. That the power to prescribe a rate is a legislative function; the power to determine its reasonableness, a judicial function; that under the Commerce Act the railways were authorized to initiate rates in interstate commerce, Congress not attempting to prescribe a rate, but providing a method for investigating and determining the reasonableness or discriminatory character of the same through the Commission; that, in the act in question, Congress has not attempted to prescribe a rate, but has simply transferred from the railways to the President the power to initiate a rate, and has left with the Commerce Commission the power therefore possessed to determine its reasonableness; that this displays an intent and understanding to apply the same to interstate commerce, alone over which the Commerce Commission alone has jurisdiction. This contention, somewhat plausible from the analogous means used in the Commerce Act and the Act of March 21, 1918, to initiate and determine rate over common carriers, is to be answered not by a comparison alone of similar language used, but through the intent and purpose of the act in connection with the emergency war situation existing and the public needs and demands occasioned thereby.

It does not follow that Congress simply intended to prescribe legislation for initiating rates, applicable only as interstate, upon a Federal instrumentality, because it constituted as board of review, to act with the President, the Commerce Commission, whose powers theretofore were confined to a determination of the common-law obligation of common carriers.

The Act of March 21, 1918, specifically provides for a method of

prescribing rates through the action of the President and the Commerce Commission, over common carriers under Federal control. The Commerce Commission are specifically instructed that due consideration be given to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition. They are further directed to take into consideration the certificate of the President, when made, that increased railway operation revenues are necessary in order to pay the expense of Federal control and operation fairly chargeable to railway operating expenses, and to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers operating as a unit. True, the Commission are authorized to make findings and orders as are authorized by the amended Act to Regulate Commerce. The language employed in this regard is not clear. The intent and purpose of the whole act, and the object sought to be gained in the war emergency, however, are clear. A Federal instrumentality was created; the control is direct; the revenues received are government property; the appropriations made out of public funds are for the public purpose of Federal operation. The persons employed as officers, agents, and employees upon such railways are considered employed in the service of the United States. The control of all traffic is directly subject to the orders of the President. It is certainly apparent that these powers conferred upon the President and the Commerce Commission to initiate or review rates upon and over such Federal instrumentalities is not the power to initiate or review a rate that must be just and reasonable under the common-law obligation of common carrier to passengers, shippers, or to the public.

The intent and purpose of the Director General in this regard is well shown in the preamble to general order No. 28, which reads as follows:

"General Order No. 28."

"Whereas it has been found and is hereby certified to the Interstate Commerce Commission that, in order to defray expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and

"Whereas the public interest requires that a general advance in all

freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an Act of Congress approved August 29, 1916, entitled 'An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Seventeen, and for Other Purposes; shall be Made by Initiating the Necessary Rates, Fares, Charges, Classifications, Regulations and Practices by Filing the Same with the Interstate Commerce Commission under Authority of an Act of Congress approved March 21, 1918, entitled 'An Act to Provide for the Operation of Transportation Systems While under Federal Control for Just Compensation of Their Owners, and for Other Purposes.'

"Now, therefore, under and by virtue of the provisions of the said Act of March 21, 1918, it is ordered that all existing freight rates, passenger fares, and baggage charges, including changes heretofore published but not yet effective, on all traffic carried by all said railroads and steamship lines, under Federal control, whether the same be carried entirely by railroad, entirely by water, or partly by railroad and partly by water, except traffic carried entirely by water to and from foreign countries, be increased or modified, effective June 25, 1918, as to freight rates and effective June 10, 1918, as to passenger fares and baggage charges, to the extent and in the manner indicated and set forth in the exhibits hereto attached and made a part thereof, by filing schedules with the Interstate Commerce Commission, effective on not less than one day's notice.

"Given under my hand this 25th day of May, 1918.

"W. G. McAdoo,

"Director General of Railroads."

Furthermore, during the continuance of the war, under the Act of August 10, 1917, heretofore mentioned, powers and duties have been imposed upon the Interstate Commerce Commission, in connection with these war powers of the President, apparently beyond their ordinary powers of determining the reasonableness or equality of rates of common carriers privately owned and operated.

It is apparent that this act directly authorizes the exercise of the rate-making power by the President over transportation lines under Federal control. A means and a method is prescribed for fixing rates to be charged through the agency of the President and the already established Interstate Commerce Commission.

Although the act provides that the rates shall be reasonable and just, and although it provides for a method of complaint and review of the same through the Commission, it is evident that this power so conferred upon the President is not the sole power theretofore possessed by the common carriers to initiate a rate that was just and reasonable to the shippers and for the public. The act, from its very provisions, intent, and purposes, discloses a purpose to confer a power upon the President to prescribe rates to be just and reasonable and to be subject to review. It is true, but nevertheless, an authority in the operation of a governmental instrumentality, for either the following purposes: To provide for a deficit in the operating revenues and to secure the government against loss under its guaranty to the carriers, or to raise revenues for the government under the clause which provides that excess revenue shall be government property.

In either case, the considerations that obtain concerning the common-law obligation of carriers to maintain a just and reasonable rate do not apply.

It is also evident that the President through the Director General, pursuant to general order No. 28, has exercised this specific power granted to him, and for the purposes, in part at least, as above stated. The order has been made applicable to all interstate and intrastate traffic under Federal control. There is no difficulty in understanding the meaning and intent of the order.

In our opinion, for the purposes of war, and the legislation enacted to enable the President to perform the high duties of his office, to carry the war to a successful determination, he possessed the specific power and authority to prescribe and make effective the rates promulgated in such general order.

5. *The power of the state to exercise the rate-making power over intrastate traffic upon railways under Federal control.*—Sec. 15 of the Act of Congress of March 21, 1918, provides as follows: "That nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds." [40 Stat. at L. 458, chap. 25, Comp. Stat. § 3115¾ o, Fed. Stat. Anno. Supp. 1918, p. 765.]

The state contends that this section expressly reserves to the state its authority concerning the rate-making power over intrastate traffic; that it discloses a specific intent on the part of Congress to not inhibit the application of the state laws concerning rates, if the same do not interfere with the governmental purpose for which the railways were taken; that it shows, likewise, a specific intent to not interfere with the power of the state in matters of purely local concern within the state; that, furthermore, the particular use of the term in § 15, "police regulations," includes and means to include the regulation of rates intrastate. From the foregoing discussion of the principles applicable in the operation of the railway under Federal control, it is evident that the contentions of the state cannot be upheld. The control, possession, and management of the railway systems involved being for governmental purposes, and as a governmental instrumentality, the power of the state heretofore existing to exercise rate-making power, to impose and require reasonable charges for services rendered by a common carrier performing a public service, does not obtain; at least this is, so far as the act prescribes a power, which has been exercised inconsistent with the exercise of such power, likewise by the state. Otherwise, in the act, the specific power is granted to the President to initiate and prescribe rates upon railways under Federal control in conjunction with the Interstate Commerce Commission. As heretofore stated, Congress, under its war powers, had ample authority so to do. It is apparent that § 15, concerning the powers of the state over taxation and lawful police regulation, may properly apply to the property of private carriers not devoted to Federal control, under the act, or even may apply to such property so taken under the Federal control except as otherwise the act inhibits the exercise by a state, of power concurrent with that of the President. The state contends that the term "lawful police regulations" means the exercise of the police power of the state, and that this police power of the state cannot be surrendered. Again it is deemed unnecessary to distinguish when a police regulation is the exercise of a police power and when it is not. It is sufficient to say, as heretofore stated, that if the instrumentalities in question are Federal agencies concerning which Congress and the President has exercised their powers in the control, possession, and operation of the same, the police power of the state does not obtain; otherwise it may.

In Pappens v. United States, 164 C. C. A. 167, 252 Fed. 55, the defendants were convicted of maintaining a house of ill fame within 5 miles of a military fort. Section 13 of the Act of May 18, 1917, chap. 15, authorized the Secretary of War to suppress, during the period of war, houses of ill fame within such distance from any fort or military camp, etc., as he deemed needful. The defendants contended that the violation of the 5-mile rule as established by the Secretary of War was an invasion of the police powers of the state. The contention was denied, the court holding that Congress, having acted under a constitutional power pursuant to its war powers, had full and plenary authority; and that, furthermore, the act was not a delegation of legislative power to an executive officer.

It is inconceivable that at a time when every resource and energy of the nation was absolutely necessary to be devoted to our Federal government in order to enable it to marshal every resource of man and property to carry on the war successfully, that the state, in the exercise of a so-termed police regulation, had the power or the authority to prescribe a rate that might obtain over a governmental controlled railway between two points in the state, or to assert, under its existing laws, what merchandise should be carried and when it should be transported, or that it should compel, under its existing laws, a particular service to passengers or to property that might be detrimental or contrary to the Federal demands. If this authority or power of the state did not exist at times when the war was at its height, it does not exist now, unless the emergency situation created by the act of Congress has, in fact, passed.

Even though, as contended, it be conceded that the exercise of the rate-making power of the state is a lawful police regulation of the state, and as such applicable under § 15 of said act, to intrastate traffic, nevertheless, such police regulations may well be considered, in view of his proclamation and the terms of the general order issued, disclosing and determining an emergency in war times to exist, to affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds.

Well might the regulatory power of the state concerning rates apply on intrastate traffic, if the President, pursuant to the powers granted to him, had deemed it unnecessary to initiate or prescribe a rate to apply to railroads under such Federal control.

The contention of the state that the provisions of § 10 of such act, which provides that actions may be instituted against the carriers affected by Federal control, and judgment rendered as theretofore provided by law, and that in any such action no defense may be made upon the ground that the carrier is an instrumentality or agency of the Federal government, show that such systems are not Federal instrumentalities, cannot be upheld. Well might this provision be construed to permit an action at law or in equity to be maintained as formerly without embarrassment to litigants by the defense of a governmental agency. The act itself and the control assumed show in fact a control by the government for war purposes, and an administration in fact through government revenues, an operation through government officials, and a rate-making power exercised through governmental authority. Clearly, upon the principles discussed herein, the powers of the state over rate making on intrastate traffic do not apply to the transportation line involved herein, if the act, and the purpose for which it was passed, are still effective.

6. *Whether the emergency for which the Congressional acts were enacted has passed and the powers conferred thereunder are now ineffective.* —The state contends that what Congress delegated as a war-time necessity has quite another aspect when that emergency has passed. That the war emergency has passed; that President Wilson in an official address on November 11, 1918, told Congress that the war was in fact concluded; that he then said: "The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German command to renew it." That the war has in fact ended; that the armistice accepted by the central powers amounted to an unconditional surrender, and the necessity for government rail control as a war measure has passed away.

Upon the legal issues presented to this court and the showing made therefrom, we are convinced that this contention cannot be upheld; there is no showing made to this court that governmental operation is not still urgently needed in the demobilization of troops, the maintenance of the armistice terms, the transportation of government materials and supplies, and in the governmental problems involved in the establishment of peace and normal conditions following the actual cessation of hostilities.

The mere fact that an armistice has been declared does not in and of itself determine that the emergency war powers then being exercised pursuant to Congressional authority then cease. Congress, in the act, has prescribed a limitation of time, to wit; one year and nine months following the Treaty of Peace, for the exercise of this Federal control. It has recognized therein the necessity of emergency war legislation continuing for a period of time after the termination of the war. In such matters, its discretion, as well as that of the President, is a matter necessarily involved in the plenary war powers conferred upon them concerning which the judiciary will not interfere unless in fact it is demonstrated by proof subject to judicial inquiry, that the necessity for the exercise of such war powers does not exist.

In Stewart v. Kahn, 11 Wall. 493, 20 L. ed. 176, the court said: "The measures to be taken in carrying on war and to suppress insurrections are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress."

It therefore follows that the petition of the relator herein should in all things be dismissed.

STATE OF NORTH DAKOTA EX REL. CHARLES A. STEARNS, Relator and Plaintiff, v. OBERT A. OLSON, as Treasurer of the State of North Dakota, and as Custodian of the North Dakota Workmen's Compensation Fund, Defendant and Respondent.

(175 N. W. 714.)

Officers — Workmen's Compensation Act — state treasurer as custodian of funds — special fund.

1. Under the Workmen's Compensation Act the state treasurer is made custodian of the fund which is accumulated in the manner prescribed by law for the payment of claims allowed by the workmen's compensation bureau. *Held*, that such fund is a special, and not a public, fund.

Officers — duty of state treasurer to pay drafts from workmen's compensation fund.

2. When a claim has been presented to the workmen's compensation bureau by one who claims benefits under the Workmen's Compensation Act, and such a claim has been determined by the bureau, and a definite amount awarded the claimant, the bureau, under the provisions of the act, may draw its voucher, or in this case its voucher-warrant, against the treasurer as custodian of such fund, directing the state treasurer, as custodian of the fund, to pay the claimant the amount stated in the voucher-warrant.

Officers — state auditor has no authority to issue warrants in payment of award by workmen's compensation bureau.

3. Under said act, the state auditor has no authority to issue a warrant for the payment of any award made by the workmen's compensation bureau.

Opinion filed October 25, 1919.

Application to the Supreme Court of North Dakota for a writ of mandamus.

Writ ordered issued.

William Lemke and *L. U. Wehe,* for relator and plaintiff.

William Langer, Attorney General, and *F. E. Packard,* Assistant Attorney General, for defendant and respondent.

GRACE, J. This is an application to this court by one Charles A. Stearns for a writ of mandamus, directing the state treasurer as custodian of the workmen's compensation fund to pay the relator the sum of $37.33, the amount of a voucher-warrant issued to him by the North Dakota workmen's compensation bureau.

The petition for the writ, in substance, shows that the relator is of lawful age and a resident of the city of Bismarck, Burleigh county, North Dakota. That the sixteenth legislative assembly of the state of North Dakota enacted a law commonly known as the North Dakota Workmen's Compensation Act, which was approved by the governor on March 5, 1919; that defendant is the state treasurer of North Dakota and custodian of the North Dakota workmen's compensation fund; that the relator is entitled to certain benefits arising out of and under the provisions of said act; that on the 14th day of August, 1919, the relator became entitled to compensation by an award made by the North Dakota workmen's compensation bureau; that it became the duty of said

bureau to disburse to the relator compensation from the North Dakota workmen's compensation fund in the sum of $37.33; that pursuant to the act, the said bureau authorized, prepared, issued, and delivered to the relator, Charles A. Stearns, voucher-warrant No. 1 for said sum, as compensation which the relator was entitled to receive; that the fund out of which said compensation should be disbursed to the relator by said bureau is in the possession of the defendant, and is sufficient in amount to pay the relator the amount designated in the voucher-warrant, and that it is the duty of the defendant to pay the same; that the relator presented to the defendant said voucher-warrant on or about August 16, 1919; demanded payment of it out of said fund, which the defendant refused.

The matter came on for argument before this court; the defendant made no return to the order to show cause why the writ should not be issued, but did present a motion to dismiss the proceedings. The question presented is a very narrow one. It is as follows: When a claim has been presented to the workmen's compensation bureau by one who claims benefits under the Workmen's Compensation Act, and such claim has been determined by the bureau, and it being further determined that the claimant is entitled to receive a certain sum of money as benefits under said act, and the bureau draws its voucher-warrant as in this case, which is duly signed by the North Dakota workmen's compensation bureau by the chairman and commissioners thereof, directing the state treasurer to pay to the claimant the amount stated in the voucher-warrant, should such warrant be honored and paid by the state treasurer from the funds in his possession for that purpose, or should such voucher-warrant first be presented to the state auditing board and by it approved, and a warrant issued therefor by the state auditor, which shall show the approval of the auditing board in the customary manner.

Section 83, Constitution of North Dakota, reads thus: "The powers and duties of the secretary of state, auditor, treasurer, superintendent of public instruction, commissioner of insurance, commissioners of railroads, attorney general and commissioner of agriculture and labor shall be as prescribed by law."

The state auditor's duties are prescribed by § 132, article 4, Comp. Laws 1913. It is not necessary to insert in this opinion a statement of those duties as defined in said section. It is sufficient to state that his

duties, as therein prescribed, largely relate to what may be termed "public money," which belongs to the state. He is, in common language, the bookkeeper of the state's finances. Among other duties prescribed by subdivision 10 of § 132 may be mentioned the following: "To audit all claims against the state, the payment of which is authorized by law." And also subdivision 7 of the same section, which reads as follows: "To keep an account of all warrants drawn upon the treasurer, and a separate account under the head of each specific appropriation, showing at all times the unexpended balance of such appropriation."

Subdivision 14 of the same section reads as follows: "To inspect, in his discretion, the books of any person charged with the receipt, safekeeping or disbursement of public money," and § 15: "To require, at such times and in such forms as he may designate all persons, who have received money or securities or who have had the disposition or management of any property of the state of which an account is kept in his office, to render statements thereof to him, and all such persons must render such statements when so required by said auditor."

Section 186 of the Constitution of North Dakota reads thus: "No money shall be paid out of the state treasury except upon appropriation by law and on warrant drawn by the proper officer, and no bills, claims, accounts or demands against the state, or any county or other political subdivision, shall be audited, allowed or paid until a full itemized statement in writing shall be filed with the officer or officers, whose duty it may be to audit the same." The money referred to in said section is money belonging to the state, which has been accumulated in the treasury as public funds, which are to be used in carrying on the state government. It means such money as is raised by taxation, or which has accumulated in the treasury by the payment of fees authorized by law to be charged for various purposes, or any manner which would constitute such money a public fund of the state. The auditor's duties relate to the public funds of the state.

Section 375, Comp. Laws 1913, as amended by chapter 227, Session Laws of 1915, provides who shall be members of the auditing board, and prescribes their duties. Among other things, it is provided: "It shall be the duty of the state auditing board to audit all claims, accounts, bills or demands against the state, except such as are now specifically

excepted by law. Each and every claim, account, bill or demand against the state, paid by the state auditor, shall bear the approval of the state auditing board, and the state examiner shall hold the state auditor personally responsible for the sum of any or all bills paid by the state auditor which do not bear the approval of the state auditing board."

The duties of the state auditor and of the auditing board relate to the disbursement of public funds. The act of the sixteenth legislature of North Dakota, creating the workmen's compensation fund, contains, among others, the following provisions: Section 6. "Every employer subject to this act shall contribute to the North Dakota workmen's compensation fund in proportion to the annual expenditure of money by such employer for the service of persons subject to the act."

Section 10. "The workmen's compensation bureau shall disburse the workmen's compensation fund to such employees of employers as have paid into the said fund the premiums applicable to the classes to which they belong, who have been injured in the course of their employment, wheresoever such injuries have occurred, or to their dependents in case death has ensued, etc."

Paragraph 1 of § 13 of the act is as follows: "The state treasurer shall be the custodian of the workmen's compensation fund and all disbursements therefrom shall be paid by him upon vouchers authorized by the workmen's compensation bureau."

Paragraph 3 of the same section provides that the "state treasurer shall give a separate and additional bond in such amount as may be fixed by the governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of the workmen's compensation fund."

Section 17 provides "the bureau shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final."

Section 17 further provides that, in an appeal to the district court upon the grounds in said act stated permitting an appeal, "any final judgment so obtained shall be paid by the workmen's compensation bureau out of the workmen's compensation fund in the same manner as awards are paid by such bureau."

Section 7 of the act requires the bureau to maintain the solvency of the workmen's compensation fund at all times; and it is further re-

quired to create and maintain a reasonable surplus, after the payment of legitimate claims, for injury and death that it may authorize to be paid from the North Dakota workmen's compensation fund for the benefit of injured and the dependents of the deceased employees. The bureau, by the same section, is required to keep accurate accounts of the money paid in premiums by each of the several classes of occupations or industries, or the disbursements on account of the injury and death of employees; and it shall also keep an account of the money received from each individual employer and the amount disbursed from the workmen's compensation fund on account of injuries and death of the employees of such employer.

Section 27 of the act provides for an appropriation of $50,000, or as much thereof as may be necessary, out of any funds in the state treasury not otherwise appropriated, to put into effect the provisions of the act, and further provided that the workmen's compensation bureau shall reimburse the general fund of the state out of the workmen's compensation fund for all money appropriated, expended, or disbursed on behalf of said bureau. It would seem that the act creating the workmen's compensation fund is so very specific and clear upon the issues involved in the application for the writ that a construction of the same in this regard would be superfluous. It is perfectly clear that the workmen's compensation fund is no part of the state fund, and is, in no sense, public money. It is a special fund accumulated by the collection of annual premiums from employers, the amount of which is determined and fixed by the workmen's compensation bureau for the employment or occupation operated by such employer, and determined further by the classification rules and rates made and published by the bureau. When the fund is accumulated, the state treasurer is, by the provisions of the act, made the custodian of it. The legislature, if it had thought it wise, could have designated the commissioner of agriculture and labor or the commissioner of insurance, or other public officer, as custodian of the fund. It might, perhaps, if it deemed it wise, have designated a trust company or responsible banking institution, or any other responsible financial agency within the state as custodian; this upon the grounds that such funds are not public funds, but is a special fund, and, in a sense, a private fund as contradistinguished from a public fund in the sense that it is collected from not all the people of the state by way of

taxation, but from certain individuals, corporations, associations, etc., of the state engaged in conducting certain occupations and employments denominated in the act; the purpose of the collection of the same into a special fund is to compensate for a definite length of time, depending on the character of the injury, employees who received injuries while engaged in such employment for employers who have paid the premiums assessed against them into such fund.

The workmen's compensation fund is a special fund, and is not a state fund. Hence, the legislature had the authority to designate such public officials as to it seemed proper, and impose upon them the duty of disbursing such fund in accordance with the provisions of the law, and had authority to prescribe the manner of the disbursement, as by vouchers, warrant, etc. The fund not being a public one, the state auditor would have no authority to draw warrants thereon, unless specifically authorized so to do by the law under the provisions of which the fund is accumulated, or the manner of disbursing the fund is specifically provided for in paragraph 1 of § 13 of the act, which is above set forth. The legislature had authority to provide for the disbursement of the fund in that manner, and the same is neither illegal nor unconstitutional. State ex rel. Olson v. Jorgenson, 29 N. D. 173, 150 N. W. 565; State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583; State ex rel. Beebe v. McMillan, 36 Nev. 384, 136 Pac. 108.

The construction contended for by the defendant, to wit, that after the bureau had determined a claim which had been presented to it, and found the amount of compensation to which the claimant was entitled, then it would be a mere clerical act on the part of the state auditor to draw a warrant in payment of the same, is in no sense tenable. The auditor could not draw such warrant unless the claim be first approved by the state auditing board. Thus, under this contention, after the determination on the claim by the bureau, it would have to go before the state auditing board and be approved by it before the state auditor could draw a warrant in payment of the claim. If such were the requirement of the law, it would be practically unworkable. Such a condition would probably result in interminable disagreement between the bureau and the state auditing board; such a condition is not contemplated nor intended by the law. The state auditing board has nothing to do with

any of such claims as may be properly presented to the bureau; neither has the state auditor. The jurisdiction to hear and determine such claims is, under the law in question, placed with the workmen's compensation bureau, and its powers and duties are thoroughly prescribed in the act creating it.

The method of disbursements by it, and the manner of the payment of its awards, is provided for in the act. The method adopted for the payment of awards by the board is what is termed a voucher-warrant, consisting of a voucher and also a warrant attached together, and which, according to the requirement in the warrant, must be presented for payment in such attached condition to the custodian of the fund. This, it would seem, is a substantial compliance with the requirements of the act itself, and it is so held.

The writ of mandamus applied for should be issued direct to the said Obert Olson as state treasurer, commanding him to forthwith pay to the said Charles A. Stearns the sum of $37.33, which is the amount of said voucher-warrant which said Obert Olson has heretofore refused to pay.

Let the writ of mandamus issue.

BRONSON and BIRDZELL, JJ., concur.

CHRISTIANSON, Ch. J. (concurring specially). This is an application for a writ of mandamus to compel the defendant state treasurer to pay the claim of an injured employee, which claim has been duly audited and vouchered by the workmen's compensation bureau. The sole question presented and argued is whether the workmen's compensation bureau has the power to draw a voucher or warrant upon the state treasurer in payment of such claim; or whether such a warrant should be drawn by the state auditor. No question has been raised as to the jurisdiction of the court. And it appears that the controversy affects every claim for indemnity which has arisen under the Workmen's Compensation Act; and that a large number of claims are unpaid by reason of the controversy as to who is authorized to draw warrants in payment of such claims.

I agree with the majority members that the legislature intended to confer authority upon the workmen's compensation bureau to draw

warrants or vouchers directly upon the state treasurer in payment of claims for death or injuries audited by the bureau.

ROBINSON, J. (dissenting). I dissent from the opinion ordering that a writ of mandamus should issue to the state treasurer to compel him to pay $37.50 on the order of the workmen's compensation bureau. Though the bureau has collected a large sum of money and deposited the same in the state treasury, it is certain that in making the collections the bureau exceeded its authority. According to the plain words of the statute the bureau had no right to make any collection without first making and publishing a classification of hazards and a schedule of rates, and such a schedule has never been made or published. It is true the bureau did buy from an alleged actuary a schedule of about 1,400 different rates, and paid therefor, with some advice concerning the same, $5,100 but the lumbersome schedule pertains to every occupation in the United States. It was never made for the state of North Dakota; it has never been published, and the bureau made a written agreement to keep the same secret, "and to hold all actuari formuli in confidence for him," his purpose being to sell it over and over again to innocent parties in other states, because such a document will answer for one state as well as another. If such a rate sheet had been published, it would not have been a compliance with the statute, because a party should not have to look over a haystack to find a grain of wheat; he should not have to read over such a lumbersome document to find the rate chargeable against him.

Then there has been, and there still is, a serious question concerning the constitutionality of the compensation statute. If its purpose was to authorize the board to fix and determine compulsory, absolute, and incontestable rates, then the statute is clearly unconstitutional. It can only be sustained on the ground that the rates must be just and reasonable, and that every party claiming that a rate against him is unjust and arbitrary may, on that ground, defend against it in a suit for its collection.

The writ of mandamus should issue only to compel the performance of a specific and plain duty. Hence the writ should be denied.

STATE OF NORTH DAKOTA EX REL. C. P. PETERSON, Petitioner, v. THOMAS HALL, Secretary of State, and Forrest Vaughan, County Auditor of Towner County, Respondents.

(176 N. W. 117.)

Elections — mandamus.

Upon the application of the petitioner and relator for a writ of mandamus commanding Thomas Hall, as secretary of state, to certify the name of the petitioner and relator to the county auditor of Towner county, which constitutes the twenty-second legislative district, as candidate for the office of state senator, at a special election to be held on the 25th day of November, 1919, and upon the petition of the relator for a writ of mandamus to compel such county auditor to place the petitioner's name upon the election ballot,

It is *held*, for reasons stated in the opinion, that a writ of mandamus should issue against Thomas Hall as secretary of state, and against Forrest Vaughan, county auditor of Towner county, as asked and prayed for by the petitioner and relator.

Opinion filed November 10, 1919.

Petition for original writs of mandamus.

Writs ordered issued.

William Lemke, for petitioner.

The courts have always construed the provisions of law governing nomination of candidates for office liberally and in the interest of the public.

Where a statute requires that an act be performed a fixed number of days previous to a specific date, the last day should be excluded, and the first day included, in making the computation. State ex rel. Jones v. Board of Deputies, 112 N. W. 136; State ex rel. Anderson v. Falley, 9 N. D. 464; Cosgriff v. Board of Election, 91 Pac. 98.

Though the statute fixing the time for filing nomination certificates is mandatory, the supreme court may, in its discretion, relieve from accidents and mistakes causing delay any such filing if the delay is not due to the negligence or fault of the party to whom the filing is intrusted, and the application is made without laches, and the granting thereof will not cause confusion in preparing the ballots. Re Darling, 82 N. E. 438; People ex rel. Simmons v. Ham, 106 N. Y. Supp. 312; Earl v. Lewis, 77 Pac. 235.

William Langer, Attorney General, and *F. E. Packard,* Assistant Attorney General, for respondents.

That certificates of nominations such as was filed in the instant case must be filed strictly in compliance with law is not an open question. This was fully considered in State v. Falley, 9 N. D. 464, 83 N. W. 913.

Petitions must be filed as provided by § 501 of the 1899 Code (Comp. Laws 1913, § 971A); Miller v. Burnham, 10 N. D. 405.

GRACE, J. This is an original application to this court for a writ of mandamus commanding the defendant, as secretary of state, to certify the name of the relator to the county auditor of Towner county, which county constitutes the twenty-second legislative and senatorial district, to be placed on the ballot, to be voted at a special election to be held November 25 A. D., 1919, in said legislative district, and for a writ of mandamus commanding the county auditor of said Towner county to place the name of said C. P. Peterson upon the said election ballot, at said special election to be held at the time above stated, in said senatorial and legislative district for the state of North Dakota.

A short statement of facts will suffice to present the matters at issue. The regularly elected and duly qualified senator of the said twenty-second legislative district of North Dakota, Honorable A. S. Gibbons, died, thus leaving a vacancy in that office, in that district, of which facts the county auditor of Towner county gave due notice to Governor Frazier, who, on the 18th day of October, 1919, issued a proclamation and filed the same with the secretary of state, calling an election to fill such vacancy, and directed it to be held, under § 501 of the Code of North Dakota, of the year of 1899, and further directed that petitions of nomination be filed not later than 11 o'clock, November 25, 1919, with the secretary of state. Petitions or certificates of nomination were circulated on behalf of C. P. Peterson, which were signed in duplicate, and one copy was filed with said Forrest Vaughan as auditor of Towner county, Cando, North Dakota, on the 25th day of October, 1919, before 11 o'clock, A. M. of said day; and, at the same time and place, a duplicate original of the said nominating petition was duly and properly mailed in the United States mail at Cando, North Dakota, by registered letter, to the secretary of state, Thomas Hall, at Bismarck, North Dakota, and, by him thereafter received.

The secretary of state admits receiving said petitions of nomination on the 27th day of October, A. D. 1919. He further admits that the petitions were circulated and signed by the legally required number of voters, placing in nomination C. P. Peterson, of Bisbee, Towner country, State of North Dakota, and admits that there is a vacancy in the office of state senator, in and for the twenty-second legislative district, which embraces Towner county only.

It is admitted by the secretary of state, that, since receiving said petitions of nomination of C. P. Peterson, as aforesaid, he has refused and continues to refuse to certify to Forrest Vaughan, county auditor of said Towner County, the said petition of nomination of said Peterson. His only ground for not doing so is based upon the claim that it was not received by him thirty days before the time of said special election. The auditor of Towner county, said Forrest Vaughan, refused and still refuses to place the name of said Peterson upon the ballot for said special election as candidate for state senator for said legislative district, upon the ground that it has not been certified to him by the secretary of state. The election is a special one; the legislative district in question is composed of only Towner county. The questions presented are:

(1) Must the petition for nomination be filed with the secretary of state? And

(2) Must they be filed with the secretary of state thirty days prior to the date of the special elections?

(3) May the petition be filed by mailing it to the secretary of state by duly registered letter, and is that a due presentation of it for filing?

We will discuss these questions together. As they are so closely related there is no need of a separate analysis of each question.

Considerable has been said by the parties to this proceeding with reference to certain provisions of the primary law. It might clarify matters to state from the very beginning that provisions of the primary law have no application to the questions confronting us, excepting in so far as it recognizes, in case of special election such as this, § 501, Rev. Codes 1899 (which was § 5 of the Law of 1891, and other provisions of law referred to in § 501), relative to the method of making nominations of candidates to be voted for at a special election.

Section 973, Comp. Laws 1913 (which was formerly § 8 of the

Election Law of 1891) has no application to a special election; that has reference, and is applicable only in a general election. The same is true of § 974 (which was § 9 of the 1891 Law).

We will subsequently discuss these two sections at greater length. Section 501 provides a method which may be used for nominating a candidate to a public office at a special or general election. This has been repeatedly held and decided by the courts of this state, and there can be no dispute in this regard.

The petition for nomination, provided for in this section, may be filed, and is required to be filed, with the secretary of state in the manner prescribed in § 500 of the Code of 1899.

Section 501 specifically prescribes that the petitions or certificates of nomination shall be so filed. Section 500, so far as it governs the filing of the petition, is specifically made a part of said § 501 by a specific reference thereto.

We have now disposed of the question as to where the petition or certificate of nomination shall be filed; and we may interpolate that where, under the law which we are discussing, provision is made for the nomination to an office by a petition signed by duly qualified electors, etc., that such petition is of the same force, effect, and character as a certificate of nomination otherwise provided for.

We come now to the discussion of the question of the time, if any, of the filing the petition with the secretary of state, and the inapplicability of § 973, Comp. Laws 1913 (formerly § 8 of the Laws of 1891). We must now distinguish between a general and a special election.

In the case of state ex rel. Anderson v. Falley, 9 N. D. 464, 83 N. W. 913, it is held that the certificate of nomination must be filed with the secretary of state, not less than thirty days before the election. That was a general election, and the section under consideration was directly applicable to it.

In the case of State ex rel. Miller v. Burnham, 20 N. D. 405, 127 N. W. 504, the election was a general primary election, and the section was also applicable to that situation. Why was it stated in § 973, that the provisions of that section should not apply to special elections? For the very reason that, if they were made applicable, it must often happen that no special election could be had.

A special election is brought about by some exigency usually unfore-

seen; for instance, as in the present case, by the death of Honorable A. S. Gibbons, who, prior to his death, was the incumbent of the office of state senator of the said twenty-second legislative district; so might a vacancy be created in a similar office by resignation, etc. There might often, and there do, arise occasions where it would be necessary, in the public interest, to hold a special election to fill such vacancy, and where it would be necessary to issue the proclamation of election, setting the time thereof, and have the whole election begun and completed in much less time than thirty days. The legislature may be in session and a vacancy occur in the representation from some district or districts by reason of death or otherwise. The session of the legislature may be, for instance, within three weeks of the time when it must, by the Constitution and law, close its session. Yet it may be absolutely imperative that the vacancy thus created be filled before the close of the session of the legislature. Public necessity might require it to be so filled. In such case, there is no doubt but what a proclamation, by the governor of the state, could be issued, fixing the time for such election, and a time for filing certificates of nomination of persons to fill such vacancy; and that such election could be initiated and completed within such space of time, as, under the circumstances of the case, could be said to be reasonable, and in less than thirty days. Thus, it clearly appears that the exception referred to in the section, *viz.*, that is, provisions should not apply to special elections, was for the purpose of meeting just the conditions we have referred to. If it were otherwise, manifestly it might often occur, the thirty-day notice being required, a special election would be entirely prevented.

In the case before us, the governor did fix the 25th day of October, 1919, as the date when the petitions for nomination should be filed with the secretary of state. Have such petitions been so filed? In order to determine this question, we must again refer to § 501, wherein is contained the *manner* and *direction* of filing the same. In that section, we find these words: "Such certificate may be filed, as provided for in § 500, in the same manner and with the same effect as a certificate of nomination made by the party convention."

As we have above stated, § 500 is referred to and made a part of § 501; that disposes of where the petition of nomination shall be filed.

The remainder of the language just quoted, to wit, the following

words, "in the same manner, and with the same effect as a certificate of nomination made by a party convention," has reference to § 499, Rev. Codes 1899, which is § 3 of the Laws of 1891, and in so far as that section is applicable to carry out the provisions of § 501, it is a part of it. It is referred to by § 501, and by this reference made a part of it.

Section 499 refers to the manner of filing the certificate of nomination of the candidate, for a public office, who has been nominated by a convention; and after stating what such certificate must contain and how it shall be signed, that is, by the presiding officer and secretary of the convention, it further provides that "such certificate, made out as herein required, shall be delivered by the secretary or president of such convention, by registered letter or in person, without charge, to the secretary of state, or to the county auditor, as hereinafter required."

The reference to county auditor in said § 499, Laws of 1899, or § 3, Laws of 1891, has no application to this case. The rest of the law quoted does. It has reference by reason of special reference made to it in § 501. It thus became a part of § 501 by such reference, so far as it is necessary to carry out the provisions thereof.

Within the meaning of § 3, Laws of 1891 (or § 499, Laws of 1899), the manner of filing a certificate of party nomination was by delivering it in person to the secretary of state, or sending it by registered letter in the manner provided in said section. This constitutes the manner of filing, and § 501 states that the certificate of nomination provided for in § 501, which is not a party nomination, may be filed in the same manner as a certificate of party nomination provided for in § 499 or § 3, above referred to, which means by delivery in person to the secretary of state, or by registered mail.

As above stated, this is the manner of filing. The time of filing a party nomination is provided for by § 8 of the 1891 Laws, which is § 793, Comp. Laws 1913, from the provisions of which, as we have seen, special elections are specifically excepted, and that section has no application to the petition in question.

It appears that the petition in question was filed within the meaning of said § 501, and under the sections to which it refers, and which are thus made a part of it, and that it was as registered mail, in the forenoon of the 25th day of October, 1919, deposited in the postoffice at Cando, addressed to the secretary of state, at Bismarck, North Dakota.

It was thus, within the meaning of § 501, and other sections to which reference was made therein, filed with the secretary of state, thirty days before the election to be held. It was not necessary that it should have been that length of time had not the proclamation of the governor fixed the date upon which petitions should be filed with the secretary of state on the date above stated, which, excluding the day of election, would be thirty days prior to the date of election, and it is only in this regard that the thirty-day period of time becomes material.

This opinion is not in conflict with the decision in the case of State ex rel. Burtness v. Hall, 37 N. D. 267, 163 N. W. 1055, upon the points involved in this case.

The petition or certificate of nomination in question being properly and, within time, filed with the secretary of state, it is his ministerial duty forthwith to certify to Forrest Vaughan as county auditor of Towner county, North Dakota, the name of C. P. Peterson as nominee for the office of state senator at said special election to be held in the said twenty-second senatorial and legislative district on the 25th day of November, 1919; and it is the ministerial duty of the defendant Forrest Vaughan, as the county auditor of Towner county, North Dakota, to forthwith place the name of C. P. Peterson upon the said election ballot, as a nominee for the office of state senator, at the special election to be held at the time and place last above mentioned.

The writs of mandamus should therefore issue against Thomas Hall as secretary of state, and Forrest Vaughan as county auditor of Towner county, North Dakota, as requested and prayed for in the petition of the relator.

Let the writs be so issued.

Robinson and Bronson, JJ., concur.

Birdzell, J. (concurring). I concur in the opinion of Mr. Justice Grace and in his statement of the reasons for the issuance of the writ, with, however, a minor exception. It will be noticed that the governor's proclamation allows ample time for the operation of the statutory provisions respecting the time of filing, and it refers specifically to a section of the statute (§ 501, Rev. Codes 1899). This section in turn speaks, as indicated in the principal opinion, upon the manner of filing petitions

or nominations with the secretary of state, referring to other sections which recognize the use of the mails. It seems to me, therefore, that the proclamation should be construed in the light of existing provisions of law in determining the sufficiency of the filing as to manner. This is both a reason for holding the filing sufficient in the instant case, as is demonstrated in the principal opinion, and, to my mind, for refraining from expressing any opinion as to the legality of calling a special election to be held within a period that would not admit of certification or advertisement for the statutory period. I therefore express no opinion upon the question as to the applicability of other sections not here in controversy to special elections, or as to the legality of special elections called to be held within such time as would not meet certain general statutory requirements.

In concurring I also deem it proper to say that since the principal opinion was prepared in this case, an amended return and answer has been filed, in which the respondents have expressed their willingness to place the name of the relator upon the ballot. But since the case had already been submitted before this amended answer was filed, I deem it proper for the court to express its opinion upon the questions raised, especially as counsel for the relator has had no opportunity to consider the amended return, and as there is but a short time remaining before the election.

CHRISTIANSON, Ch. J. In this case the governor of the state issued a proclamation, calling a special election for the election of a senator in the twenty-second legislative district. The proclamation required that petitions for nomination "be filed *not later than* 11 *o'clock on the 25th day of October,* 1919, *with the county auditor and secretary of state.*" The relator, Peterson, on October 25, 1919, caused a nominating petition to be filed with the county auditor and mailed to the secretary of state by registered mail. The secretary of state received the petition on the 27th day of October, 1919. The question arose whether the petition was presented within the time prescribed by law.

In the original return the respondents asserted that the petition was not received in time, and they refused to recognize the petition. But in a subsequent return they have informed the court that there was only one other nominating petition presented, *viz.,* the petition of one B. J.

Beisel; that said Beisel has requested such officers that the name of the relator be placed upon the ballot as a candidate; that in view of this, and other circumstances, the secretary of state expresses "his entire willingness to certify the name of C. P. Peterson to the county auditor of Towner county as having been nominated as a candidate for state senator by petition;" and "said Forrest Vaughan, county auditor of Towner county, expresses his willingness to place the said name upon the official ballot." Hence, it appears that the respondents will place the name of the relator upon the ballot, even though this court decided that there was no duty incumbent upon them to do so. In these circumstances the questions of statutory constructions raised, and attempted to be decided, have really become moot, and I deem it wholly unnecessary to express any opinion thereon.

Nor can I see what has been accomplished by the opinions which purport to decide such questions, unless it be to demonstrate the necessity of some appropriate legislative action on the subject of special elections. For, while my associates agree on the general result, and three of them agree on some of the legal propositions discussed in the principal opinion, apparently no three members are agreed upon all that is said upon the subject in that opinion.

I do not see, however, how the respondents could very well have interpreted the governor's proclamation otherwise than they did. The governor said that the petitions should " be *filed* not later than 11 o'clock on the 25th day of October, 1919." The word "filed," as so used, has a well-settled, definite meaning. All dictionaries are agreed that to file a paper on the part of a party means to actually deliver the paper into the official custody of the designated officer. See Webster's Int. Dict. and Black's Law Dict. Nor is there anything in our statutes relative to elections which changes the meaning of the word "file." Section 499, Rev. Codes 1899 (§ 970, Comp. Laws 1913), merely makes it the duty of the president and secretary of a nominating convention to prepare a proper certificate of nomination and deliver the same to the secretary of state, either "by registered mail or in person, without charge."

ROBINSON, J. (concurring specially). At a special election to be held on November 25, 1919, the relator is a candidate for state senator for Towner county. Thirty-one days before the special election he filed

with the county auditor of Towner county a nominating petition as required by law, and mailed to the secretary of state a duplicate of the same. Now the county auditor and the secretary of state refuse to put his name on the ballot, because the nominating petition was not filed with the secretary of state thirty days prior to the election. There is no good reason for filing the petition with the secretary of state; it is an idle act, which the law does not require. "It is the duty of the county auditor to provide printed ballots, and to cause to be printed on the ballots the names of each candidate whose name has been certified to or filed with him in the manner provided by law." The petition of the relator giving his name was thus filed with the county auditor, and hence it became his imperative and plain duty to cause the name to be printed on the official ballot. It is made the duty of the county auditor to deliver to the inspector of each election precinct in his county the official ballot prepared by him, at least twenty-four hours before the time for opening the polls on election day. It is the duty of the county auditor to provide poll books for the use of the county. In regard to county elections the county auditor appears to be the whole thing. The law does not require idle acts, such as the mailing of a petition to the secretary of state. But were it necessary to file a copy of the petition with the secretary of state, mailing the same to him thirty-one days before the election was entirely sufficient. Unless, where there is good reason to the contrary, a statute fixing the time to perform a public duty is only directory, and not mandatory. Hence, even though the petition had been filed with the county auditor only twenty-five days prior to the election it would have been entirely sufficient. The election laws are to be liberally construed to give every voter a chance to express his preference for men or measures.

M. A. BALDWIN, as Receiver of the North Dakota Improvement Company, a Corporation, Plaintiff and Respondent, v. TIMBER INVESTMENT COMPANY et al., Defendants, and J. A. JOHNSON, H. M. Collinson, C. E. Burgess, and Ferd Noecker, Defendants and Appellants.

(176 N. W. 662.)

Corporations — suit by alleged creditor to recover for worthless stock.

1. This is a suit by one insolvent and defunct corporation against a similar corporation, and against the subscribers to its capital stock. Judgment was given against the appellants under the statute providing that each stockholder of a corporation is liable for its debt to the amount unpaid on the stock held by him. Appellants subscribed for certain shares of worthless stock, to be delivered on *full payment*, but no stock was ever delivered to them, and they never became stockholders, and their subscriptions were canceled before the action was commenced. The judgment is reversed and the action dismissed.

On Petition for Rehearing filed November 12, 1919.

Corporations — indebtedness an individual obligation and not debt of corporations.

2. The evidence is examined and *held* to show that the indebtedness upon which plaintiff's action is based was not an indebtedness of the defendant corporation, but an individual indebtedness of an officer, common to both plaintiff and defendant corporations, and that plaintiff corporation had knowledge of such fact.

Corporations — defendants who signed subscriptions for stock not liable to one who knew subscriptions to be invalid.

3. Where one claiming to be a creditor of a corporation extends credit with knowledge of the fact that all of the stock of the corporation has been issued in trust for certain individuals and placed in escrow pending the performance by them of the conditions upon which their ownership shall become absolute, and where such individuals take subscriptions for the resale of their stock running in the name of the corporation, it appearing that all the stock of the corporation was to be issued in exchange for certain property, those who sign

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NOTE.—The great weight of authority appears to be that one dealing with a corporation with knowledge that the stock has been issued as fully paid in exchange for property at an amount above its actual value cannot hold the stockholders for the difference between the actual value of the property and the par value of the stock, as will be seen by an examination of the cases collated in a note in 7 A.L.R. 972, on creditor's knowledge that stock is unpaid as affecting stockholders' liability.

On liability of stockholders to creditors for corporate debts, see note in 3 Am. St. Rep. 806.

On stockholder's liability on his subscription generally, see note in 9 Am. Dec. 96.

so-called subscription agreements are not liable to such creditors as stockholders under § 4554, Comp. Laws 1913.

Corporations — creditor with full knowledge of facts cannot claim property exchanged for stock was not equal to par value of the stock.

4. A creditor who extends credit with knowledge that the stock of a corporation has been issued as fully paid and nonassessable in exchange for property is precluded from subsequently asserting that the property is not the equivalent of the par value of the stock.

Corporations — liability of parties who subscribed for stock after entire stock has been issued.

5. Where it is sought to hold subscribers as stockholders under § 4554, Comp. Laws 1913, and it appears that certificates for the whole capital stock had been issued before the alleged subscriptions were taken, defendants are not liable as subscribers.

Opinion filed November 30, 1918. Rehearing denied June 24, 1919.

Appeal from the District Court of Cass County, Honorable *Chas. A. Pollock,* Judge.

Reversed and action dismissed.

M. A. Hildreth, for appellant Noecker.

The rule is well settled that one cannot faithfully serve two masters whose interests are diverse. Andrews v. Pratt, 44 Cal. 309; San Diega v. S. D. L. A. R. Co. 44 Cal. 106; Wilbur v. Lunde, 49 Cal. 290 (19 Am. Rep. 645); Cumberland Coal & I. Co. v. Sherman, 30 Barb. 553; Jackson v. Ludeling, 21 Wall. 616.

The making of the notes was a fraud on the stockholder and the burden of proof shifts to the plaintiff to show that there was good faith in the entire transaction. First Nat. Bank v. Flath, 10 N. D. 283; Mooney v. Williams, 9 N. D. 329.

Harold B. Nelson, for appellant H. M. Collinson.

If a party dealing with a corporation, with full knowledge of the fact that its nominal paid-up capital has not, in fact, been paid up for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in. First Nat. Bank v. Gustin Minerva Con. Min. Co. 44 N. W. 198; Coit v. Amalgamating Co. 119 U. S. 343, 30 L. ed. 420; Adamont Mfg. Co. v. Wallis, 16 Wash. 614, 48 Pac. 415; Rickerson Roller Mill Co. v. Farrel Foundry Co. 43 U. S. App. 425, 75 Fed. 561; Gogebick Invest. Co. v. Iron Chief Min. Co. 78 Wis. 427, 47 N. W. 726; Cunningham v. Holly, 58 C. C. A. 140, 121 Fed. 721; Robinson v. Bidwell, 22 Cal. 379; State Trust Co. v. Turner, 111 Iowa, 674, 82 N. W. 1029;

Woolfolk v. January (Mo.) 33 S. W. 432; Walburn v. Chenault (Kan.) 23 Pac. 657; Whitehill v. Jacobs (Wis.) 44 N. W. 630.

That a corporation may cancel subscriptions to its shares, where the rights of creditors have not intervened, there can be no doubt. 10 Cyc. 452; Hill v. Silvery, 3 L.R.A. 150; Campbell v. Raven, 42 N. W. 355; Shoemaker v. Lumber Co. 73 N. W. 333.

The issuance of the stock and the payment therefor are concurrent acts, and, until both have been done, the defendant Collison did not become a stockholder, and no liability as such was created. 1 Thomp. Corp. §§ 775, 791, cases there cited.

The shareholder is not liable to creditors after the insolvency of the corporation, unless the circumstances are such that he would have been liable to the corporation itself. Bank v. Mining Co. 44 N. W. 198; Robertson v. Sibely, 10 Minn. 323; Association v. Seligman, 1 Am. St. Rep. 776.

Where officers of different corporations unite in the same individual, whatever knowledge or notice such individual has, as an officer of one corporation, he is bound to have as the officer of the other corporation. 10 Cyc. 1054; Emerado Farmers Elev. Co. v. Bank of Emerado, 20 N. D. 270; Bank v. Moline & S. Co. 7 N. D. 211.

M. J. Englert, for appellant C. E. Burgess.

The directors had authority to cancel appellant's subscription, and by so doing release him from future liability to future creditors. This cancelation was binding upon the creditors and upon the corporation itself. Lexington & O. R. Co. v. Bridges, 46 Ky. 556, 46 Am. Dec. 536; Mills v. Stewart, 41 N. Y. 384; Allen v. Montgomery, 11 Ala. 437; Maculy v. Robinson, 18 La. Ann. 619; Cook, Stock & Stockholders, § 127; Thompson's Liability of Stockholders, § 193; New Albany v. Burke, 11 Wall. 96.

J. J. Weeks, for appellant Johnson.

Where a person deals with a corporation, with full knowledge of the fact that its nominal paid-up capital has not, in fact, been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in. First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co. 44 N. W. 198.

The capital stock of corporations is a trust fund for the payment of creditors, but when the reason for the rule does not exist, the rule itself ceases to apply. Coit v. Amalgamating Co. 119 U. S. 343, 30 L. ed. 420; Rickerson Roller Mill Co. v. Farrel Foundry Co. 43 U. S. App. 452, 75 Fed. 561; Cunningham v. Holly, 58 C. C. A. 140, 121

Fed. 721; State Trust Co. v. Turner, 111 Iowa, 674, 82 N. W. 1029; Walburn v. Chenault (Kan.) 23 Pac. 657; Whitehill v. Jacobs (Wis.) 44 N. W. 630; Young v. Iron Co. 65 Mich. 111, 31 N. W. 814; Woolfolk v. January (Mo.) 33 S. W. 432; Mfg. Co. v. Wallis (Wash.) 48 Pac. 415; Robinson v. Bidwell, 22 Cal. 379; Gogebick Invest. Co. v. Iron Chief Min. Co. 78 Wis. 427, 47 N. W. 726; Adamont Mfg. Co. v. Wallis, 16 Wash. 614, 48 Pac. 415.

The general rule is that the shareholder is not liable to the creditors after the insolvency of the corporation unless the circumstances are such that he would have been liable to the corporation itself. Deadwood First Nat. Bank v. Gustin Minerva Min. Co. 44 N. W. 198; Union Sav. Asso. v. Seligman, 92 Mo. 635, 15 S. W. 630; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359; 10 Cyc. 651, 1053, 1054; Emerado Farmers Elevator Co. v. Bank of Emerado, 20 N. D. 270; Bank v. Moline & S. Co. 7 N. D. 211; Chase v. Redfield Creamery Co. 81 N. W. 951.

A. W. Fowler, for respondent.

The unpaid balance upon his stock is a statutory asset to which all creditors are entitled to resort. Marshall-Wells Hardware Co. v. New Era Coal Co. 13 N. D. 396; German Mercantile Co. v. Wanner, 25 N. D. 483; Easton Nat. Bank v. American Brick Co. (N. J.) 8 L.R.A. (N.S.) 2711, 64 Atl. 917; 4 Thomp. Corp. § 4801.

The books of the corporation are admissible to show prima facie when parties became stockholders and the amount paid or unpaid upon their stock. Fish v. Smith (Conn.) 47 Atl. 711.

Payment of stock subscription is an affirmative defense, and must be alleged and proved by defendant. Hargadine v. Breedlove (Okla.) 130 Pac. 267.

No particular form of acceptance is essential in order to constitute an offer to become a stockholder a binding contract. It is sufficient that the corporation, by its acts, shows that it equivocally accepts the offer. 10 Cyc. 384; Jackson v. Sabie, supra.

The appellants being purchasers of stock, and therefore stockholders, it is wholly immaterial that only intermediate stock certificates, and not final stock certificates, were delivered to them. Jackson v. Sabie supra; Holland v. Duluth (Minn.) 68 N. W. 50; Balbraith v. McDonald, L.R.A.1915A, 465 and note.

Robinson, J. This suit was commenced in the summer of 1916. It is a suit by one defunct and bankrupt corporation against another of

the same kind, and against several persons who were induced to subscribe for the worthless stock of the Timber Company. Before the action was commenced each corporation was legally dead and buried. It had ceased to exist and its charter had been canceled. However, judgment went against the Timber Company for some $40,000, against its subscribers,—Noecker, $5,115; Burgess, $1,390; Collinson, $112; Johnson, $667.

The case presents a wealth of material in the form of testimony, account books, and exhibits. The principal actor was Edward Wilson, who quit the state and went to New York city in January, 1913. In each corporation he was the organizer, president, manager, treasurer,—and the whole thing. Receiver Baldwin was nearly always the treasurer or director in one or both of the corporations, but Wilson never allowed him or any other person to handle the money, give checks, or keep the bank books. The first corporation was organized in 1906, with a stock capital of $100,000; the second, in 1909, with a capital of $1,500,000. The real purpose of each corporation was to sell blocks of worthless stock and investment certificates at 100 cents on the dollar, and to put the money into the pockets of Wilson. This he knew well how to do, and he did it.

The complaint is on a note to this effect:—

Fargo, May 27, 1906.

On the 1st day of December, 1912, for value received, I promise to pay to the order of the North Dakota Improvement Company $29,345.50, with interest at 8 per cent.

[Signed] Timber Investment Company,
By E. A. Wilson, Pres.

Then it avers that each personal defendant is a stockholder of the Timber Investment Company, and has not paid for his stock.

By answer each one denies that he is a stockholder, and avers that in 1910, by fraud and deception of said companies, their agents, and managers, he was induced to subscribe for certain shares of worthless stock, and that in the year 1912 the subscription was duly rescinded and canceled.

The default judgment was given against the Timber Company without proof that Wilson had authority to make the note. It was given on an affidavit that on July 6, 1916, the summons and complaint were served on H. H. Aaker, secretary of the company. But in truth Aaker was not secretary of the company. It had ceased to exist and

its charter was canceled February 1, 1915. In January, 1913, Wilson left the company for good, taking with him R. M. Farmer, who had been the real secretary.. The company at once collapsed. The books fail to show that it ever did another particle of business, and fail to show that Aaker was ever secretary. But the only purpose of the judgment against the defunct Timber Company was to lay the foundation for a judgment against the other defendants.

As it appears, each appellant subscribed for a few shares of stock, made a part payment, and refused to pay the balance. Each received from the Timber Company a certificate, giving the number of shares, the sum paid, and a promise to deliver the stock *upon full payment.* The by-laws of the company provide that "no certificate of stock shall be issued until full payment." Ex. A–15. A sample of the real stock certificate is in evidence. It is an imposing and magnificently engraved document, surmounted by a glorious spread eagle. It shows that the person therein named is a stockholder, and that his stock is fully paid. (52) Stockholders of a corporation are persons who *hold stock.* They are limited partners, because each has a right to share in the profits and losses, and, by his vote and otherwise, to direct and control the affairs of the company. In dealing with a corporation the creditors have a right to assume that the members are honest, and have paid, or will pay, for their stock which they have accepted and received. And the creditor who does not know to the contrary may assume that a corporation of $1,500,000 is not organized to swindle those who subscribe for stock. By statute each stockholder of a corporation is liable to honest creditors to the amount unpaid on his capital stock. Comp. Laws, § 4555. Now the questions here present are few and simple:—

(1) Is the Wilson Improvement Company a creditor—an honest judgment creditor—entitled to maintain this action? The answer is: No, no, no.

(2) Are the appellants' stockholders? No.

(3) Were the subscriptions obtained by fraud and without consideration? Yes, yes.

(4) Were the subscriptions canceled before this action was commenced? Yes, yes; most assuredly.

Certain it is that in December, 1911, and December, 1912, the cancelation of each subscription was duly entered on the books of the company, both on the journal and in the ledger; and in like manner numerous other cancelations were made, amounting to some $30,000.

While the books of the corporation are not necessarily evidence in its favor, they are certainly evidence against it.

Wilson knew of good reasons for canceling the stock. He knew, and all his agents and managers knew, that the stock was a mere gold brick; that the Timber Company had no property, save a worthless option on some timber licenses. He knew that no person had subscribed for or made payments on the stock, without some deceptive allurments and promises. He knew how he had contracted to exchange large blocks of stock for timber licenses which he did not deliver, and how he had, at the same time, acted as buyer and seller. Ex. A–62. It may well be that, in dealing with his pals, Wilson was not as generous as he ought to have been, and yet they must have had some crumbs from their master's table. Baldwin paid for his ten shares of stock only $100. He was allowed for commissions a credit of $625, and he was permitted to pay the balance by merely adjusting it. He testifies: "I don't owe the company anything. I have adjusted the matter." Q. "How did you adjust it?" A. "Nothing more than by my statement." (75) What amazing innocence! Manifestly there is no consideration for the stock subscriptions, and the law will not enforce a promise to pay good money for nothing. 13 C. J. 368; Shellberg v. Wilton Bank, 39 N. D. 530, 167 N. W. 723. The promise to purchase the timber stock was in no way different from a promise to purchase a regular gold brick. The enormous one and a half million charter which the Timber Company displayed was itself a fraud and a gold brick. It cost $775, and it represented nothing of value.

Indeed it is passing strange that any court should entertain a suit on such a contract. In such a case the quibbles and fine theories of the law are of no avail. It is time for courts and counsel to know that the law must not be used to rob men of their property.

Counsel say the answer of Noecker is merely a general denial, and he did not appear at the trial; but that is no reason for asking the court to aid in robbing Noecker. The judgment against him is manifestly unjust. The Timber Company has had $1,500 of his good money for nothing,—for absolutely nothing. To hold that he must give up for nothing a further sum exceeding $5,000 would be a lasting reproach to the court.

Judgment reversed and action dismissed, with costs.

BRUCE, Ch. J. (concurring). I concur in the result of the above and in the opinion of Mr. Justice BIRDZELL in its entirety.

GRACE, J. I concur in the result.

CHRISTIANSON, J., did not participate.

On Petition for Rehearing.

BIRDZELL, J. A petition for rehearing has been filed, which is addressed principally to some propositions advanced in a short concurring opinion prepared by the writer and concurred in by the then Chief Justice Bruce. The statements in the opinion to which they petition for rehearing is directed were made with reference to the facts in the particular case, although this perhaps does not sufficiently appear. Since the petition for rehearing was filed, the whole case has been submitted on the briefs to District Judge Hanley, sitting in the place of Mr. Chief Justice Christianson, disqualified. In order to obviate misunderstanding and to make the basis for the concurrence of the writer more clear, as well as to more adequately express the views of my brother Hanley, who participates in the decision, it is deemed to be both necessary and proper to substitute this opinion for the short opinion previously filed.

This action is brought by M. A. Baldwin as receiver of the North Dakota Improvement Company against the Timber Investment Company to recover upon two notes of the latter. Certain individual defendants are joined, against whom it is sought to enforce the alleged stockholders' liability. The action is brought under the authority of § 7997, Compiled Laws of 1913, which authorizes any creditor of a corporation seeking to charge stockholders on account of any liability created by law, to maintain an action for that purpose in the district court. The liability sought to be enforced is that which is expressed in § 4554, Compiled Laws of 1913. The section, in so far as it is germane to the questions that will be hereinafter discussed, is as follows: "Each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him. Any creditor of the corporation may institute joint or several actions against any or all of the stockholders of a corporation whose shares have not been fully paid up, and in such action the court must ascertain the amount that is unpaid upon the stock held by each stockholder and for which he is liable, and several judgments must be rendered against each in conformity therewith." The action is here for trial *de novo* upon separate appeals from a judgment finding defendants J. A. Johnson, H. M.

Collinson, C. E. Burgess, and Ferd Noecker personally liable for unpaid subscription balances. There is a judgment against the Timber Investment Company for $40,460.67, and against the appealing defendants as follows: J. A. Johnson, $667.40; H. M. Collison, $1,112; C. E. Burgess, $1,390; and Ferd Noecker, $5,114.20. The facts disclosed by the record are substantially: Sometimes in 1906 the North Dakota Improvement Company, hereinafter referred to as the Improvement Company, was organized and it continued to transact business until a receiver was appointed in 1913, the exact date being immaterial. Among the papers that came into the possession of the receiver were the notes in suit. The principal note is for $29,345.50. It is dated May 22, 1912, and due December 1, 1912, with interest at the rate of 8 per cent payable semi-annually. The other note is for $1,370, dated December 27, 1912, and due on demand, with 7 per cent interest.

Prior to October, 1909, a syndicate, composed of several individuals, among whom were Baldwin, the receiver in this action, E. A. Wilson, then an officer of the Improvement Company, and H. G. Otis, and others unnecessary to mention, had contracted in the name of Wilson and Otis for the purchase of some seventy-four timber licenses and grants on the island of Vancouver, in British Columbia, and had made some comparatively small initial payment or payments thereon. This contract was made with the Timber Investment Company of Washington.

In October, 1909, the defendant corporation, Timber Investment Company of North Dakota, which will hereinafter be referred to as the Investment Company, was organized, and at the first meeting of stockholders there were represented eight stockholders each subscribing for ten shares. The by-laws provided for the election of nine directors, and these eight stockholders elected themselves and one absent person as a board of directors. At the first directors' meeting E. A. Wilson was elected president; Wall, vice president; Hopp, secretary; and Baldwin, the receiver, plaintiff in this action, treasurer. The authorized capital of the corporation was one and a half million dollars, one million common stock and five hundred thousand preferred. It seems that the first business of this corporation after its organization was to contract with its own directors and officers for the purchase from the syndicate of the timber contract previously referred to. The facts in connection with this purchase and assignment will be more fully stated later on.

Upon the trial of this action certain defendants, including the Investment Company, defaulted, and the plaintiff's attorney moved for judgment by default against all defaulting defendants. The court, however, after granting the motion as to the Investment Company, reconsidered its ruling, and required the plaintiff to put in his evidence, which was done with the understanding that the individual defendants who had answered, and who were contesting liability, were to be given the benefit of every defense which they had, regardless of whether it was included in their answers or not,—the understanding apparently being that they should be allowed to amend their answers to include any defense that might be established on the trial. It also appears that all of the defendants who were represented at the hearing contested liability on the ground, among others, that the Improvement Company was not in reality a creditor of the Investment Company. The plaintiff introduced the notes sued upon, the so-called subscription contracts of the various defendants, and the stub stock books, which evidenced the issuance of what are termed "intermediate stock certificates." These certificates simply certify that the subscriber is entitled to so many shares of the stock of the Investment Company upon full payment of the par value and the surrender of the certificate. At this stage of the case both the plaintiff and defendants rested, and the latter moved to dismiss. It appears that the plaintiff relied upon the case of Hargardine-McKittrick Dry Goods Co. v. Breedlove, 36 Okla. 768, 130 Pac. 267, in support of the prima facie case claimed to have been made by the evidence referred to. The case apparently holds that in a creditor's suit to recover a stockholder's liability it is sufficient for the plaintiff to prove the subscription, whereupon it would devolve upon the defendant to prove payment or other circumstances which would negative liability. The trial judge, however, at this stage of the case, took the matter in his own hands, and suggested to plaintiff's counsel that additional proof be offered. Also that, inasmuch as this was an action in which the receiver was plaintiff and various other beneficiaries interested, he would ask that the account books of the Timber Investment Company be introduced. The books were then brought forward. The merits of this controversy are brought out in the books and in the testimony which followed their production. The facts so established will be fully presented as we consider the contentions of counsel upon this appeal.

Although the defendants in this case were represented by able counsel, it is clear on the record before this court that they were greatly

handicapped in their efforts to establish the facts. Their clients did not hold certificates of stock in the company, and were not stockholders in the full sense of the word on the books of the corporation. They had not enjoyed either the privilege or the opportunity of examining the books of the corporation. Perhaps the extent to which they were thus handicapped in establishing the facts is best illustrated by an incident occurring at the trial. Counsel who took the most active part in the trial of the case represented a defendant by the name of Theodor M. Aamodt, who, upon his subscription application for $200, described himself as a common laborer. It appears that he subscribed on April 9, 1910, and is credited upon the subscription blank with a payment of $20 cash. According to the theory upon which the plaintiffs originally brought and presented the case to the district judge, they were entitled to a judgment against him for $180 and interest, although it appears affirmatively in the ledger account that this common laborer had made instalment payments extending over a period of approximately one and a half years, which left his account balanced by full payment long before this action was brought. A judgment against him, therefore, on the prima facie case attempted to be made by the subscription and the stub book would have been a gross fraud. This was prevented only through the somewhat accidental introduction of the books in evidence. The books of the defendant Investment Company came from the possession of the plaintiff, which makes the circumstance of the fraud referred to all the more significant. The conduct of the plaintiff, in thus attempting to get a judgment against one defendant whose account was fully paid, is indicative either of absolute dishonesty or of gross incompetency. At any rate, it is an invitation to a court of conscience to examine with the closest scrutiny the entire transaction upon which the judgment which the plaintiff seeks, and which he obtained in the lower court, must rest.

The plaintiff comes into court as a creditor, and relies upon its right as a creditor to compel the individual defendants to contribute their proportionate shares of the capital of the defendant corporation. It would doubtless be conceded that, before being entitled to recover anything, the plaintiff must establish that the Improvement Company was in fact a creditor of the Investment Company. And furthermore it must appear, before the plaintiff can recover, that it comes into court with clean hands as a creditor seeking to enforce an obligation which, as between the individual defendants and the plaintiff, exists in equity and good conscience. Through foreclasure the Improvement

Company has already acquired for $500 all the property that the Investment Company ultimately obtained for the many thousands contributed by the gullible subscribers in the manner hereinafter described.

Our first inquiry, therefore, is: Is the plaintiff Improvement Company in reality a creditor of the Investment Company?

The notes which are in evidence may be considered prima facie evidence of indebtedness. Inasmuch, however, as the Investment Company did not appear and defend, we are not, as to it, concerned with the judgment; but the appellants do have a right to question that indebtedness as it affects them. We are satisfied from an examination of the record that the principal note sued upon ($29,345.50) does not represent an actual indebtedness of the Investment Company; that it was not given on the day of its date, to wit, May 27, 1912, and did not fall due on December 1, 1912. And we are further satisfied that this note does not represent any cash advanced by the Improvement Company to the Investment Company in May, 1912, or in any other month of 1912, or, for that matter, at any other time. The books make it perfectly plain, we think, that the note in question was given on Novemebr 5, 1912, as a renewal note, renewing a supposed indebtedness of more than two years standing. The circumstances upon which we base these findings are: First, the absence of any positive testimony which would go to indicate that the note represented a cash loan to the Investment Company made at or about the time the note is dated. Baldwin, the treasurer of both companies, testifies that he had no knowledge of any draft that was drawn on account of the Investment Company for the amount of the supposed loan, although he says that he was consulted upon the question of sending the proceeds of the Timber Investment Company of Washington, and he says that he is "pretty reasonably sure" that the payments of the Timber Investment Company of North Dakota went to the Washington Company, because he got credit for these payments upon a settlement later made by him. He is the only witness who testifies concerning these transactions, and dates are sadly lacking in his testimony, as is also assertion of positive knowledge. Second, the books of the Investment Company disclose no such transaction as that evidenced by the note in May, 1912. But, on the contrary, they do evidence the renewal of an obligation for exactly the face of this note on November 5, 1912. Entries appear both in the journal and in the bills payable account of the ledger in which the bills payable account is charged on November 5th with the face of this note, and on the same day Improvement Company notes amount-

ing to $27,115.51 are noted as being paid. Tracing, in the bills payable account, the Improvement Company notes which were thus retired in November, 1912, by the giving of the new note, we find that the notes retired represent a supposed obligation incurred upon March 29 and 30, 1910. In other words, stating the facts chronologically: In March, 1910, the Investment Company, which had then been organized only a few months, apparently obtained upon its notes to the Improvement Company cash to the amount of $27,400, and these notes were never paid, but remained a liability of the company until November 5, 1912, when the note for $29,345.50 was given as a renewal.

The consideration, then, for the principal note in suit takes us back to March, 1910; and a further examination of the books reveals the fact that the Timber Investment Company did not obtain the benefit of that consideration; that it was not intended that the company should receive the benefit; and that the Improvement Company, acting through its officers, knew these facts. The loan was in fact one for the benefit of Wilson and Otis, and the Improvement Company was aware of the fact when the loan was made. These facts are likewise established by the books, which speak more eloquently than the most positive testimony of the apparently incompetent receiver. In fact, though the receiver in this action was treasurer of both the Improvement Company and the Investment Company when these transactions all took place, and though he is the only witness brought in to enlighten the court upon the facts, he leaves the most important matters almost entirely to inference. His testimony throughout leaves the impression that he was a sort of Esau responding to the voice of Jacob in the person of Wilson. Turning to the minute books of the Investment Company we find that on March 28, 1910, a meeting of the directors was held, at which the president and secretary were authorized to negotiate the loan of such amounts and at such terms as are necessary to care for payments due upon the contract for the timber limits purchased through Wilson and Otis. Turning, then, to the cash book of the two following days we find these entries:

CASH.

DR. 1910		
	To Bills Payable	
Mar. 29	To N. D. Improvement Co. 1 year @ 8 %	$10,000
" "	To N. D. Improvement Co. 18 months @ 8%	10,000
	To N. D. Improvement Co. 6 months @ 8%	5,000

"	30	To E. A. Wilson, on demand @ 8%	1,000
"	"	To N. D. Improvement Co. on demand @ 10%	2,400

These items also open the bills payable account in the ledger, and are the ones evidencing the indebtedness which has never been paid as hereinbefore indicated. (According to the ledger, Wilson got his money back the following month.) Turning next to the journal, it shows that on March 30 and 31, 1910, transactions were had requiring entry in the ledger account of Wilson and Otis, trustees. These transactions involve items of about $29,600. On the 31st, payments were made to Thurston, president, amounting to $31,000, $6,000 of which was for interest on a $200,000 loan from October, 1909, to April 1, 1910, a loan which apparently antedated the organization of this corporation. Thurston was connected with the company from which the timber licenses were being purchased. Turning next to the treasurer's account, it shows that on the 30th and 31st there was deposited in the treasurer's account in the Commercial National Bank of Fargo, $29,500 in two separate items, $1,100 and $8,400, respectively. And that on the same dates on which the deposits were made like sums were checked out. These circumstances alone indicate that the money that went to Thurston was the Improvement Company money that had been obtained by the use of the name of the Investment Company in the manner indicated. But there are other circumstances pointing in the same direction. The treasurer's account shows that prior to this time there had been no other large deposits made, and that the account had at all times prior been practically in a state of balance; that is, such deposits as were made had been used to pay current expenses. Still a further fact pointing in the same direction is that up until April 1, 1910, the total so-called stock subscriptions, both common and preferred, amounted to less than $52,500, and that this had been obtained upon an instalment basis requiring 10 per cent at the time of subscription, so, beyond question, it was the Improvement Company money that was transmitted to Thurston in the latter part of March, 1910. And equally without question is the fact that whatever authority the president and secretary of the Investment Company had to borrow money was exercised by borrowing from the Improvement Company.

Having traced the date of its origin in March, 1910, it remains to be seen whether this indebtedness can be regarded as the indebtedness of the Investment Company. This involves a consideration of the contract under which the Timber Investment Company was to become owner of the timber licenses hereinbefore referred to. A resolution

passed at a special meeting of the directors on November 19, 1909, authorized the purchase from Wilson and Otis of the timber grants, as follows:

"On motion duly made and carried, the following resolution was adopted: Resolved, that this company purchase of Edward A. Wilson and Herbert G. Otis, the following described timber licenses and Crown Grant, to wit: (Describing the grant).

"And pay therefor, with and by the issuance to said Wilson and Otis, of the ten thousand (10,000) shares of common stock and five thousand (5,000) shares of the preferred stock of this company, authorized by its charter, upon the following terms and conditions:

"All of the above-mentioned stock of this company shall be issued and delivered to the Commercial Bank of Fargo, North Dakota, as trustee, in certificates covering one (1) share or more, as said Wilson and Otis may direct, and said bank shall, from time to time, deliver to said Wilson and Otis, or upon their order, certificates of shares of said stock, on the payment to it of seventy-five dollars ($75) for each share so delivered, and all the moneys so received by said bank shall be paid to the Timber Investment Company of Washington, upon the order of said Wilson and Otis, to be applied upon the purchase price of the timber licenses and Crown Grant, hereinbefore described, and when said Wilson and Otis deliver to said bank the timber licenses of British Columbia, in the Dominion of Canada, hereinbefore described, then said bank shall deliver to said Wilson and Otis, or upon their order, all of the shares of stock then remaining in the hands of said bank, and the president and secretary are hereby directed to issue and deliver said stock in conformity to this resolution.

"The following directors voted in favor of the adoption of said resolution, namely: E. A. Wilson, H. G. Otis, A. L. Wall, M. A. Baldwin, G. M. Hopp."

Beneath the minutes of this resolution appears the following acknowledgment of receipt of the stock described and acceptance of the trust created:

Received the stock described in the foregoing resolution, and the trust therein expressed is hereby accepted.

Dated this 22nd day of November, A. D. 1909.

Commercial Bank of Fargo,
By M. A. Baldwin, President.

The minutes also contain a copy of the contract of assignment, dated November 22d, which corresponds with the recital in the minutes above, except there is added a provision whereby Wilson and Otis agree that

they will, within two years from date, procure and deliver to the company the timber licenses and Crown Grant described free and clear of all taxes, assessments, and renewals to the date of such delivery; and that, in the event they shall be unable to procure a delivery of the same, they will deliver or cause to be delivered an amount of capital stock of the Timber Investment Company of Washington, at par, equal to one fifth the money received by said bank and paid on the order of the parties of the first part to the Timber Investment Company of Washington. On the following day, apparently, the foregoing resolution and transaction were ratified.

From this resolution and the copy of the contract which is spread at length upon the minutes, it appears that the obligation to make payments upon the timber licenses was that of Wilson and Otis, trustees of the syndicate, and not that of the Timber Investment Company. For they had bound themselves to deliver within two years the licenses and grants free and clear of all taxes, assessments, and renewals to date of delivery. The added stipulation for the delivery of stock in the Washington Company in case of inability to deliver the licenses makes the obligation with respect to the renewals none the less the obligation of Wilson and Otis. So, assuming to be true the testimony of Baldwin, to the effect that the money borrowed from the Improvement Company was credited on the licenses, it was a credit that Wilson and Otis should have secured, and is one which never, in fact, inured to the benefit of the Timber Investment Company. The use of the name of the Timber Investment Company in this connection, therefore, could only have been for the purpose of giving to a private loan an appearance of being for the benefit of a corporation.

There can be no question but what all of the facts stated above were known to the Improvement Company. Baldwin, as stated, was treasurer of both companies; Wilson was the president of the Investment Company and secretary of the Improvement Company. Wall, who was present at the directors' meetings of the Investment Company authorizing the above transaction, was a director in both companies. Baldwin himself admits that the officers of the Improvement Company were fairly conversant with the affairs of the Timber Investment Company. In equity, therefore, the basic obligation upon which the individual judgments against the appealing defendants is based does not exist as a corporate obligation. The plaintiff, who from the beginning had knowledge of this fact, is not in a position to assert the contrary as against the appealing defendants. If the plaintiff corporation

has lost money on this transaction, it has lost it by reason of the fact that it allowed its own irresponsible officers to borrow it to meet their personal obligations.

There are still further reasons why the appealing defendants in this case are not liable. Reference to the transaction in which the Investment Company obtained the assignment of the contract for the timber licenses discloses that all of its stock was turned over to and receipted for by the Commercial National Bank of Fargo. It was to hold that stock in trust for Wilson and Otis, and to deliver it upon their order upon payment of $75 for each share to the Timber Investment Company of Washington. In short, the North Dakota Timber Investment Company agreed to take the timber licenses as the equivalent of its full capital stock of one and half million dollars, and, to enable Wilson and Otis to raise the money with which to make the future payments on the licenses, they were to sell the stock and, for each share sold, pay to the Washington Company $75 on the licenses. The total amount to be paid did not exceed $300,000. If Wilson and Otis, then, had raised this money themselves, they would have been the owners of all the stock of the one and a half million dollars in the North Dakota Company. In short they were the sole subscribers to the original capital, and were pursuing a plan whereby, by making a resale of their stock, they were enabling themselves to share a profit which would be measured by the difference between the total cost of the timber licenses and their full value, and at the same time they were obtaining from third persons through the resale of their stock the necessary capital to secure this profit to themselves. That this is the character of the transaction appears so clearly from the minute book that any presumption that might arise from the subscriptions running in favor of the corporation is entirely overcome. This transaction was likewise known to the officers of the Improvement Company, because its own officers were participating in it. When boiled down, it amounts to this: The directors of the Investment Company transferred all its stock for what they considered an equivalent in property.

It is well settled that when the directors of a corporation authorize the stock to be issued as fully paid and nonassessable in exchange for property deemed by them an equivalent, any subsequent creditor who takes with knowledge of the fact is not in a position to assert that the value received for the stock is less than par. 10 Cyc. 467–478, though a different rule might obtain as to creditors generally.

In the case of First Nat. Bank v. Gustin Minerva Consol. Min. Co.

42 Minn. 327, 6 L.R.A. 676, 18 Am. St. Rep. 510, 44 N. W. 198, Mr. Justice Mitchell had occasion to consider the principle last above mentioned in connection with the exact statute upon which liability is predicated in the instant case. It was then § 413 of the Civil Code of Dakota. It was there held by a unanimous court, concurring in his opinion, that a creditor of a corporation who had full knowledge of the fact that its stock had been issued in exchange for other stock not representing in actual value 100 per cent or par was in no position to enforce the statutory stockholder's liability. And it is also held that new shares issued after the claim of the particular creditor arose cannot add to the creditor's right, except as he may be fortunate enough to avail himself of the added capital actually represented by them. That is, the capital actually received in exchange for the new shares. Says Justice Mitchell (page 334): "So, too, if a party deals with a corporation, with full knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the shareholders than the corporation itself could claim as a part of its assets. . . . This doctrine with respect to trusts has no application to a case where a party, like the plaintiff, was cognizant of the whole arrangement under which the stock of the defendant company was issued, and of what was paid or intended to be paid for it, and who accepted a novation of its debt with full knowledge of these facts, and received as great or greater security for it than it had before. To hold otherwise would be to perpetrate a fraud on the stockholders, and not on the creditors."

So, in the case at bar, taking the facts as they appear in the books of the Investment Company, and as they must have been known to the plaintiff Improvement Company, all of the stock of the Investment Company was exchanged for the licenses, and delivered to the bank as trustee, pending payment on part of it up to $75 per share by Wilson and Otis, or the delivery by them of the timber licenses free from renewals and assessments. The Improvement Company must be held to have loaned its money on the strength of the credit of Wilson and Otis, supported by their ability to secure purchasers of their stock. If any fraud has been perpetrated upon the plaintiff creditor, therefore, it has been perpetrated by the individuals, the present receiver among them, who thus disposed of the stock of the Investment Company, and not by the subsequent subscribers upon whom Wilson and Otis depended to finance their own purchase. See Coit v. North Carolina

Gold Amalgamating Co. 14 Fed. 12, 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231; 2 Morawetz, Priv. Corp. 2d ed. § 829.

It follows from what has been said that these defendants are not in fact subscribers to the capital stock. The case was not tried below on that theory, apparently for the reason that the attorneys lacked an opportunity to investigate the facts as they actually existed in the books. It is a well-established proposition that a subscriber's liability cannot be enforced where the corporation does not control the stock to be issued to him in exchange for the payment of the subscription. In the instant case, the bank has receipted for the entire stock, and, as previously stated, Wilson and Otis could secure the delivery of the whole amount to them upon the payment of $75 per share for enough shares to pay out on the timber licenses, the balance coming to them without any payment whatsoever. It would thus appear that the entire capital stock has been once subscribed by Wilson and Otis, and that certificates for the full amount have been issued and receipted for by the bank. See McCord v. Ohio & M. R. Co. 13 Ind. 220; Burrows v. Smith, 10 N. Y. 550; Knoxville, C. G. & L. R. Co. v. Knoxville, 98 Tenn. 1, 37 S. W. 883; Leigh v. Chattanooga, R. & C. R. Co. 104 Ga. 13, 30 S. E. 381. The following language of the supreme court of Tennessee in the Knoxville Case, 98 Tenn. 1, 37 S. W. 883, partly quoted from Cook on Stock & Stockholders, § 192, as applied to this situation, is pertinent: "If certificates for the whole capital stock have already been issued, the defendant subscriber, by this fact, may defeat the action to collect his subscription" (Citing).

In both the Georgia and Tennessee cases cited above, there are facts strikingly parallel with some of the facts in the case before us. In the Georgia case the subscription was allowed to be enforced, but it was for the reason that the certificates had been placed with financial agents in blank for delivery to subsequent subscribers.

All that has been said in the foregoing opinion regarding the note for $29,345.50 is also properly applicable to the other note for $1,370, for the reason that the testimony shows that the second note is an interest note.

For the foregoing reasons we are of the opinion that the stockholder's liability expressed in § 4554 of the Compiled Laws of 1913 does not exist in favor of this plaintiff. The petition for rehearing is denied.

ROBINSON, J., and HANLEY, District Judge, sitting in place of CHRISTIANSON, J., disqualified, concur.

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BANKRUPTCY.

1. In this case the verdict is well sustained by the evidence, the facts and the probability. Goldman v. Fargo Iron & Metal Co. 480.

BILLS AND NOTES.

1. Where a promissory note is procured by fraud and misrepresentation, there is no legal execution nor delivery of it, and it is of no legal force or effect. Stevens v. Barnes, 483.
2. Where one, through himself or agent, falsely and fraudulently procures another to sign a paper, purporting to be an order for goods, to which is attached a promissory note, the two instruments being separated only by a perforation, and the note is, after the delivery of the order, detached from it, such detachment constitutes a material alteration of the note, and destroys its legality if any it had. Stevens v. Barnes, 483.
3. Fraud, at the inception of the alleged contract and note, having been established, the burden shifted to the indorsee to prove by fair preponderance of the evidence, that he was a good-faith purchaser, for value, before maturity, without notice. This he has failed to do. Stevens v. Barnes, 483.
4. In an action upon a non-negotiable note, a defense based upon false and fraudulent representations inducing its execution is not established in the absence of proof that the representations were false. Bank of Valley City v. Lee, 503.

CARRIERS.

1. In an action against a railroad company brought to recover damages occasioned by the death of the plaintiff's husband, where it appeared that the deceased before the accident resulting in his death had ridden as a passenger in a smoking car a distance of approximately 110 miles; that he had been riding in a seat with a man with whom he was personally acquainted; that he was intoxicated to a degree that he staggered when he walked and was unable to converse intelligently; that he was several times up and about the coach, and as the train neared a station other than his destination he walked to the front end of the coach and out onto the platform, from which place he probably fell and was killed, it is held that the evidence is insufficient to show any breach of duty on the part of the carrier. Olson v. Minneapolis, St. Paul & S. Ste. Marie Railway Co. 371.
2. In an action for personal injuries, where it appears that the plaintiff had shipped certain stock from Carbury to St. Paul, and was accompanying the same under a shipper's contract, and was injured in the stockyards of the railway company at Devils Lake, while proceeding in the dark upon an unlighted platform or bulkhead used as an instrumentality of the railway company in the handling of stock, it is held, upon the record, viz.: That

DAMAGES.

DIVORCE.

DRAINS.

ELECTION OF REMEDIES.

HOMESTEADS.

INDEMNITY.

INSURANCE.

MORTGAGES.

MUNICIPAL CORPORATIONS.

PLEADING.

1. In such action, where the complaint has failed to allege such notice of acceptance given, but, nevertheless where, in the trial of such action, proof is received, without objection, that such notice of acceptance was given, after the trial court had overruled a motion to dismiss such complaint upon the grounds of its insufficiency, it is held to be prejudicial error to dismiss such action, upon the ground that such complaint failed to allege notice of acceptance, without permission granted to the pleader to amend this complaint to conform to the facts proved. Aluminum Cooking Utensil Co. v. Rohe, 433.

PROHIBITION.

1. A writ of prohibition will issue to arrest the proceedings of a tribunal, corporation, board, or officer only when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person; and when there is no plain, speedy, and adequate remedy in the ordinary course of law. Comp. Laws 1913, Sections 8470, 8471. State ex rel. McDonald v. Hanley, 388.
2. In this case it is held, for reasons stated in the opinion, that it was not an act without or in excess of jurisdiction for the defendant, Judge Hanley,—one of the judges of the sixth judicial district,—to act as judge of the fourth judicial district upon and pursuant to the written request of one of the judges of said fourth judicial district. State ex rel. McDonald v. Hanley, 388.

RAILROADS.

1. The Act of Congress of March 21, 1918, confers upon the President extraordinary executive powers rendered necessary by the existence of a state of war. State ex rel. Langer v. Northern Pacific R. Co. 556.
2. The termination of hostilities under the armistice does not justify Federal interference to restrain the further exercise of the extraordinary executive powers rendered necessary by the existence of a state of war. State ex rel. Langer v. Northern Pacific R. Co. 556.
3. Section 10 of the Act of Congress of March 21, 1918, which gives to the President power to initiate rates, fares, charges, classifications, regulations, and practices, is construed in the light of the other provisions of the act and of the pre-existing method of regulating commerce through the agencies of Federal and state governments, and as so construed it does not confer original authority to initiate intrastate rates which will supersede pre-existing lawful rates, prescribed by the legislature or other competent state authority. State ex rel. Lange v. Northern Pacific R. Co. 556.
4. Rates initiated by the President or Director General, under Section 10, are subject to review by the Interstate Commerce Commission, and its power

SCHOOLS AND SCHOOL DISTRICTS.

VENDOR AND PURCHASER.

WILLS.

DISTRICT COURT RULE 19.

(Adopted June 28, 1921, to take effect August 15, 1921).

AFFIDAVITS OF PREJUDICE AGAINST DISTRICT JUDGES.

Whenever an affidavit of prejudice or bias against any District Judge shall be filed pursuant to Chapter 1, Session Laws of 1919, there shall be stated in the affidavit, in addition to the matter prescribed by said Chapter 1, the following:—(1) The nature of the action; (2) the date when issue was joined; (3) the date of the opening of the regular, special, or adjourned term at which the cause is to be tried; (4) the name of the District Judge to preside at such term; (5) a statement that the affidavit is filed in good faith and not for purposes of delay.

It is ordered that the foregoing additional Rule of Practice be and the same is hereby adopted to take effect August 15, 1921, and that the foregoing be spread on the minutes of this court and be known as Rule No. 19 of Article 3 of the General Rules of Practice of the District Court now in force.